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August 3, 2012

RIN: 0694-AF66

Regulatory Policy Division
Bureau of Industry and Security
Room 2099B
U.S. Department of Commerce
14th St. and Pennsylvania Ave., NW
Washington, D.C. 20230

RIN: 1400-AD22

Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
U.S. Department of State
Washington, D.C. 20522-0112

Re: Comments of KEMET Electronics Corporation on Proposed Definition of "Specially Designed"
Proposed Rules – (BIS) RIN 0694-AF66; (State) RIN 1400-AD22

Dear Sir/Madam:

On behalf of KEMET Electronics Corporation ("KEMET"), we submit these comments on the Bureau of Industry and Security ("BIS") and State Department proposed definitions of "specially designed" under the Export Administration Regulations ("EAR") and the International Traffic in Arms Regulations ("ITAR").[1] Because of the parallel nature of the proposals, KEMET is submitting consolidated comments to both rulemakings.

KEMET, headquartered in Simpsonville, South Carolina, is one of the world's largest producers of capacitors, with origins dating back to 1919. KEMET sells over 30 billion capacitors each year. KEMET manufactures several hundred different types of capacitors, with thousands of specific part numbers and configurations. Capacitors are basic building block components used in virtually all electrical and electronic applications. For example, there are typically two hundred capacitors in a modern cell phone, six hundred capacitors in a modern laptop computer, and tens of thousands in a modern commercial aircraft.

[1] BIS Proposed Rule, "Specially Designed" Definition, 77 *Fed. Reg.* 36409 (June 19, 2012) ("BIS Proposal"); Department of State, Amendment to the International Traffic in Arms Regulations: Definition of "Specially Designed," 77 Fed Reg. 36428 (June 19, 2012) ("State Proposal").

KEMET generally supports the proposed definitions of "specially designed." However, as drafted, KEMET is concerned that the definitions would be difficult to apply on a day-to-day basis to KEMET's products (and to other basic building block electrical components).

As part of the export control reform process, it appears BIS and the Department of State Directorate of Defense Trade Controls ("DDTC") (collectively the "Agencies) have singled out nuts and bolts and other hardware as the "low hanging fruit" that can be largely carved out of licensing requirements under the ITAR and EAR 600 series in part through these rulemakings, thus allowing the Agencies to focus resources on end-items and components that are of military strategic significance. We believe that multi-purpose basic building block electrical/electronic components are another broad swath of items, where the benefit of carving out as many of these items as possible from the ITAR and EAR 600 series outweighs the minimal national security interests in restricting export of these items.

SPECIFIC COMMENTS AND JUSTIFICATION

A. MODIFY THE NOTE TO PARAGRAPH (b)(4) and (b)(5) IN BOTH THE ITAR AND EAR PROPOSED DEFINTIONS

1. Justification.

As written, this note largely eviscerate the utility of (b)(4) and (b)(5) and is inconsistent with the objectives of the rule and other discussions in the preamble of the BIS Proposal. KEMET has many capacitors lines that date back decades. Determining the original design intent of a capacitor developed in the 1950s or 1960s is often a futile exercise. Further, like many other electrical/electronic minor component manufacturers, KEMET has catalogues of off-the-shelf capacitors that it manufactures to meet certain high reliability MILSPEC (or "MIL-PRF") requirements.[2]

MILSPECs for capacitors do not provide specific designs, but rather create a "smart" part number naming convention that is cross-referenced to physical and electrical parameters, as well as the test criteria. For example, under MIL-PRF 49470, the convention is as follows:

M49470	P	01	473	K	B	N
Military Specification Number	Characteristic	Slash Sheet Number	Capacitance	Capacitance Tolerance	Rated Voltage	Lead Configuration

[2] There are a number of MILSPECs applicable to capacitors. *See, e.g.*: http://www.interfacebus.com/Design_Capacitors_MIL.html. (MIL-PRF capacitors are in general more robust in design than non-high reliability applications. However, in terms of technological advancement, these capacitors meeting MIL-PRF requirements are, particularly in the case of ceramic capacitors, generations behind modern commercial capacitors in terms of performance and size).

KEMET generally has a corresponding catalogue part number for any combination within a particular MIL-PRF.

