August 3, 2012

Mr. Timothy Mooney
Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
14th Street Pennsylvania Ave., N.W.
Washington, D.C. 20230

RE: "Specially Designed" Definition (*Federal Register* Notice of June 19, 2012; RIN 0694-AF66)

Dear Mr. Mooney:

Semiconductor Equipment and Materials International ("SEMI") is pleased to submit to the Commerce Department's Bureau of Industry and Security ("BIS") the following comments on BIS's revised proposed definition of the term "specially designed" ("Revised Proposed Definition").[1] As detailed below, SEMI urges that BIS further improve the Revised Proposed Definition.

Semiconductor Equipment and Materials Industry

SEMI represents nearly 2,000 global companies that provide equipment, materials and services used to manufacture semiconductors, photovoltaics, displays and other high tech devices for consumer and industrial products. SEMI's over 500 U.S. member companies are comprised of both large and small companies that make a critical contribution to the advancement of microelectronic technologies that are central to the communities of highly skilled and educated engineers and technologists in many regions of the United States.

The instruments and materials that SEMI member companies produce are used to manufacture commercial integrated circuits or semiconductors on a mass volume basis. The main customers of semiconductor manufacturing equipment ("SME") and materials companies are large, well-known semiconductor manufacturers.

The U.S. SME industry serves a global customer base, and SEMI members must export on a commercially reasonable basis to survive. The average U.S. maker of SME receives over 80 percent of its revenues from overseas sales. These firms cannot be

[1] "Specially Designed" Definition, 77 Fed. Reg. 36,409 (June 19, 2012) ("Revised Proposed Definition").

global industry leaders or even sustainable enterprises unless they achieve substantial export sales.

Based on SEMI members' day-to-day experience, SEMI can confirm the validity of widespread concern regarding existing U.S. export controls. With their overly broad scope and licensing uncertainties and delays, many export controls add costs and curb SME industry investment growth, sales and employment without contributing to U.S. security.

Comments

I. Revised Proposed Definition Is Improvement Over Initial Proposed Definition

In comparison to the proposed "specially designed" definition that BIS published in July 2011 ("Initial Proposed Definition"),[2] the Revised Proposed Definition is structurally clearer and would move classification outcomes closer to outcomes that would result from the natural meaning of "specially designed."

In particular, SEMI commends BIS's adoption of three SEMI recommendations:

- BIS expanded exceptions to the "specially designed" definition to include accessories as well as parts and components.[3]
- BIS replaced "serial production" with "production" in exclusions to the definition. The Initial Proposed Definition would have excluded components used in controlled and non-controlled end items if the non-controlled end items were in "serial production." The ambiguous term "serial production" would have introduced substantial uncertainty for exporters.
- "One for one replacement" as between a component at issue and a component used in a non-controlled end item is not a requirement for satisfying any exclusion in the Revised Proposed Definition. That requirement would have made an exclusion unnecessarily limited.

[2] Proposed Revisions to the Export Administration Regulations: Control of Items the President Determined No Longer Warrant Control Under the United States Munitions List, 76 Fed. Reg. 41,958, 41,980-81 (July 15, 2011).

[3] Unfortunately, this positive development came at the cost of unnecessarily expanding the scope of accessories captured by the definition in the first instance.

II. Revised Proposed Definition Retains Significant Shortcomings

Notwithstanding improvements identified above, the Revised Proposed Definition has several shortcomings, not the least of which is its complexity. BIS continues to employ a "catch-and-release" structure in the Revised Proposed Definition. This structure is intrinsically complicated and inconsistent with the basic concept of a definition – which should simply specify the meaning of a term.

The Revised Proposed Definition may also expand controls unnecessarily and give rise to subjectivity in interpretation. Several key terms are undefined. These include "function as designed," "enhance its usefulness or effectiveness," "reasonable expectation," and "described on the CCL." Given the uncertainty and complexity associated with the Revised Proposed Definition, exporters will be required to expend considerable time and resources seeking to interpret and apply the new definition to their day-to-day export activities.

A foremost uncertainty is how paragraphs (a)(1), (a)(2), and (a)(3) would collectively serve as "catch" provisions. It appears that these provisions are intended to be evaluated independently and successively, as evidenced by the "or" following paragraph (a)(2). This understanding is called into question, however, by the note to paragraph (a)(1). The note addresses whether example components are "specially designed" by applying the paragraph (a)(1) test of whether the component is "peculiarly responsible" for causing an item to meet or exceed a control parameter.[4] This tends to suggest that one can definitively determine whether a component is "specially designed" based solely on application of paragraph (a)(1).

Other aspects of paragraph (a) reinforce uncertainty about how the "catch" provisions are to operate. BIS observes that paragraph (a)(2) is "similar to (a)(1), but . . . must be listed separately because not all descriptions of commodities on the USML and the CCL include performance levels, characteristics, or functions as the basis for control."[5] This justification for paragraph (a)(2) implies that paragraph (a)(2) only applies to parts and components that are incorporated by end items covered by ECCNs (or USML categories) that do not include performance levels, characteristics, or functions as bases for control. In addition, the term "function as designed" used in (a)(2) is, as noted above, undefined and could result in expansion of controls.

