Robert Monjay

From: Bump, Mark W. <mark.bump@timken.com>
Sent: Thursday, August 02, 2012 9:20 AM
To: DDTCResponseTeam@state.gov; PublicComments
Cc: Christensen, Larry
Subject: RE: Specially Designed Definition (RIN 1400-AD22) and (RIN 0694-AF66)

Via Email

Ms. Candace M. J. Goforth

Director

Office of Defense Trade Controls Policy

U.S. Department of State

Re: RIN (1400–AD22)

DDTC proposed definition of "specially designed" 77 Fed. Reg. No. 118, 36428-36433 (June 19, 2012).

Via Email

Mr. Timothy Mooney

Regulatory Policy Division Bureau of Industry and Security U.S. Department of Commerce 1401 Constitution Avenue, N.W. Washington, DC 20230

Re: Docket No. 120403245–1034–01, RIN 0694–AF66, BIS proposed definition of "specially designed", 77 Fed. Reg. No. 118, 36409-36419 (June 19, 2012).

Dear Ms. Goforth and Mr. Mooney:

The Timken Company ("Timken") appreciates this opportunity to comment on the proposed rules published in the Federal Register by the U.S. Department of Commerce, Bureau of Industry and Security ("BIS") and the U.S. Department of State, Directorate of Defense Trade Controls ("DDTC") on July 19, 2012 (77 Fed. Reg. 118, 36409-36419 and 36428-36433, respectively) regarding the proposed definition for "specially designed." Because this letter addresses the largely identical definition of "specially designed" and the relationship of the term to the proposed revisions of the United States Munitions List ("USML") and the Commerce Control List ("CCL"), we address this letter to both export control agencies.

Background

Timken is a 110 year old international business, with an expertise in friction management and power transmission. We are headquartered in Canton, Ohio. Our web site is at: www.Timken.com. Our most famous product is bearings.

In the past 10 years, the global "footprint" of bearing manufacturing has changed dramatically. China is the world's largest bearing manufacturing country, passing the U.S. and Japan in 2007. European and Japanese bearing makers have made significant advancements. Japanese bearing makers have made bearings for spaceflight, using "home grown" capabilities. European aerospace and defense customers want "ITAR free" aircraft and weapons, and our European competitors have been able to provide bearings to accomplish this. Timken continues to lose business with our aerospace and defense customers in Western Europe, as these customers push their preference for "non-ITAR" bearings. A good example is the EC-175 helicopter.

Introduction

We commend DDTC and BIS for their efforts to amend the International Traffic in Arms Regulations (“ITAR”) and the Export Administration Regulations (“EAR”) as part of the President’s ongoing Export Control Reform effort. The proposed definition of “specially designed” is a significant improvement over earlier versions of the definition. It is quite apparent from the draft, from comments of agency officials, and from our experience with commodity jurisdiction determinations that it was an enormous challenge to address all nine of your goals with the definition. We believe the current proposal can be improved further with clarifications via interpretation of the new elements.

In the interest of national security, we believe it is important to publish the redrafted United States Munitions List (“USML”) categories and Commerce Control List (“CCL”) entries to reflect positive, objective criteria in the control lists and avoid overlapping or conflicting claims of jurisdiction. Because the definition of the term “specially designed” is a precondition to the publication of the control lists in final form, we believe the proposal to define “specially designed” should be finalized with clarifying interpretations of the type suggested below.

We suggest the following specific comments on key aspects of the proposed definition:

I. Aircraft Parts and Components “Specially Designed” – Discussion re Timken 629-code Aircraft Wheel Bearings
Previous Commodity Jurisdiction Determination

We believe that DDTC and the Administration should retain the discretion to issue a determination that a component is not subject to ITAR jurisdiction under proposed Category VIII(h)(1)[1] and that a commodity jurisdiction ("CJ") determination granting EAR jurisdiction and suggesting an ECCN 9A991.d. classification should not be reversed with the publication of the proposed definition of “specially designed”. An example is the recent commodity jurisdiction determination and suggested classification of Timken 629-code[2] aircraft wheel bearings.[3] We believe this

determination should not be reversed even when certain of the components would otherwise be considered “specially designed” under the BIS and DDTC proposals to define “specially designed”, rewrite Category VIII, and establish the 600 series for aircraft parts and components. Specifically, the DDTC decision at Matter No. 1244-11 should be grandfathered; the described bearings should be classified under ECCN 9A991.d. and not under proposed ECCN 9A610.y99. The U.S. Government also should not reverse CJ Case No. 1244-11 which is a consolidated response to all three requests (February 17, 2012) and should not change the ECCN 9A991.d. classification for the specific bearings reviewed in this CJ determination.

