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

Subject: RIN 0694-AF66 "Specially Designed" Definition

Dear Mr. Mooney:

Esterline Technologies Corporation, a manufacturer of a wide variety of parts and components for the aerospace and defense sector, appreciates the opportunity to comment on the U.S. Department of Commerce's proposed definition of "specially designed." It commends the Bureau of Industry and Security (BIS) for the progress made since the definition proposed in RIN 0694–AF17 (76 FR 41958, July 15, 2011) and supports the goals and objectives of the Export Control Reform (ECR) Initiative.

Noting that the regulatory impact of this proposed definition is strongly related to proposed rules previously published in the Federal Register, Esterline requests that BIS also consider relevant comments regarding "600-series" ECCNs, the definitions proposed in RIN 0694–AF17, and the timing of adoption of this rule with respect to other elements of the ECR Initiative.

Esterline agrees with the nine objectives set forth in this proposed rule for the definition of "specially designed" and supports the idea of a two-part "catch and release" structure. Esterline has considered the proposed definition against those nine stated objectives and has tested the definition against its products, as Assistant Secretary of Commerce for Export Administration Kevin Wolf requested in his remarks at last month's Update 2012 Conference in Washington, DC:

> *We, however, need you to test the definition against your products. Does it result in items being controlled that otherwise wouldn't or shouldn't be? Does it result in items being de-controlled that wouldn't or shouldn't be under a reasonable application of the term? If so, then why?*

Esterline has concluded that the proposed definition must be further revised to meet the nine stated objectives and prevent unintended negative consequences. These include over-controlling some items, under-controlling others, and imposing a greater compliance burden on small and medium entities than they already face.

Summary of Comments and Recommendations

Esterline offers the following summary of its comments and recommendations to substantially improve the proposed definition. The comments and recommendations are explained in detail later in this letter.

Proposed Definition Paragraph	Comment/Recommendation
(a)	Clarify policy objective for modification of items
(a)(2), (a)(3)	Clarify the "catch" and merge the paragraphs
(b)(2)	Clarify and broaden the "release" for simple, multi-use minor components
Note to (b)(3)	Clarify and broaden the "release" for items with minor differences
(b)(3)	Prevent unintended effects – "release" of significant items and failure to "release" insignificant items
(b)(4)	Prevent unintended effects – "release" of significant items
new (b)(6)	Prevent increased control of items covered by existing CJ Ruling and CCATS
Unspecified	Clarify policy intent for software and materials

Additionally, Esterline offers the following related comments and recommendations, also explained later in this letter.

Related Issues	Comment/Recommendation
CML	Consolidate the "600 series" ECCN ".y" lists
CCL	Clarify policy objectives for "catch-all" ECCNs that do not refer to "specially designed"
USML	Consider effects of USML "catch-all" controls based on specific end items with respect to "specially designed" definition in EAR
Definitions	Define "avionics" and resolve uncertainty over its classification

Final Rule	Make concurrent changes to avoid unintended consequences
Final Rule	Allow an extended final comment period

In the remainder of this letter, Esterline will discuss why it believes the proposed definition fails to meet several of the nine stated objectives as well as broader stated objectives of the ECR Initiative. It will then offer several case studies that illustrate what it believes would be the unintended negative consequences of the proposed definition. Finally, Esterline will amplify on its suggested changes and the reasoning underlying them.

Measuring Proposed Definition against Nine Stated Objectives

Esterline assesses below the currently proposed definition for "specially designed" against the nine objectives in the July 15 proposed rule:

(i) Does the definition preclude multiple or overlapping controls of similar items within and across the two control lists?

No. As proposed, the definition results in multiple possible control categories for similar items with minor variation in features. The terms "function as designed" and "enhance its usefulness or effectiveness" in paragraphs (a)(2) and (a)(3) of the definition are vague and broad. The term "as a result of 'development'" is not clear as to which article is under "development," and current MTCR-related definitions in the EAR raise questions about the scope of "development."

Generally, any part installed in military equipment may be argued to be "caught" by paragraph (a)(2) or (a)(3). Conversely, items with very minor dimensional or material differences are not "released" by paragraph (b)(3). Further, existing ambiguities in the CCL remain in place, and are exacerbated by not having a "release" mechanism when an ECCN contains a "catch-all" that does not refer to "specially designed" (for example, 7A994 and 9A991.d).