The intent behind paragraph (a)(3) is also obscure. BIS has defined "accessories" and "attachments" to be items which are associated with other items but "are not neces-

[4] Revised Proposed Definition at 36,419

[5] Revised Proposed Definition at 36,412.

sary for their operation."[6] It is unclear why accessories and attachments, which by the definition provided are "not necessary" for the operation of the end item, would be considered "specially designed" when the objective of export control reform is creation of "a system where higher walls are placed around fewer, more critical items."[7]

III. Modifications Should Be Made to the Revised Proposed Definition

A. Paragraph (a)(1) Standard Should Apply to All Items

The following should constitute the entirety of the "specially designed" definition:

An "item" is "specially designed" if, as a result of "development," it:

is an end item having properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or U.S. Munitions List (USML) paragraph , or

is an application-specific part, component, accessory or attachment having properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions of an end item enumerated in the relevant ECCN or U.S. Munitions List (USML) paragraph.

This definition would:

- be reasonably straightforward and easy to administer;
- comport with the normal meaning of "specially designed;" and
- not result in expansion of export controls.

B. Alternatively, If "Catch-and-Release" Structure Is Retained BIS Should Adjust "Catch" and "Release" Provisions

1. Confirm That Component or Part Not "Specially Designed" If ECCN Has Control Performance Levels, Characteristics or Functions and (a)(1) Standard Not Met

The better interpretation of paragraph (a) of the Revised Proposed Definition is that a component or part would not be "specially designed" for an end item if: 1) the

[6] Revised Proposed Definition at 36,419.

[7] Remarks by Secretary Robert Gates before the Business Executives for National Security on April 20, 2010

ECCN for that end item relies on performance levels, characteristics or functions as control parameters; and 2) the component or part does not satisfy the (a)(1) standard with respect to that end item. SEMI urges BIS to add the following note to the Revised Proposed Definition confirming this interpretation.

> **Note to paragraph (a)(2):** This paragraph pertains only to parts and components that are incorporated into enumerated end items covered by ECCNs or USML categories that lack performance levels, characteristics, or functions as bases for control. All other parts and components are subject to paragraph (a)(1).

The alternative to this approach would seem to be a "double jeopardy" policy under which a component or part would be deemed "specially designed" if it satisfies either (a)(1) or (a)(2). Such a policy would be incongruous, unnecessary, and contrary to the rationale for (a)(2) as articulated by BIS.[8]

2. Extend (b)(2) to Minor Components

As drafted, the paragraph (b)(2) exclusion covers only parts. That exclusion should also apply to minor, simple assemblies notwithstanding that they might technically be considered "components." The purpose of (b)(2) is presumably to exclude from the "specially designed" definition items that obviously cannot be peculiarly responsible for achieving or exceeding control parameters. That rationale applies with equal force to minor components such as a cable harness, a simple pipe/fitting assembly or a stud assembly. There is no reason to treat a simple piece of pipe differently from the same piece of pipe with a fitting on it. This modification would go far toward making the Revised Proposed Definition workable and appropriate.

3. Eliminate "Form and Fit" from (b)(3)

The paragraph (b)(3) exclusion would be limited to parts, components, accessories, and attachments with the "same form, fit and performance capabilities" as parts, components, accessories and attachments used in or with a non-enumerated end item. The requirement that items have the same performance capabilities is understandable. The requirement that items have the same form and fit is not justified since form and fit do not determine what the item is capable of achieving, i.e., performance capabilities. Two components or accessories that have the same performance capabilities should be treated as being materially the same, regardless of form or fit distinctions.

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[8] SEMI also urges BIS to clarify paragraph (a)(3) to establish that it captures only accessories and attachments that are necessary for achieving end item control parameters.

4. Modify Note 1 and (b)(3)(ii)

Note 1 and paragraph (b)(3)(ii) could be simplified with no effect on their meaning. There is no need for the phrase "or is enumerated in an ECCN controlled only for Anti-Terrorism (AT) reasons" in paragraph (b)(3)(ii), or for the phrase "except in the context of paragraph (b)(3), where an item in an ECCN controlled only for AT reasons is considered enumerated when it is not controlled in a catch all paragraph" in Note 1. Both of those phrases should be eliminated. If that were done, the definition of "enumerated" would be unchanged and the meaning of paragraph (b)(3)(ii) would be unchanged, but both would be clearer.

5. Replace "Described" with "Enumerated" and "Commodities" with "End items" in (b)(4)(i)

The Revised Proposed Definition does not define the phrase "described on the CCL," which appears in paragraph (b)(4)(ii). There are two possibilities: First, that "described" means "enumerated;" or second, that "described" is broader than "enumerated." If "described" is synonymous with "enumerated," paragraph (b)(4)(ii) discusses two mutually exclusive categories of items and fits with the rest of the Revised Proposed Definition. If this is the case, however, there is no reason to use a term other than "enumerated," and doing so creates confusion. If, on the other hand, products "described on the CCL" encompasses all of the products "enumerated on the CCL" and some additional products – meaning that a single product could be both "not enumerated on the CCL" and also "described on the CCL" – then paragraph (b)(4)(ii) becomes identical in scope to paragraph (b)(4)(i), at least vis-a-vis the CCL. Under either scenario, replacing "described" with "enumerated" would clarify the meaning of the paragraph without altering its meaning.

In addition, BIS should replace "commodities" with "end items" throughout paragraph (b)(4) to clarify that parts, components, accessories, and attachments are being used in or with end items.

IV. Grace Period Should Be Established

Regardless of the extent to which BIS adopts SEMI's recommendations, BIS should establish that the new "specially designed" definition will not become effective earlier than 90 days after publication of the final rule. Doing so would provide much needed time for exporters to fully assess the final rule and adjust their licensing and classification practices appropriately.

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SEMI and its member companies are committed to export control reform, and we appreciate the opportunity to provide these comments.

Sincerely,

Karen Savala
President, SEMI Americas