While some MIL-PRF standards give a general list of applications, the origins or intended uses of any particular MIL-PRF standard are often difficult to discern. Moreover, for any particular part number, this historical research would be virtually impossible. But for the note, the regulatory language in (b)(5) would appear to exclude any such part from the definition of "specially designed."

This note directly contradicts one objective of the rule: that the rule does not require a need to "*investigate or divine the intentions of the original designer of a part . . . .*"[3] It is also directly inconsistent with the example given regarding the intent of this paragraph, as follows: "*many catalogue electronic components are designed as basic building blocks for other equipment, regardless of whether the equipment is military or civilian, controlled or uncontrolled.*"[4]

2. Proposed Change. KEMET proposes the Note to paragraph (b)(4) and (b)(5) be revised in both the ITAR and EAR proposed definitions to state:

Note to paragraph (b)(4) and (b)(5): *Applicability of (b)(4) and (b)(5) to a commodity may be established by:*

(i) Documents contemporaneous with a commodity's "development," which in their totality, establish the elements of paragraphs (b)(4) or (b)(5). Such documents may include concept design information, marketing plans, declarations in patent applications, or contracts.

(ii) Documents, such as generic MIL-PRF specifications for minor components for basic building block electronic components that do not specify a particular end-item.

B. CLARIFY THE TERMS "FORM, FIT, AND PERFORMANCE" AS USED IN THE DEFINITION OF "SPECIALLY DESIGNED"

1. Justification.

The export community has long struggled with the application of the "form, fit, and function" test in the commodity jurisdiction context. And the subjective application of the Agencies has changed over time to focus more on function/performance rather than on minor changes in form or fit that do not affect the performance of the item. For example, KEMET is routinely asked to modify the type of lead on a standard part, or to change lead spacing for a particular customer. Notwithstanding that there is no change in performance, these capacitors are, and under the new rules would continue to be, classified as specially designed based on the component or end-item into which the capacitor will be used. With the advent of the 600 series, and .x and .y subsections within the 600 series, sub-component suppliers like KEMET will now need to know not only what the end-item is, but what the specific major component the capacitor will be used in, to properly classify such minor components. Major component and end-item

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[3] *BIS Proposal* at 36410.
[4] *Id.* at 36415.

manufacturers, for good reason, are often reluctant to share this information with sub-contractors like KEMET that provide basic building block items like capacitors.

Since "Form, Fit, and Function" are defined in a note in 120.4(d) of the ITAR, we suggest that this ITAR note be incorporated into the note to Paragraph (b)(3) of the EAR definition of "specially designed" and modified to exclude non-significant changes in form or fit as set forth below:

2. Proposed Changes:

- Add to the proposed Note to Paragraph (b)(3) in the EAR definition of "specially designed" the following text:

The form of the item is its defined configuration, including the geometrically measured configuration, density, and weight or other visual parameters which uniquely characterize the item, component or assembly. For software, form denotes language, language level and media. The fit of the item is its ability to physically interface or interconnect with or become an integral part of another item. Performance capabilities of the item are objective electrical/physical standards the component is designed to meet or actions it is designed to perform. Minor changes in form or fit that do not materially affect performance do not make an item Specially Designed. For example, changing lead spacing or changing location of fastener holes would be minor. Decreasing the footprint of an item by 25% to fit in a particular application would not be minor.[5]

- Revise the note defining "form, fit, and function" in ITAR 120.4(d)(ii) to the above language.

C. ADDRESS ISSUES RELATING TO COMMON ISSUES IN THE RULEMAKING

Many parts and components manufacturers struggle with the issue of whether an item is "specially designed" because such components are subject to specific MIL-SPECs, meet certain "space qualified" standards and face issues of when and whether test and quality assurance affect classification. Yet none of these questions was specifically addressed in the rulemakings. We believe that, to the extent the Agencies can make clear "bright line" statements, this will help a great deal to clarify the definition of "specially designed." While KEMET is not suggesting any specific language, it suggests that these issues be discussed in a note to the definition, in the preamble, and/or in secondary guidance as suggested in Section D below.