As noted in Case Example 1 below, under the proposed rule a D-subminiature connector with slight design change may fall under ECCNs EAR99, 6A998.a, 7A994, 9A991.d, 0A606.y.6, 9A610.x, or other ECCNs, or under USML Category VIII h, XI c, or other USML categories, depending on whether it has a separable element and on the application in which it is used.

Hence, the ambiguity in control category currently plaguing U.S. export controls would remain and could become worse.

(ii) Is the definition easily understood and applied by exporters, prosecutors, juries, and the U.S. Government?

No. The ambiguity described above would prevent the definition from being easily understood and applied. The terms "properties peculiarly responsible", "function as designed", and "enhance its usefulness or effectiveness" in paragraphs (a)(1), (a)(2), and (a)(3) are subjective and therefore not amenable to consistent application. The result of applying Note 1 to intermediate assemblies has an uncertain effect in paragraph (b)(3)(ii).

Further, exporters have difficulty understanding control categories that depend on the design intent behind very minor feature variations. The application of drastically different controls depending on relatively insignificant variation does not seem logical to exporters.

The definition would continue the need to apply complex analysis to simple, multi-use items. Many exporters produce thousands of similar products all having minor variation. Control categories must be determined for all products, even those not shipped outside the U.S., to comply with deemed export rules. Applying complex analysis to thousands of similar, simple items cannot possibly result in easy understanding or application, and is likely to cause a fairly high error rate in classifications.

Given that the proposed definition is already confusing to subject matter experts within the exporting community, it will certainly be confusing to prosecutors, juries, and CBP agents.

(iii) Is the definition consistent with definitions used by the multilateral export control regimes?

Unclear. The Missile Technology Control Regime (MTCR) is the only one of the four multilateral export control regimes that includes a definition for "specially designed." The MTCR definition of "specially designed" is more limited in its scope than the definition in *United States v. Lachman* (1st Cir. 2008). Assistant Secretary of Commerce Kevin Wolf indicated in remarks before the U.S.-Sweden Defense Industry Conference on May 17, 2011, that applying the MTCR definition to the other three regimes is considered unacceptable by the Department of Commerce and the other U.S. Government agencies primarily concerned with export controls for a number of reasons. Using the MTCR definition would result in inadvertent decontrol of articles that should be controlled under the Wassenaar Arrangement. No definition could be simultaneously consistent with the MTCR and *Lachman*. Hence, a definition for "specially designed" that works for all the regimes must have broader scope than the MTCR definition and may over-control in the MTCR context.

The proposed definition, however, is not consistent with the application of military list controls by other signatories to the Wassenaar Arrangement. The United States today applies "specially designed" broadly to simple parts and components. This creates difficulties when foreign items enter the United States. The items are usually not considered military list before entry, but are military list after entry. The controls applied to a foreign part in a global supply chain depend on whether the item ever entered the United States. Inconsistent application of rules by Wassenaar Arrangement signatories causes problems for U.S. corporations that must manage global supply chains. The proposed definition would continue this broader treatment by the United States of many simple components as "specially designed."

(iv) Does the definition exclude items specifically enumerated on either the USML or the CCL; and does it avoid a definitional loop by using "specially designed" as a control criterion?

Yes. Note 1 to the definition accomplishes this purpose.

(v) Is the definition capable of excluding from control simple or multi-use parts such as springs, bolts, and rivets, and other types of items the U.S. Government determines do not warrant significant export controls?

No. Certain simple items that the U.S. Government determined do not warrant significant export controls are excluded from significant control by proposed ".y" lists for each "600-series" ECCN, rather than by the proposed definition of "specially designed." The Aerospace Industries Association (AIA) has recommended in a previous comment excluding simple items from the definition of "specially designed" through the use of one consolidated list rather than resorting to ".y" lists. The rule would be improved by a using a single, expansive list of simple or multi-use parts that do not warrant significant export controls. Paragraph (b)(2) could be revised to cite a new supplement to the Export Administration Regulations (EAR), which could describe simple and multi-use parts expansively. The separate ".y" lists create confusion, complexity, and difficulty.

Several of the case examples provided below demonstrate that simple or multi-use parts that do not warrant significant export controls are not excluded from control by the current proposed definition.

(vi) Does the definition apply to both descriptions of end items that are "specially designed" to have particular characteristics *and* to parts and components that were "specially designed" for particular end items?

Yes. However, as noted in Case Example 4 below, Note 1 "releases" lower-level items of intermediate assemblies subject to a "catch-all" paragraph, which would result in decontrol of significant items.

(vii) Does the definition apply to materials and software because they are "specially designed" to have a particular characteristic or for a particular type of end item?

