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August 2, 2012

Sent via email

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

Re: "Specially Designed" Definition

Federal Register / Vol. 77, No. 118 / Tuesday, June 19, 2012 / Proposed Rules

RIN 0694-AF66

Dear Sir or Madam:

TechAmerica's members appreciate the U.S. government's efforts to craft a new, unified definition of "specially designed". This current proposed rule is an improvement over the original. However, the "catch and release" approach is overly complex, even for large sophisticated businesses. Indeed it may be impossible to comprehend by small and medium sized businesses. We believe that this definition should be applied only in narrow circumstances where a positive list approach may prove overreaching.

For the proposed definition to be successful, it is imperative that no item, including any part or component, is subject to increased control merely as a result of revisions to the definition. Any implementation of the proposed revisions that results in re-control or new controls would represent a major step backwards.

The definition given the term should also take account of the fact that "specially designed" is used as a control criterion throughout the CCL and USML. Given that, in the context of the CCL and the USML, the term "specially designed" should mean designed and/or developed in a peculiar and particular manner for a specific end use or end item ***and*** contributing directly and significantly to that end use or end item.

In particular, TechAmerica strongly endorses the following comments of the Semiconductor Industry Association on the proposed definition of "specially designed" as it affects integrated circuits (ICs) and components per se.

I. Components Such As ICs Should Have Their Control Status Determined By the End Items into Which They Are Incorporated

The Bureau of Industry and Security (BIS) has defined "component" to be "an item that is useful only when used in conjunction with an "end item." Every IC fits squarely within this definition. Indeed, ICs have no utility or impact standing alone and are purposeful only when incorporated into an end item. Components such as ICs are by definition distinct from end items and their capabilities are achieved only when incorporated into end items. Accordingly, components' inherent derivative nature means that they should not be set forth on a control list as enumerated controlled end items themselves. Instead, the export control status of all components – and particularly of ICs not already enumerated as components in Category 3 of the CCL -- should be determined entirely by the control status of the end items into which the components are incorporated. That is, all ICs that are not already enumerated as components in Category 3 of the CCL should be placed in catch all categories on the CCL and USML, such that the export control status of such items is determined exclusively by the uses to which the components are put. No component should be positively listed on the USML or CCL as an end item, and no component that is not "specially designed" for a controlled end item or is not already enumerated as a component in Category 3 of the CCL should be subject to export controls.

II. The Proposed Definition As Applied To ICs Should Be Limited To ASICs That Are Peculiarly Responsible For the Specific Controlled Parameters of the End Items into Which They Are Incorporated

The only components worthy of export control as specially designed components are those that are application-specific. Components that are employed for a variety of purposes and/or in multiple end products should not be controlled as specially designed components. In the case of ICs, this means that only application-specific ICs – or ASICs – should be subject to export controls. General purpose ICs should not be controlled, for the simple reason that they are not specifically designed (in any natural sense of that term) for a controlled end item. BIS has recognized this, stating that "specially designed" does not mean merely "capable of use in" or "capable of use with," and that, in particular, non-ASIC, general purpose ICs "that are not designed for a particular application would not be "specially designed" items, even if they are used in controlled items."

In addition, "specially designed" should only apply to ASICs (and other application-specific components) that are peculiarly responsible for achieving or exceeding the controlled parameters of end items into which they are incorporated. An IC is worthy of

control as being specially designed only if it contributes significantly to the achievement of military advantage or national security sensitivity of an end item as described in and through the objective criteria of a control list. ASICs that provide benign functions that are separate from or contribute only indirectly to the national security features of an end item, such as routine communications or memory capabilities, should not be captured as specially designed controlled components.

III. The Proposed "Specially Designed" Definition Constitutes a Major Improvement from the Previous Proposal, but Nonetheless Requires Further Improvement

BIS has adopted several positive elements into its proposed definition, and we applaud BIS for significantly improving the "specially designed" definition and moving that definition much closer to where it needs to be. First, in paragraphs (b)(3) and (b)(4) of the Proposed Definition BIS has correctly stipulated that if a component is employed in several different end items with differing control status, then the component is not "specially designed." These exclusions should appropriately remove from control those devices that are general purpose.