The three CJ requests made clear that, of the 385 tapered roller bearings reviewed in the CJ, some are used exclusively on military aircraft, a handful were not derived from civil aircraft bearings and are of a unique geometry[4], and some of the bearings are used on low observable aircraft identify in proposed Category VIII published well before the CJ determination.[5] Thus, some of the bearings are “necessary” under (a)(2) and are not released by (b)(3) of the proposed definition of “specially designed.” That said, all civil and military landing gear wheel bearings result from identical production methods and tolerances, which we believe influenced DDTC in its conclusion that all of the bearings fall outside the category of commodities that warrant ITAR controls.

We ask the Administration to confirm that the licensing agencies have the discretion to maintain an ECCN 9A991.d. classification in the above circumstances as well as in future CJ decisions the Administration will make regarding aircraft parts, components, attachments, and accessories given the proposed definition of “specially designed.” We do not believe that a part or component unique for a military aircraft should presumptively be subject to proposed ECCN 9A610.y.99. The current Guidance in the Preamble to the proposed Transition Rule supports this position. When referring to a part or component that DDTC has determined is not subject to the ITAR, the Guidance provides:

If it was identified or, as a matter of law or the result of a subsequent commodity classification (“CCATS”) determination by Commerce, controlled by another legacy ECCN, such as 9A991.d, 7A994, or 9A003, that ECCN would continue to apply to the item.

Preamble to Transition Rule at 76 Fed. Reg. 68675. 68681 (November 7, 2011).

II. Conflicts between Proposed Category VIII(h)(1) and Proposed ECCN 9A610.y.

As proposed, Category VIII(h)(1) and the items specified in ECCN 9A610.y contain conflicting and overlapping language. Officials at the Update 2012 Conference explained that Category VIII(h)(1) will prevail when this overlap occurs. We also learned that the only other example of this resolution of conflicting language occurs in proposed Category XX. Conflicts between the 600 series and USML categories for parts, components, accessories and attachments are resolved in favor of the 600 series. We urge the agencies to confirm this information given the structure of the proposed definition of “specially designed” and the Administration's objective to avoid conflicts between the revised USML and CCL.

III. Changes to an EAR Item During the Production Period for Feature Enhancements, Cost Reductions or Quality Improvements that Do Not Change the Basic Performance or Capability of the Commodity.

A significant issue for Timken under the Export Control Reform proposals thus far pertains to the changes that a manufacturer may make to a component subject to the EAR without creating a different item and potentially changing the classification or agency jurisdiction. This is particularly important, given the proposed definition of "specially designed." In summary, the proposed definition of "specially designed" provides that a component classified under EAR99 or an ECCN other than the proposed 600 series will retain that agency jurisdiction and classification so long as (a) the changes are for feature enhancements, cost reductions or quality improvements, and (b) changes do not alter the "basic performance or capability of the commodity. . .":

Note to paragraph (b)(3): Commodities in "production" that are subsequently subject to "development" activities, such as those pertaining to quality improvements, cost reductions, or feature enhancements, remain in "production." However, any new models or versions of such commodities developed from such efforts that change the basic performance or capability of the commodity are in "development" until and unless they enter into "production."

77 Fed. Reg. 36409, 36419 (June 19, 2012) (hereafter, "BIS Proposed Specially Designed Rule").

Timken offers thousands of bearings in a vast variety of geometries and performance capabilities that we believe meet the "production" standard in the Note to (b)(3) even though many such Timken bearings are used in military applications. Its existing offerings include a small number of predefined options for base bearings.