Not as intended. The "catch" paragraphs (a) and a(1) apply to "items"; hence materials and software may be "caught". The "release" paragraphs (b)(1) through (b)(5) apply to "parts", "components", "accessories", and "attachments"; hence, materials and software cannot be "released".

(viii) Does the definition prevent increase from current control level to "600 series" control or other higher end controls of items?

No. Paragraphs (b)(1) through (b)(5) do not "release" items currently categorized under EAR99 or the CCL through formal DDTC CJ and BIS CCATS that otherwise meet the definition of "specially designed." This could result in an increase of control for items on which the U.S. Government has already made a determination.

(ix) Does the definition prevent historically EAR-controlled items from becoming ITAR-controlled?

Yes. The current DDTC interpretation of 22 CFR 120.3(a) is sufficiently broad that it currently controls under the ITAR any item proposed for the EAR under the "specially designed" definition.

Measuring Proposed Definition against Broader Objectives of ECR Initiative

BIS states that the proposed rule will reduce the burden on small entities by facilitating enhanced public understanding of a key term used in the CCL. Esterline respectfully suggests that the rule must be further modified before this reduced burden can be realized. Under the proposed definition, similar simple items can be controlled under many different export control classifications. Public understanding is therefore not yet enhanced.

Esterline requests that BIS also consider the economic impact of the part-by-part classification analysis that the proposed definition would require of entities that manage inventories consisting of tens of thousands of small parts and minor components. Many

of these entities are small and mid-sized businesses. An analysis that can take hours per part is an excessive burden on industry. A simpler "release" criterion for simple multi-use items is essential to reducing that burden,

At first blush, many small entities would appear to benefit from the proposed definition of "specially designed" and its counterpart proposed by the Department of State's Directorate of Defense Trade Controls for use in the International Traffic in Arms Regulations (ITAR) (See RIN 1400-AD22 published at 77 FR 36428, June 19, 2012). Specifically, they would arguably benefit by no longer having to register as manufacturers/exporters of defense articles pursuant to ITAR Part 122, would no longer have to pay ITAR license application fees, and would no longer have to comply with ITAR Part 129 brokering controls.

However, Esterline strongly believes that the proposed definition must be considered in the context of the overall ECR Initiative. All the proposed changes must be read and evaluated together to understand their likely effect. Considering the proposed definition of "defense services" (See RIN 1400-AC80 published at 76 FR 20590, April 13, 2011), the foregoing benefits are likely not to be as great as hoped. The reason is that manufacturers of parts and minor components proposed for the "600-series" ECCNs or Commerce Military List (CML) frequently provide a service commonly called "application engineering" to their customers. This may include advice or other assistance in the integration of the manufacturer's item into a customer's end item. If the part or component is controlled on the CML, the end item is likely to be controlled on the USML, and the application engineering is a defense service if furnished to a foreign person. The manufacturer would thus still have to register under ITAR Part 122, still have to apply for ITAR Part 124 Technical Assistance Agreements, and still have to comply with ITAR Part 129 brokering controls; while also being subject to licensing under the EAR.

This possibility of dual licensing in connection with integration assistance, as well as the additional analytical burden that the current Commerce and State proposed "specially designed" definitions will place on manufacturers of small parts and minor components, is why Esterline fears the currently proposed definitions may actually increase the complexity of many U.S. companies' export control compliance environments. If so, then their compliance costs and risks of committing inadvertent violations will also increase. This is surely not in keeping with the original objective of the ECR Initiative to "build higher walls around fewer things" and thus reduce the regulatory requirements on U.S. businesses and their foreign customers.

Case Examples

Esterline provides the following case examples to illustrate why it believes the proposed definition requires changes.

Case Example 1 – Electrical Connectors

A basic model D-subminiature electrical connector is a simple, multi-use item broadly used in military and civil applications. For purposes of this analysis, consider the following two intermating connectors. Connector A features fixed terminals for soldering into a printed wiring board and a fixed metal flange with mounting holes. Connector B features insert terminals for crimping to wires and an assembled metal shell with mounting holes. Both perform the same basic function. Under the current proposed definitions in RIN 0694–AF17 published at 76 Fed. Reg. 41958 (July 15, 2011), Connector A is a "part" and Connector B is a "minor component". As standard off-the-shelf catalog items, both would currently be classified as EAR99 under the EAR.