Second, in paragraph (b)(5) of the Proposed Definition BIS has correctly stipulated that non-application specific components – in the case of ICs, non-ASICs – are not "specially designed." This appropriate exclusion should remove from control those devices that are not inextricably tied to the controlled parameters of an enumerated end item.

Finally, in its discussion of the Proposed Definition BIS has explicitly rejected "capable of" as a possible meaning of "specially designed." This is a long-overdue and extremely important clarification. Moreover, the BIS discussion of this point in conjunction with explaining paragraph (a)(1) of the Proposed Definition is worth highlighting:

> even if something is capable of being used with a controlled item, it is not captured by this part of paragraph (a) unless someone did something during the item's development so that it would achieve or exceed the performance levels, characteristics, or functions described in a referenced ECCN or USML paragraph.[5]

However, BIS has inexplicably and wrongly limited this principle only to end items and not components or accessories. It should not do so, but instead should apply this principle to all items and commodities.

[5] Proposed Definition at 36,412.

IV. Certain Modifications Should Be Made to the "Catch and Release" Methodology

A. The Definition of "End Item" Should Be Modified

The definition of "end item" put forward by BIS is flawed and needs modification. End items must be able to operate by themselves and perform functions independent of other items. As currently drafted, the definition of "end item" could capture items that squarely fall within the definition of "component." For example, an IC, which clearly meets the definition of a "component," also meets the definition of an "end item," as it is "an assembled commodity ready for its intended use" and requires only energy "to place it in an operating state." If wholesale confusion is to be avoided, there should not be any overlap between the definition of an "end item" and the definition of a "component." In order to avoid such a result, BIS should modify its definition of "end item" as follows:

> *End item.* This is an assembled commodity ready for its intended use, **capable of operating by itself and performing functions independent of any other item**. Only ammunition, fuel or other energy source is required to place it an operating state. Examples of end items include ships, aircraft, **computers,** firearms, and milling machines.

This definition should apply with equal force to both the CCL and the USML. Consistent with this definition, the universe of "defense articles" should consist entirely of end items.

B. Paragraph (a) (1) of the Proposed Definition Should Be Revised to Apply to End Items, Parts and Components Alike

There is no credible reason why paragraph (a)(1) of the Proposed Definition should not apply to parts and components. As BIS notes, an item should not be deemed "specially designed" simply because it is capable of being used with a controlled item; instead, an item should not be deemed "specially designed"

> unless someone did something during the item's development so that it would achieve or exceed the performance levels, characteristics, or functions described in a referenced ECCN or USML paragraph.

That logic applies with equal force to parts, components and end items. That discussion clearly evidences the applicability of this paragraph to components. BIS should explicitly codify the applicability of paragraph (a)(1) to components in the manner indicated below.

It is true that in a minority of cases components appear within ECCNs or USML paragraphs that do not contain any performance levels, characteristics or functions; however, such relatively unusual cases should not be permitted to control the treatment of all components, especially given the derivative nature of components and their proper inclusion only within catch all provisions of the USML and CCL.

Accordingly, paragraph (a)(1) of the Proposed Definition should be modified as follows:

> (1) **(i) In the case of an end item**, has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or USML paragraph; **or (ii) In the case of a part or component for an enumerated end item having stated performance levels, characteristics or functions, is an ASIC or other application-specific part or component having properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions of the enumerated end item.**

In addition, paragraph (a)(2) of the Proposed Definition should be modified as follows:

> (2) Is a part or component **not covered by (a)(1)(ii) and is an ASIC or other application-specific part or component that is** necessary for an enumerated ~~or referenced commodity~~ **end item** ~~or defense article~~ to function as designed;

When these modifications are made to paragraph (1) of the Proposed Definition the definition is moved much closer to the natural meaning of the term "specially designed" for parts and components and is therefore clarified and made much easier to understand and apply.

C. If Paragraph (a)(1) Of The Proposed Definition is Not Modified, Then Paragraph (a)(2) Should be Modified to Distinguish Between Parts and Components Used With or In Enumerated End Items With Specified Performance Levels, Characteristics, or Functions And Parts and Components Used In Other End Items

If paragraphs (a)(1) and (a)(2)of the Proposed Definition are not modified as indicated in the preceding section, then paragraph (a)(2) of the Proposed Definition should be modified to distinguish between parts and components used with or in enumerated end items with specified performance levels, characteristics, or functions in the relevant ECCN or USML paragraph and parts and components that are used with or in other types of end items. As noted above, the logic supporting of paragraph (a)(1) applies with equal force to parts and components, and the only compelling reason not to apply the "peculiarly responsible" standard to certain parts and components is that in some unusual instances one is literally unable to do so.

