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August 3, 2012

Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
14th and Pennsylvania Avenue , N.W.
Room 2099B
Washington, D.C. 20230

ATTN: Mr. Timothy Mooney

SUBJECT: RIN 0694-AF66 Proposed amendment to the Export Administration Regulations – definition of "specially designed"

Dear Mr. Mooney:

United Technologies Corporation ("UTC") is submitting the attached comments in response to the Commerce Department's proposed rule concerning the definition of "specially designed," as published in the June 19, 2012 Federal Register.

We appreciate the opportunity to comment on this important proposed rule. Please feel free to contact me if you have any questions about these comments.

Sincerely,

Jim Lemon

Jim Lemon
202-336-7462

Attachment: UTC comments on June 19, 2012 proposed EAR definition of "specially designed"

UTC Comments on June 19, 2012 Proposed EAR Definition of "Specially Designed"

General Comments:

Clarity and Understanding

The concept of 'specially designed' is subjectively understood, but there is significant difficulty in providing an objective definition. While a simple and direct definition would be ideal, given both the importance and usage history of the term, 'simple' is not compatible with providing a robust definition. The 'catch-and-release' approach is probably the best under the situation.

Even with a 'catch-and-release' approach that is suitable for a decision tree, some of the decision entries in the tree are themselves complex and require study and analysis. For those who have not spent a significant amount of time studying the regulations, or have not followed the evolution from the original July 15 rule, the definition may be initially difficult to understand. To mitigate this we recommend the published rule include a number of illustrative examples.

Elimination of the Section 17(c) clarification

The new Category XIX no longer contains the clarification of the use of the Section 17(c) criteria. This clarification is essentially replaced by the (b)(3) 'release' paragraph, as a part or component considered standard equipment and integral to a civil aircraft covered by a civil type certificate issued by the FAA would be 9A991.c or .d, which is an AT-only control. Therefore, "parts," "components," "accessories," or "attachments" with the same form, fit, and performance capabilities as an ECCN 9A991.c or .d item would by definition not be "specially designed."

However, the Section 17(c) clarification in Category VIII of the ITAR states that a non-SME *component* or *part* that is not controlled under another category of the USML, that: (a) Is standard equipment; (b) is covered by a civil aircraft type certificate (including amended type certificates and supplemental type certificates) issued by the Federal Aviation Administration for a civil, non-military aircraft (this expressly excludes military aircraft certified as restricted and any type certification of Military Commercial Derivative Aircraft); and (c) is an integral part of such civil aircraft, is subject to the jurisdiction of the EAR.

The Section 17(c) rule specifically makes the parts and components subject to the jurisdiction EAR. The proposed (b)(3) states an item would not be "specially" designed if it has the same form, fit, and function as, in the case above, an item used in or with a ECCN 9A991.c or .d commodity. While an item would have the identical form, fit, and function as itself, there is some room for confusion.

Aerospace suppliers have made significant use of the Section 17(c) rule in determining the jurisdiction of items since it was clarified in 2008. UTC has utilized it to determine the jurisdiction of in excess of 125,000 items. It would be advantageous not to have to review each of the items where the Section 17(c) rule has been previously applied.

We would request an entry in the final Federal Register notice for the Rule stating that the intent of paragraph (b)(3) is to provide the same function as the Section 17(c) rule, simply extended beyond Category VIII.

Specific Comments

Revise paragraph (b)(2) of the proposed definition of "Specially Designed"

From:

(2) Is a single unassembled "part" that is of a type commonly used in multiple types of commodities not enumerated on the CCL or the USML, such as threaded fasteners (*e.g.,* screws, bolts, nuts, nut plates, studs, inserts), other fasteners (*e.g.,* clips, rivets, pins), basic hardware (*e.g.,* washers, spacers, insulators, grommets, bushings, springs), wire, and solder;

To:

(2) Is a single unassembled "part" that is of a type commonly used in commodities not enumerated on the USML or CCL, such as threaded fasteners (*e.g.,* screws, bolts, nuts, nut plates, studs, inserts), other fasteners (*e.g.,* clips, rivets, pins), basic hardware (*e.g.,* washers, spacers, insulators, grommets, bushings, springs), wire, and solder.

Rationale:

The term 'multiple types' is unclear, as in this context, 'types' implies a grouping. Without defining 'types', it is not clear if commodities fall into different types. For example, if a bolt is used in aircraft tail sections and also aircraft seat-backs, are they different commodity types because tail sections are not seat backs, or are they the same commodity type because they're both used in aircraft? 'Types' imparts the sense of significantly different uncontrolled commodities (e.g. toasters and automobiles), but provides no specificity (pop-up toasters versus toaster ovens.) Since the intent is to identify parts used in otherwise not controlled commodities and 'multiple types' provides no legally defensible difference, we recommend removing the term and going with 'used in commodities…' This is effectively the same without the need to parse commodities into undefined 'types'. The critical aspect of this paragraph is 'not enumerated on the CCL or the USML', and we strongly support the change made from 'civil items' as it provides necessary specificity.

Currently, much time is needlessly expended investigating and analyzing minor parts in order to establish export control jurisdiction and classification. It is important that the reform initiative succeed in eliminating this burden on industry and ensuring that such parts are not over controlled.