A customer desires a modification or redesign to each connector, in which quick-connect fasteners are installed in the mounting holes. This modification is not described in the manufacturer's standard catalog. Under the proposed State and Commerce "specially designed" definitions and other ECR Initiative proposals, the applicable export control classification would depend on the customer's application, assuming it is under "development":

Application	Current Rules		Proposed Rules	
	Connector A	Connector B	Connector A	Connector B
Civil railway train door circuit	EAR99	EAR99	EAR99	EAR99
Military tank hatch circuit	USML VII(g)	USML VII(g)	EAR99	0A606.y.6
Civil aircraft avionics (7A994)	EAR99	EAR99	7A994 or EAR99	7A994 or EAR99
Civil airborne radar control panel (6A998.a)	EAR99	EAR99	EAR99	6A998.a
Fighter aircraft avionics	USML XI(c)	USML XI(c)	USML XI(c) or VIII(h)	USML XI(c) or VIII(h)
Civil aircraft bleed air circuit	EAR99	EAR99	9A991.d or EAR99	9A991.d or EAR99
F-16 fighter aircraft bleed air circuit	VIII(h)	VIII(h)	9A991.d or EAR99	9A610.x

F-22 fighter aircraft bleed air circuit	VIII(h)	VIII(h)	9A991.d or EAR99	VIII(h)

Note that questions over the application of "catch and release" to parts and components under ECCNs 7A994 and 9A991.d lead to some uncertainty in classification under the proposed rules. Also, since the proposed rule for USML Category XI has not been published, there is uncertainty about its implications with respect to USML Category VIII(h)(16) proposed in RIN 1400-AC96 (see 77 FR 68694, Nov. 7, 2011) and to the possibility of transfer to the CCL. Also, RIN 1400-AC96 would differently control "specially designed" minor components depending on whether they were used on a specifically listed aircraft under USML Category VIII(h)(1).

Using the proposed changes that Esterline recommends below, both connectors would fall under ECCN EAR99 across all applications.

Case Example 2 – Oscilloscope Probes

Oscilloscopes are "enumerated" under ECCNs 3A002, 3A292, and 3A992. ECCN 3A002 controls accessories without reference to "specially designed." ECCN 3A292 controls "specially designed" components. For analog oscilloscopes only, a Note to ECCN 3A292 identifies five specific "specially designed" "component" types controlled by the ECCN: plug-units, external amplifiers, pre-amplifiers, sampling devices, and cathode ray tubes. ECCN 3A992 does not control "parts" or "components".

Oscilloscope probes are accessories that enhance the function of oscilloscopes. Oscilloscope probes currently fall under ECCN EAR99, These are relatively minor items that do not "make a significant contribution to the military potential" of another country or threaten "the national security of the United States." Oscilloscope probes are normally "usable for" multiple equipment models from more than one manufacturer under ECCNs 3A002, 3A292, 3A992. They are, however, normally cosmetically styled, marketed, warranted, and calibrated for use with a particular manufacturer's oscilloscopes.

Under the proposed rule, a manufacturer of high-end oscilloscopes under ECCNs 3A002 and 3A292 will find the ECCN for its common oscilloscope probes may be increased from EAR99 to 3A002 or 3A292, even though they are usable in oscilloscopes under ECCN 3A992. The oscilloscope probes will be "caught" by paragraph (a)(3) because they enhance the usefulness of oscilloscopes. They will not be "released" by (b)(2) because they are not "parts". They will not be "released" by (b)(3) because they are not identical in form to other oscilloscope probes. They will not be "released" by (b)(4) because they are only used with commodities "enumerated" on the CCL. Finally, they will not be "released" by (b)(5) because there is an expectation of use with oscilloscopes.

Esterline believes this implication for oscilloscope probes is more restrictive than BIS' objectives for its proposed definition, and more restrictive than intended by *Lachman*.

Case Example 3 – Windshield Wipers

Under RIN 0694-AF36 (76 FR 68675, Nov. 7, 2011), windshield washer and wiper systems specially designed for military aircraft would be controlled for anti-terrorism under proposed ECCN 9A610.y.22. The same systems for civil aircraft are currently

controlled for anti-terrorism under current ECCN 9A991.d. This leads to a conclusion that windshield washer and wiper systems do not warrant significant export controls. The same items, however, if designed for military land vehicles or naval surface vessels, would be controlled for national security and regional stability under proposed ECCNs 0A606.x and 8A609.x, respectively, because such items are not called out under the related ".y" lists in RIN 0694-AF17 (76 FR 41957, July 15, 2011) or RIN 0694-AF42 (76 FR 80282, Dec. 23, 2011). As with Case Example 1, the control list categories depend on the customer's application:

Application	Current Rules	Proposed Rules
Civil aircraft	ECCN 9A991.d	ECCN 9A991.d
Military cargo aircraft	USML VIII(h)	ECCN 9A610.y.22
U.S. military technology demonstrator aircraft	USML VIII(h)	USML VIII(h)
School bus	EAR99	EAR99
Armored vehicle	USML VII(g)	ECCN 0A606.x
Merchant vessel	ECCN 8A992.f	ECCN 8A992.f
Naval vessel	USML VI(f)	ECCN 8A609.x

Case Example 4 – Intermediate Assembly

Aircraft fuselages are major components that are not "enumerated" in RIN 1400-AC96, RIN 0694-AF36, or the current CCL. They would be controlled under ECCN 9A991.d, ECCN 9A610.x, or USML Category VIII(h), depending on the aircraft. Aircraft fuselages are sometimes delivered as products by Tier 1 suppliers to aircraft manufacturers. Aircraft fuselages typically enter production before aircraft production.

Because aircraft fuselages are not "enumerated", components of aircraft fuselage would be "released" either by (b)(3) or (b)(4) unless the components had reached such a stage of manufacturing that they met the criteria of Note 1 to ECCN 9A610.x.

Changes Recommended to Definition of "Specially Designed"

In light of its foregoing comments, Esterline offers the following suggested changes to the definition of "specially designed":

1. **Clarify policy objective for modification in paragraph (a)**

   Paragraph (a) restricts the definition of "specially designed" with the term "as a result of 'development'." The term "development" is consistently defined in 15 CFR 772 and the MTCR; however, the MTCR distinguishes "specially designed" from "designed or

modified" in that "specially designed" may only result from "development" whereas "designed or modified" may result from "development" or modification. In 15 CFR 772, the term "designed or modified" is restricted to the MTCR context.

Modification of parts and components already in production frequently, though not exclusively, takes place during the development of end items. Paragraph (a) is not specific as to which article is under "development" – the part, the component, or the end item. The implication of paragraph (a) is therefore not clear for the manufacturer of parts or components.

Modification at any phase of a product life cycle may also result in substantial performance enhancements or additional characteristics, such that a modified item should be subject to the controls intended under *Lachman.*

This implies that the proposed definition for "specially designed" would include modifications within its scope. Esterline's comments are based on this assumption; however, Esterline suggests that BIS clearly state its policy objectives for modification within the proposed definition.

Esterline observes that small entities should not be obligated to determine the particular project life cycle phase of an end item to determine the export control licensing requirement applicable to a "part" or "minor component," as this information is frequently not available to small entities.

Esterline also suggests BIS consider the effect of limiting the definition of "specially designed" to the phase before serial production. In *Lachman*, the defendants attempted to circumvent the EAR through a product with dual capabilities (two heating zones vs. five). Had the proposed definition of "specially designed" been in effect, the defendants in *Lachman* might have simply developed an article with a lower capability and then implemented a design change post-production to increase its capability. The definition should allow for "catching" post-production design changes that result in a substantially altered article.

2. Clarify the "catch" paragraphs (a)(2) and (a)(3).

Esterline recommends changing paragraph (a)(2) to read: *is a "part," "component," "accessory," or "attachment" used in or with commodities enumerated on the CCL or the USML* and deleting paragraph (a)(3).

Esterline believes that paragraphs (a)(2) and (a)(3) have this practical effect as written, due to uncertainty over the scope of the term "necessary ... to function as designed." It is unclear whether paragraph (a)(3) refers to end item system-level requirements or to all derived requirements at all hierarchical levels of design.

It is also unclear whether a "part" or "component" would be "caught" for enhancing usefulness or effectiveness, because end items are often required to operate at several different levels of mission capability or effectiveness depending on probability

of component failure; thus, enhanced capability or effectiveness is often also a required function. The distinction in purpose between parts and accessories is in any case meaningless and unhelpful.

Further, small and medium-sized manufacturers of parts and minor components frequently do not know the end-item purpose or function for an item. They are already burdened with the obligation of determining the end item. They should not also be burdened with determining the purpose for which the part is installed. As noted in BIS' objective (ii), exporters should not have to divine the intentions of the original designer. This is especially true when the designer is a former employee of different company.

Finally, paragraph (a)(3) as written duplicates language that is already included in the definitions proposed for "accessory" and "attachment." This redundant language is potentially circular and should be eliminated,

While the proposed language might "catch" slightly more items, it would be easier to understand, and Esterline recommends a stronger focus on what is "released."