Accordingly, if the modifications to the Proposed Definition indicated in the previous section are not made, then paragraph (a)(2) of the Proposed Definition should be modified as follows:

> (2) **(i) In the case of a part or component for an enumerated end item having stated performance levels, characteristics or functions, is an ASIC or other application-specific part or component having properties peculiarly**

responsible for achieving or exceeding the performance levels, characteristics, or functions of the enumerated end item; **or (ii) In the case of a part or component not meeting the requirements of (i),** is **an ASIC or other application-specific** ~~a~~ part or component necessary for an enumerated ~~or referenced commodity~~ **end item** ~~or defense article~~ to function as designed;

D. The Phrase "Same Form and Fit" Should Be Eliminated From Paragraph (b)(3) of the Proposed Definition

The exclusion contained in paragraph (b)(3) of the Proposed Definition is limited to parts, components, accessories and attachments with the "same form, fit and performance capabilities" as parts, components, accessories or attachments used in or with a non-enumerated end item. While the requirement that items have the same performance capabilities is well-reasoned and appropriate, the requirement that items have the same form and fit is baseless and inappropriate. Form and fit are inherently superficial and non-substantive characteristics and as such should play no role in the control status of a part, component, accessory or attachment. Two components that have the same performance capabilities should be deemed to be substantively identical and therefore worthy of the same control status, regardless of any differences in form and fit between the two components.

Accordingly, BIS should revise the first section of paragraph (b)(3) of the Proposed Definition as follows:

> (3) Has the same ~~form, fit, and~~ basic performance or capability, or substantially equivalent performance capabilities as a part, component, accessory, or attachment used in or with a**n** **end item** ~~commodity~~ that:

E. The Term "Particular Application" In Paragraph (b)(5) of the Proposed Definition Is Ambiguous and Should be Modified With "Of A Particular End Item"

Paragraph (b)(5) of the Proposed Definition excluded from the definition of "specially designed" those parts, components, accessories or attachments that were or are being developed with no reasonable expectation of use for a "particular application." TechAmerica applauds this exclusion and expects that it means that, in the case of ICs, only ASICs will be "specially designed." However, it is not entirely clear that such will in fact be the meaning of this exclusion, as the term "application" is subject to wide-ranging interpretations.

If "application" is interpreted very broadly and giving a meaning that would encompass, for example, activities as broad as computing, communications, data processing, signal processing or data conversion, then very few items would ever be excluded from the "specially designed" definition under paragraph (b)(5) – rendering the

paragraph largely, if not entirely, irrelevant. Instead, this paragraph should be given particular scope and meaning by ascribing a relatively narrow definition to "application." This may be achieved by an appropriate regulatory history and by making the following modification to paragraph (b)(5):

> (5) Was or is being developed with no reasonable expectation of use for a particular application in **a particular end item.**

This modification would tie "application" to a specific end item and so would narrow the scope of that term, thereby infusing the exclusion provided by this paragraph with meaning and usefulness.

In addition, the following example of a component excluded under paragraph (b)(5) provided by BIS should be included in the regulations in a Note to paragraph (b)(5):

> **Note to paragraph (b)(5):** A component that would not be "specially designed" as a result of paragraph (b)(5) is one that was developed for general or multi-purpose or non-customized applications. For example, many catalog electronic components are designed as basic building blocks for other equipment, regardless of whether the equipment is military or civilian, controlled or uncontrolled. In contrast, a component that would not be excluded from the "specially designed" definition under paragraph (b)(5) would be one that is customized and/or specifically adapted for a particular use in a specific end item.

Inclusion of this new note in the regulations will clarify the intended scope of the exclusion contained in paragraph (b)(5).

TechAmerica would like to thank the Department of Commerce for the opportunity to provide comments on this proposed rule and we look forward to additional rules as part of the President's Export Control Reform Initiative.

Sincerely,

Ken Montgomery
Vice President, International Trade Regulation
TechAmerica