A base bearing contains a single type of anti-friction device, such as a tapered bearing, ball bearing, cylindrical bearing, or spherical bearing anti-friction element. A bearing with a different type of anti-friction element is a different base bearing. There are other unique features for a single base bearing assembly. These include the amount and direction of loads it will carry, torque needed to turn a shaft in the base bearing, dimension of the inner diameter for the axle, length of space taken on the axle, other basic geometry, and, as noted above, the type of anti-friction element. A bearing with a different type of anti-friction element is a different base bearing and a different product. Timken believes that changes to any of the above types of performance capability, form and fit to a base bearing which alter the basic performance or capability of the base bearing will constitute new "development" of a new model that would be outside the scope of the allowable "production" period.

We urge the Administration to confirm that the following types of changes to a base bearing are allowed in the production phase without creating a new model or new development, i.e., that a base bearing with the features described in this paragraph will continue to constitute the identical "form, fit, and performance capability" as that phrase is used in (b)(3) of the proposed definition of "specially designed." Timken is confident that none of the following features, when applied to a base bearing assembly, will change its "basic performance or capability", which is defined by the elements described in the prior paragraph regarding the base bearing assembly with a unique product identification number. These optional features for a given base bearing assembly include (a) different production tolerances permitted during production and (b) testing procedures and frequency of testing during production. These features are predefined and are already in production of other based bearings. Timken's bearing offerings also include features such as different cages, cups, and cones to retain the anti-friction elements of the base bearing in place within a base bearing assembly. The feature offerings also include different lubrication options. The "basic performance or capability" of each base model of a given bearing offered by Timken remains the same when a new customer selects that base model and then chooses among the various features described in this paragraph. A new customer or its Timken customer representative may choose a combination of options that have not been chosen by another Timken customer in exactly the same combination of base model and features.

The offerings for both the base bearing assembly and the optional features are defined and made available to each potential customer. Most importantly, Timken has already developed the feature options and has put the options into

production for many of the base bearing assemblies. Timken offers options for most of its bearings. For example, Timken has a base bearing first designed for and used in an agricultural tractor or combine. Timken may then receive a request for the same base bearing for use in a military ground vehicle after making changes with preexisting and predesigned feature options such as a different method of lubrication, which Timken has offered and made on other base bearing assemblies. The basic performance and capability of the modified bearing assembly remain exactly the same in terms of the agricultural tractor, the agricultural combine, and the military ground vehicle. As another example, Timken has a base bearing assembly for a commercial aircraft landing wheel bearing. It may then receive a request for a bearing to be used on a military aircraft using the same base model bearing assembly but using a different cage to hold the anti-friction elements in place. In fact, Timken has many such aircraft bearings modified with the above-described feature. Many of the bearing assemblies reviewed in CJ Matter Case No. 1244-11 discussed in detail at Part I of this letter fit this scenario and were reviewed by DDTC, who found them to be subject to EAR jurisdiction and suggested classification ECCN 9A991.d. See Matter Case No. 1244-11 (combining Case Nos. 1245-11 and 1246-11, request submitted Dec. 23. 2011, DDTC Determination Issued Feb. 17, 2012).

IV. Conflicts between Proposed Category VII and Series 600 for Vehicle Parts and Components

We believe the descriptions for parts and components in proposed Category VII are consistent with the descriptions for vehicle parts and components in the Series 600 proposals. Nonetheless, we are concerned about the Guidance in the preamble to the BIS proposed aircraft 600 series for the general applicability of “y.99” in relation to ITAR Categories other than Category VIII. Other categories do not have related legacy ECCNs.

We urge BIS and DDTC to maintain their discretion to reclassify a part or component as EAR99, even if it was initially captured by “y.99,” where DDTC issues a determination that the ITAR does not cover the part or component. We urge the Administration to modify the text of the Guidance to permit the Administration to reclassify a part or component as EAR99 in these circumstances. We see no reason “y.99” has to be the default position if DDTC agrees another non-600 series is an appropriate classification. This suggestion is related to the proposal to amend the definition of “specially designed” and is in response to the Administration’s request for examples of how the proposed rules in Export Control Reform would operate in practice if finalized in their pending form without clarification or additional guidance.

V. Application of (b)(4) of the Proposed Definition of “specially designed” to Timken Bearing Assemblies

Release pursuant to Section (b)(4) of the proposed definition of “specially designed” is determined by a developer’s reasonable expectation of use as documented during development. The qualifying expectation is of a use in an unenumerated item on either the CCL or USML or such an actual use in addition to a reasonable expectation of a use in or with an enumerated item or commodity. Administration officials have indicated that a manufacturer need not revisit those expectations after the initial release of the item or commodity to the marketplace. We urge the Administration to confirm this interpretation by including clarifying language in the final rule.