This change would be supportive of the nine objectives, most particularly (ii), to be easily understood and applied.

3. **Clarify and broaden the "release" paragraph (b)(2).**

Esterline strongly recommends changing paragraph (b)(2) to read: *is a "part" or "minor component" of a type commonly used in multiple types of commodities (for examples, see Supplement X to Part 772).*

Paragraph (b)(2) is unduly restrictive and fails to "release" many simple multi-use items that should not be construed as subject to Wassenaar controls.

Esterline respectfully requests that BIS reconsider its rationale regarding "minor components" stated at 77 FR 36413-36414. Esterline believes paragraph (b)(2) should include "minor components," provided that they are commonly used in multiple types of commodities, because manufacturers and exporters need a common policy approach to simple, multi-use items. Such items may be either "parts" or "minor components" as defined in RIN 0694–AF17, depending on whether they contain separable elements. Simple multi-use items are usually treated identically by supply chain and logistics functions because they are all considered low-level commodities. Different policy treatment for simple multi-use items would create undue complexity and increase the expenses borne by small entities in classification analysis, and by the Department of Defense in managing its logistics system.

By qualifying "minor component" with "of a type commonly used in multiple types of commodities", and by providing a more expansive illustrative list, BIS would prevent

the inadvertent decontrol of commodities that are more complex than simple multi-use items.

Paragraph (b)(2) should not include "single unassembled." This term occurs both in paragraph (b)(2) and in the definition for "part" found in RIN 0694-AF17, whereas "not normally subject to disassembly without the destruction or impairment of design use" is only found in the proposed definition of "part." This results in a potentially circular definition that would be confusing to part and component manufacturers. .

The illustrative list should also be revised. It includes both single-element "parts" (washers and springs) and multi-element "parts" (nut plates), but is so brief that its application to other part types is unclear. This could lead to widely different subjective interpretations as to what (b)(2) was intended to "release." That is, does (b)(2) only release basic hardware and fasteners, or does it release all "parts"? Esterline recommends including an expansive reference list within the EAR of simple multi-use commodity types that are "released" under (b)(2). This might include fixed resistors, capacitors, transformers, relays and contactors, switches, knobs, electrical connectors and sockets, etc.

This change would be supportive of the nine objectives, most particularly (i), to preclude multiple or overlapping controls of similar items within and across the two lists, (ii), to be easily understood and applied, (v) to exclude from control simple or multi-use parts that do not warrant significant export controls.

This change is particularly important to small entities because it would eliminate an unnecessary analysis burden that they would bear if the rule were adopted as written. It would also implement BIS' stated intention to "release" simple, multi-use items.

4. **Clarify and broaden "release" in paragraph (b)(3).**

Esterline recommends amending the Note to paragraph (b)(3) along the following lines: *Items with the following types of modification are considered to have the same form, fit, and performance capabilities: cosmetic modifications, part marking modifications, and software modifications for reporting the equipment configuration identifier. Items with the following types of modification are considered to have the same form and fit: minor dimensional modifications such that the sum of all changes expressed as ratios to their original dimensions does not exceed .05, and installation of minor external hardware such as O-rings and threaded fasteners totaling less than 5% of the item's parts count. Internal modifications are only considered if they affect form, fit, and performance capabilities.*

Exporters normally receive guidance from regulators that cosmetic and part marking variation does not affect classification on the USML or CCL. This should be explicitly stated for clarity. Because "part marking" is today often a digital output of software, the policy should extend to digitally reported configuration.

Exporters have historically experienced different policy treatment for USML and CCL items in the area of "form, fit, and function" with DDTC's taking a strict view and BIS' being more nuanced. If the historical DDTC view were to prevail in the definition of "specially designed," the result would be increased CCL controls over dual use items that have been historically treated as EAR99, which is contrary to BIS' objective (viii), not to increase the current control level to "600 series" or other higher end controls of items.

Esterline believes a single definition of "specially designed" cannot simultaneously maintain two historically different policies as USML items are moved to the CCL. Hence, some balance between the policies is necessary that will continue to "release" slightly modified dual use items rather than increase their control level.

The minor modifications described above are not sufficiently important to be considered as "specially designed." Classification of items with minor modifications of this type has been difficult for exporters to apply correctly for many years. Such minor modifications are routine in many small businesses. A substantial, continual effort is required to train designers that such modifications are relevant to export compliance. Training objectives are difficult to achieve because a particularly strict "form, fit, performance" standard result in multiple or overlapping controls for similar items, which appears illogical.