We also believe that consideration should be given to expanding the above suggested approach beyond single unassembled parts. There are many innocuous components (e.g. electrical connectors) that should not be controlled at a high level.

Revise the definition of the term "part" as defined in the July 15, 2012 proposed rule

From:

Part. This is any single unassembled element of a component, accessory, or attachment which is not normally subject to disassembly without the destruction or the impairment of design use. Examples include threaded fasteners (e.g., screws, bolts, nuts, nut plates, studs, inserts), other fasteners (e.g., clips, rivets, pins), common hardware (e.g., washers, spacers, insulators, grommets, bushings), springs and wire.

To:

Part. This is any single element of a component, accessory, or attachment which is not normally subject to disassembly without the destruction or the impairment of design use. Examples include threaded fasteners (e.g., screws, bolts, nuts, nut plates, studs, inserts), other fasteners (e.g., clips, rivets, pins), common hardware (e.g., washers, spacers, insulators, grommets, bushings), springs and wire.

Rationale:

Although BIS does not propose to re-define the term "part" in the proposed rule, its usage does require comment.

The July 15 rule defined a "part" as 'any single *unassembled* element of a component, accessory, or attachment which is not normally subject to disassembly without the destruction or the impairment of design use.' The proposed rule uses "part" multiple times, in one case referring to an 'unassembled "part"' (paragraph (b)(2)) which would be redundant with the definition. The issue concerns the use of 'unassembled' in the definition of "part."

'Unassembled' relates to the method of fabricating the item, and does not necessarily determine the sophistication. One of the listed examples in (b)(2) is a nut plate. This can be fabricated by cutting a hole and threads into a metal

plate, but it can also be fabricated by welding a nut to a plate. The same can be said of solder; rosin or acid core solder is 'assembled' from at least two different materials. It is likely that the user of a "part" may not know the fabrication method, and requiring such research would be an unnecessary burden.

The intent of the definition is to address simple, one-piece items. That is addressed in the definition by the clause 'not normally subject to disassembly without the destruction or the impairment of design use.'

We recommend that the modifier 'unassembled' be removed from the definition of "part", so that an item won't be excluded from (b)(2) simply due to the choice of fabrication method.

Revise paragraph (b)(3)(ii) of the proposed definition of "Specially Designed"

From:

(ii) Is either not enumerated on the CCL or USML, or is enumerated in an ECCN controlled only for Anti-Terrorism (AT) reasons;

To:

(ii) Is either on the USML or CCL controlled in a 'catch-all 'paragraph, or is in a CCL ECCN controlled for AT-only reasons and is not a 'catch-all' paragraph.

Rationale:

The intent of the rule will be met by the proposed definition, although in some cases the wording is unavoidably complex. This is especially true in section (b)(3)(ii), where 'enumerated' is used in both the positive and negative sense, but the positive sense 'enumerated' is not the inverse of 'not enumerated.' Because 'enumerated' is a list of conditions joined with 'and', 'not enumerated' is True if any of the 'and' conditions are false. An item on the CCL is 'enumerated' if it is not controlled in a 'catch-all' *and* controlled for more than AT-only reasons. To be 'not enumerated', all it takes is for the item to be in a 'catch-all' control; after that, the reason for control is moot. The case where an item on the CCL is not controlled in a 'catch-all' control for AT-only reasons satisfies both the conventional 'not enumerated' and the (b)(3) context of 'enumerated.'

An item meets the conditions of (b)(3) if it is:

a. On the USML controlled by a 'catch-all'; *or*
b. On the CCL in a 'catch-all' controlled for more than AT-only reasons; *or*
c. On the CCL in a 'catch-all' controlled for AT-only reasons; *or*
d. On the CCL not in a 'catch-all' controlled for AT-only reasons.

It can be seen that conditions b and c can be simplified into one

We suggest the following:

(1) Replaced (b)(3)(ii) with the simpler and more positive:

Is either on the USML or CCL controlled in a 'catch-all ' paragraph, or is in a CCL ECCN controlled for AT-only reasons and is not a 'catch-all' paragraph.

This also allows the deletion of the paragraph (b)(3) definition of 'enumerated' in Note 1.

(2) Provide simple illustrative examples of each of the cases.

(3) Since identifying 'catch-all' paragraphs is critical, provide either a listing of 'catch-all' paragraphs in the USML or CCL, or add a notation to each 'catch-all' paragraph, similar to the asterisk in the USML to indicate SME.

Revise paragraph (b)(4)(i) of the proposed definition of "Specially Designed"

From:

(i) Use in or with commodities described on the CCL *and* commodities not enumerated on the CCL or the USML; *or*

To:

(i) Use in or with both commodities described on the CCL *and* commodities not enumerated on the CCL or the USML; *or*

Rationale:

A key criterion to paragraph (b)(4)(i) is that the item must be used in or with both items on and off the controlled lists. This is shown by italicizing the word 'and.' Because of the importance of this dual test, for additional emphasis the word 'both' should be added:

(b)(4)(i) Use in or with both commodities described on the CCL and commodities not enumerated on the CCL or the USML