Further, provision (b)(4)(i) of the BIS proposed definition “releases” from control under “specially designed” a part or component that is developed with a reasonable expectation of “use in or with commodities described on the CCL” (emphasis added). We suggest “described” should be changed to “enumerated” to make the definition parallel in

construction to the DDTC proposed definition covering items with a reasonable expectation of use in or with defense articles enumerated and not on the USML.

At Timken, we offer some bearings based solely on a catalogue published by a competitor without market research or a request from a specific customer. Assuming the competitor's catalogue does not advertise a particular use, we urge the Administration to clarify whether the practice of meeting a competitor's offering qualifies for release under (b)(4) of the proposed definition of "specially designed."

VI. "Particular Application" and Release under (b)(5) of the Proposed Definition of Specially Designed

Section (b)(5) of the proposed definition for "specially designed," bases the release upon the "reasonable expectation" of the manufacturer or developer that the unit is not for use for a "particular application." Timken believes that every development is for one or more "particular" applications even if the item is developed for a general purpose. For example, Timken commonly conducts market research in aerospace, vehicles, and electronics to determine whether a given function or performance level may have a market. However, that research often will not allow Timken to know whether buyers will use that function for military or civil applications or both. We do not anticipate the Administration intends (b)(5) to be an empty box and release no items or commodities. We urge the Administration to interpret (b)(5). We urge it to explain in writing whether market research precludes a release under (b)(5) if the research or other knowledge indicates a potential market for an unenumerated mechanical function or electronic function but does not indicate whether the future buyers will use the function for a civil application, a military application, or both and does not indicate whether a use or application is or is not enumerated.

VII. "Reasonable Expectation" and Release under (b)(5) of the Proposed Definition of Specially Designed

Timken believes that the proposed regulations at (b)(5) are unclear: does "reasonable expectation" have the same definition of "knowledge," including "high probability," as defined in Part 772 of the EAR? We believe the "high probability" standard is appropriate and achieves the Administration's national security goals. If this is the standard, we trust the Administration will confirm that in the final rule. However, Administration officials have indicated the "reasonable expectation" standard is established and interpreted in federal law in other areas outside of export controls and sanctions. If so, we ask the Administration to provide a clarifying note and, especially for the export control bar, to indicate which body or bodies of law have interpreted the "reasonable expectation" standard.

VIII. Metric vs Imperial Measurements in Production under Note 3 to (b)(3) of the Proposed Definition of Specially Designed

We believe the Administration should consider the release from "specially designed" based upon changes that consist solely of adjustments to internal diameters of a bearing assembly to accommodate slightly different dimensions in metric vs imperial units of measurement. Such a change should be viewed as an improvement during the production

phase so long as the improvement or feature is within the existing offerings of Timken and already made by Timken with the same techniques and to the same standards (materials, tolerances, testing, and published commercial standards).

IX. Ongoing Publication or Posting of Guidance

The national security and companies manufacturing items controlled for export will greatly benefit if the export control agencies will publish examples that clarify the application of the criteria used in the various provisions of the proposed definition of "specially designed." After promulgation of the proposed rule in final form, we also urge the agencies to continue to post, on an ongoing basis, additional examples regarding end items, parts, components, accessories, and attachments that meet and do not meet the various standards within the definition of "specially designed." Publishing new interpretations periodically will ultimately provide a full and robust interpretation of each standard sufficient to permit the private sector to self-classify "specially designed" items on the CCL and commodities on the USML. Publishing examples should be more than a one-time exercise by the agencies.

X. Classification Disputes and Agency Jurisdiction

Timken supports the creation of positive control lists in order to create lists that complement each other, avoid overlaps, and avoid control gaps between the USML and the CCL. We hope that the rewriting of the lists will significantly reduce the number of conflicting claims of authority between DDTC and BIS. Below, we recommend processes that we believe will reinforce and institutionalize these goals over the long term.

First, for the fewer remaining jurisdictional conflicts, we recommend that the Administration establish a single decision-maker to resolve such disputes. For example, the National Security Advisor would be a good candidate for this role.