The precise objective criteria described above are a suggestion to illustrate how objective criteria might be formulated. They may be overly restrictive and may still have the effect of increasing control levels of items already subject to the EAR. Esterline suggests that BIS carefully consider an appropriate balance between historical BIS and DDTC policy.

This change would "release" unimportant modifications within specific objective criteria, consistent with BIS objective (i) to preclude multiple or overlapping controls of similar items within and across the two lists, and (ii), to be easily understood and applied. It is intended to support to the extent possible objective (viii), not to increase the current control level to "600 series" or other higher end controls of items.

This change would be consistent with *Lachman* in that the definition would still support the national security purpose of the Export Administration Act. That is, the rule would still control as "specially designed" commodities that can "make a significant contribution to the military potential" of another country and threaten "the national security of the United States," but would not control items having the same performance and essentially the same form and fit as an item that is not "specially designed."

5. Prevent unintended effects of paragraph (b)(3)

Esterline recommends changing paragraph (b)(3) to read: *has the same form, fit, and performance capabilities as a "part," "component," "accessory," or" attachment"*

ultimately used in or with one (or more) commodity that (i) is or was in "production" (i.e., not in "development"); and (ii) is either not enumerated on the CCL or USML, or is enumerated in an ECCN controlled only for Anti-Terrorism (AT) reasons, or are enumerated in more than one ECCN; provided that no characteristic of the "part," "component," "accessory," or" attachment" is directly related to a characteristic described in any USML category or any ECCN controlled for more than AT reasons..

Ultimate use, end use, or final assembly should be considered in deciding whether an item is "specially designed". Paragraph (b)(3) as written could release items that do not meet the criterion of broad commercial applicability described at 77 FR 36414, because end items typically contain many levels of custom intermediate assemblies separately produced by different manufacturers. These intermediate assemblies are typically not "enumerated" as described in Note 1 to the definition, but are instead controlled by "catch-all" paragraphs as described in Note 2. As written, paragraph (b)(3) would "release" a part whenever an identical part is installed in a controlled intermediate assembly. This could result in a situation where designers add an intermediate stage of assembly for the purpose of decontrolling a lower-level item, as shown in Case Example 4.

Also, as written, paragraph (b)(3) would "release" a control panel suitable for use with production electrostatic presses now controlled under both ECCNs 2B204.a and 2B999, because ECCN 2B999 is only controlled for Anti-Terrorism. Thus, it would "release" the item central to *Lachman*.

Adding the word "ultimately" and adding an additional criterion (b)(3)(iii) would prevent the unintended "release" of items with a single category ultimate end use (*e.g.*, military aircraft) simply because the items are installed on custom intermediate assemblies that have entered production, without inadvertently controlling items used in intermediate assemblies that have broad commercial application.

An item designed for use multiple, unrelated ECCNs should not be considered "specially designed" because the designer clearly intended broad commercial application. As written, paragraph (b)(3) increases the control of existing dual use items that are used in or with multiple ECCNs, simply because all of them are controlled for reasons other than "Anti-Terrorism." The oscilloscope probes in Case Example 2 remain "caught".

In *Lachman* the "specially designed" control panel incorporated a capability (five heating zone controllers) specifically needed to achieve the performance of hot isostatic presses (HIPs) controlled under former ECCN 1312A but not needed to achieve the performance of uncontrolled isostatic presses. This capability was directly related to a characteristic described in ECCN 1312A (the diameter of the HIP) and resulting in the control of the HIP.

By adding "provided that no characteristic of the 'part,' 'component,' 'accessory,' or 'attachment' is directly related to a characteristic described in any USML category or any ECCN controlled for more than AT reasons," the oscilloscope probes in Case Example 2 would be "released" but the control panel in *Lachman* would remain "caught."

6. **Prevent unintended effects of paragraph (b)(4)**

   For reasons similar to those above, Esterline suggests changing "use" to "ultimate use" in paragraphs (b)(4)(i) and (b)(4)(ii).

7. **Address items covered by existing CJ Ruling and CCATS**

   Esterline strongly recommends adding a release paragraph (b)(6) to provide: *Has already been found by a U.S. Department of State Commodity Jurisdiction determination to be subject to EAR, and has already been assigned an ECCN by the U,S, Department of Commerce through a formal Commodity Classification, whether communicated directly by the U.S. Department of Commerce or coordinated with the U.S. Department of State in its Commodity Jurisdiction determination.*

   As written, the proposed definition would increase control of certain items already subject to the EAR for which a Commodity Jurisdiction ruling has been obtained and an ECCN formally determined, either within the CJ ruling or in a separate BIS CCATS. This would also increase control of similar or derivative items for which formal CJ and CCATS determinations have been used as the basis for self-determination.