- *MIL-SPEC/MIL-PRF* – Agencies officials and export professionals know that the fact that an item meets a particular MIL-SPEC does not, in and of itself, make an item ITAR controlled or make that item "specially designed" for a particular end-use. (*See* discussion in Section A above). However, it is unclear whether this is understood more generally among law enforcement officers and non-export professionals. Addressing the role that MIL-SPEC does and does not play in export classification and in applying the definition of "specially designed" would be very useful.

[5] Note: The non-underlined language was extracted from the Note to ITAR § 120.4.

- *Testing/Quality Assurance* - In many cases with basic building block electrical/electronic components, a buyer will order a standard catalog component but require that the component meet certain additional testing requirements, such as shock or thermal testing, or that a higher percentage of a batch be subject to quality assurance (QA) inspections. When the manufacturer has to make changes to the design to meet such requirements, the result is a new product that is almost certainly specially designed for that particular application. However, more typically, the same exact component is manufactured the exact same way as the catalog component and merely subject to the additional testing. The general understanding is that, absent a change to the manufacturing process that alters the component (*e.g.*, by changing the thickness or materials) in order to meet the requirement, such additional testing/QA would not alone change the classification of the component. However, it is unclear whether this is consistently the interpretation given by the Agencies.

- *Space Qualified* - Another major issue is whether, when, and how the term "space qualified" is implicated in applying the definition of "specially designed" in the classification analysis and commodity jurisdiction determination. The EAR has a definition in Part 772 of "space qualified" applicable to Cat. 3 and Cat. 6, where specific reference to "space qualified" is used as performance criteria for certain export classification control numbers ("ECCNs"). The ITAR Cat. XV currently covers generically all "specially designed" parts and components for enumerated spacecraft and launch vehicles, and generically certain radiation-hardened microelectronic circuits meeting specific performance criteria.[6] Further, different procuring entities or agencies have differing performance requirements for components that are intended for use in space applications. In the case of MIL-PRF standards, there is often a more stringent testing requirement for parts or components intended for use in space applications. The issue of a common definition of "space qualified" should be addressed as part of export control reform efforts generally. However, there should be some discussion with respect to the effect of Space Qualified in the discussion of this "specially designed" rulemaking.

D. WAYS TO CAPITALIZE ON THE EXPORT CONTROL REFORM PROCESS

There is really no way in a regulatory definition to address all the possible permutations and considerations that go into deciding whether a part or component is "specially designed," and therefore should be controlled under a particular ECCN or as ITAR versus EAR. However, we believe that during the export reform process there has been an extraordinary if not unique dialogue between the U.S. Government agencies involved in export controls, and between the Agencies and industry in working groups, conferences, etc. The Agencies should consider capitalizing on these discussions. In particular, the Agencies should consider publishing explanatory notes, or guidance documents explaining in more detail the rationale and discussions that underlie the decisions.

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[6] This performance specification has no particular relevance or equivalent for capacitors and other passive electrical devices that are not affected by radiation in the same way as active micro electric circuits.

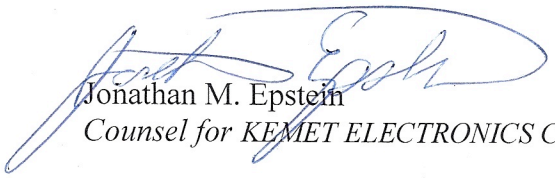
Official or unofficial commentary or guidance on laws is not uncommon. The U.S. Customs and Border Protection has a series of "Informed Compliance" publications that give detailed guidance on how to classify specific categories of goods, ranging from gas turbine engines to diodes.[7] The importer can also refer to the multi-volume Harmonized Tariff Code Explanatory Notes issued by the World Customs Organization.[8]

Having a body of published guidance documents would be an enormous aid to the industry in self-classification, and benefit the Agencies by reducing the volume of classification/commodity jurisdiction requests and informal requests for guidance. Further, it would give the Agencies a body of interpretive guidance on which to refer.

Thank you for your consideration of these comments. If you have any questions, please contact the undersigned at (202) 828-1870 or jonathan.epstein@hklaw.com.

Sincerely,

HOLLAND & KNIGHT LLP



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[7] http://www.cbp.gov/xp/cgov/trade/legal/informed_compliance_pubs/
[8] https://help.cbp.gov/app/answers/detail/a_id/885/~/explanatory-notes-to-the-harmonized-tariff-schedule