Second, BIS should repeal Section 734.3(b)(1)(i) of the EAR. Each control list should be considered on an equal footing without any regulatory presumptions. Rather, objective classification processes and standards should apply.

Third, DDTC should modify Section 120.3 of the ITAR to eliminate terms such as "developed, configured, adapted, or modified for a military application." It is essential to eliminate these terms in order to avoid overlapping agency jurisdiction. In resolving the few remaining ambiguities, the single-decision maker should consider each control list on an equal footing without a regulatory preference. That would be the practical result of a single agency, and it is a goal of the Administration to amend the two control lists to serve as a future single list in a single agency.

Without these procedural changes, a major flaw of the current system will remain. A well-managed corporate export control program may seek a classification or CCATs request from BIS and be left with the potential that a prosecutor or future managers of DDTC will disregard the BIS decision to the surprise of a well-intended and compliant company. We believe that senior officials in the Administration must ensure internal coordination of classification decisions of the two agencies and that such decisions must be prospective. Well-intended and compliance-minded exporters should not be left to wonder if current classification decisions by one agency of the Government will be changed later by another agency. The procedures we recommend will avoid the temptations of future classification officials and managers in the agencies to forget the current lessons well-recognized by Defense, State, and Commerce in the Export Control Reform Initiative. These procedures will avoid the temptation to return to a former time when the rules were intentionally

opaque; decisions were based on a rule providing unlimited discretion without changes in the list to reflect decisions; and jurisdiction decisions were enforced retroactively.

XI. Seeking Reduction in the Multilateral Regimes for the Use of "Specially Designed"

We recommend that the Administration move to implement the rewritten control lists as soon as possible. The tremendous challenge of defining "specially designed" illustrates that the United States and its regime partners should work to reduce the use of the term "specially designed" and replace it with objective control criteria with defined functionality. While the multilateral efforts will require a commitment of many years, the gains to the national security will be well-worth the effort. Timken therefore urges the Departments of Defense, State, and Commerce to commit to that effort.

Conclusion

We commend Defense, State, Commerce, and the NSC staff for their tremendous effort in defining "specially designed" in regulations that will determine agency jurisdiction, classifications, and license requirements. With the additional interpretations we suggest, we urge the agencies to finalize the "specially designed" rules and move on to the tasks of reporting to the relevant oversight committees and publishing the rewritten control lists. Timken believes these changes will maintain controls on critical U.S. technology while allowing new opportunities for U.S. companies to increase exports of items that do not warrant more restrictive control and is often readily available from our foreign competitors.

Most importantly, we believe clearer control lists benefit the national security of the United States and give the export control agencies more than sufficient authority to change the lists from time to time in order to respond to new technologies and new threats. A well-executed revision of the USML and CCL will provide the nation several benefits.

First, a clearer set of control lists will reduce the number of unlicensed exports that many small- and medium-sized corporations make because many portions of the USML are unclear and such companies do not realize they have a product that may require a license.

Second, a positive list will enable effective oversight by the Congress. Without a positive USML and CCL, complete with detail regarding the multilateral control language, Congress cannot effectively perform its important oversight role.

Third, a positive USML will be more enforceable. Prosecutors will be less likely to face the challenges described in the Seventh Circuit opinion in Pulungan.

Fourth, the private sector can more effectively administer and comply with positive control lists.

Sincerely,

Mark Bump

The Timken Company

Mgr - Global Trade & Compliance

Customs Attorney

330-471-3949

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[1] 76 Fed. Reg. 68694, 68697 (November 7, 2011) (hereafter Category VIII).

[2] The “629-code” is an internal Timken standard that defines a common set of manufacturing tolerances, testing procedures, and testing frequencies described in the CJ requests discussed in this paragraph. The “629-code” does not refer to 629 different bearings.

[3] Timken 629-code Aircraft Wheel Bearings and Recent Commodity Jurisdiction Determination Made by DDTC under Matter Case No. 1244-11 (combining Case Nos. 1245-11 and 1246-11), request submitted Dec. 23. 2011, DDTC Determination Issued Feb. 17, 2012.

[4] See, page 10 of CJR 1244-11.

[5] See, pages 14-15 of CJR 1246-11 of certain low observable aircraft described in proposed Category VIII(h)(1).

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