   The U.S. Government has already formally ruled on the appropriate level of export control for these items. Normally the items are subject to a lower level of export control than the "600 series" items.

   According to BIS' objective (viii), these items should not be subject to an increase in control to "600 series". This should be explicitly stated in the rule.

8. **Clarify policy intent for software and materials**

   As written, the definition may only "catch" software and materials, but these cannot be "released." BIS' policy objective for software and materials is not clear.

Other Recommended Changes

9. **Consolidate the "600 series" ECCN ".y" lists.**

   Many of the ".y" listed items are simple parts and minor components that should instead be "released" by (b)(2) or (b)(3). Of those that remain, most of the ".y" listed items do not warrant different treatment depending on the end item.

Esterline recommends that ".y" listed items (*i.e.*, "specially designed" items subject to multilateral regimes that only warrant control for Anti-Terrorism) be consolidated and harmonized for consistent policy treatment regardless of end item.

10. Address "catch-all" ECCNs that do not refer to "specially designed"

Certain existing ECCNs, including ECCNs not subject to multilateral controls such as 7A994 and 9A991.d, control "parts and components n.e.s." (or through similar language) in which some custom aspect is implied but "specially designed" is not specifically stated.

Esterline requests that BIS clarify its policy for ECCNs that contain "catch-all" language but not the term "specially designed," particularly with respect to ECCNs not subject to multilateral agreements. Absent a clarification, regulators or exporters may construe that the "catch and release" policy for "specially designed" applies to these catch-all ECCNs also. Alternately, ECCNs that do not site "specially designed" might be construed to permit no "release." This could lead to an increase in control for some items currently treated as ECCN EAR99.

11. Consider effects of USML "catch-all" controls based on specific end items

RIN 1400-AC96 proposes to control under USML Category VIII(h)(1) components, parts, accessories, attachments, and equipment "specially designed" for the following U.S.-origin aircraft: B-1B, B-2, F-15SE, F/A18E/F/G, F-22, F-35 (and variants thereof), F-117, or United States Government technology demonstrators. Taken with the definitions for "specially designed" proposed in RIN 0694-AF66 and RIN 1400-AD22, many simple multi-use items would remain subject to USML controls.

Absent a broader "release" in the definition of "specially designed," this would dramatically increase the complexity and regulatory burden for small entities.

12. Define "avionics" and resolve uncertainty over its classification

The EAR controls certain avionics but contains no definition for avionics. Existing CCL controls fall primarily under CCL Category 7, but also ECCN 6A998.a, and in some cases ECCN 9A991.d may be applicable. Proposed rules in RIN 0694-AF36, RIN 1400-AC96, and RIN 0694-AF66 will increase uncertainty over the correct classification for avionics, with certain avionics items moving from USML Category XI to USML Category VIII, and other avionics items being defined in ECCN 9A610. Esterline requests that BIS and DDTC clarify their policy for export control classification of avionics.

13. Make concurrent changes

Further, to prevent unintended consequences, Esterline recommends that adoption of the proposed definition be made concurrent with the transition rule, with a

corresponding change to 22 CFR 120.3, and with all rule changes transferring items from the USML to the CCL "600 series" ECCNs.

Esterline believes 22 CFR 120.3 as presently written would trump the definition of "specially designed" and all enumerations under the "600 series" ECCNs.

Many parts and components currently controlled under the USML could be placed under multiple USML categories. Unless all USML categories are concurrently addressed by the ECR initiative, the "specially designed" definition would lead to ambiguity in jurisdiction and classification.

14. Extended final comment period

Esterline recommends that a final extended comment period be permitted after all critical elements of ECR are finally published in the Federal Register so that the final definition of "specially designed" can be evaluated in the context of all proposed transfers from the USML to the CCL.

Summary

Esterline is greatly encouraged by the progress made on the ECR Initiative to date. BIS, DDTC, and the DoD should be commended for their efforts. A good definition of "specially designed" meeting all the stated objectives, conforming to multilateral agreements, conforming to *Lachman*, and appropriately balancing historical BIS and DDTC policies is particularly difficult to obtain. The proposed definition provides a promising structure that can be modified to better achieve these objectives. Esterline hopes that BIS, DDTC, and the DoD will continue to engage with industry toward this end.

Regards,

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