September 13, 2011

***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: Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML); Proposed Rule**

**Federal Register / Vol. 76, No. 136 / Friday, July 15, 2011 / Proposed Rules**

**RIN 0694-AF17**

Dear Sir or Madam:

TechAmerica would like to thank the Department of Commerce for the opportunity to comment on this proposed rule which is an integral part of the President's Export Control Reform initiative. Please accept our comments in the headings below as outlined in the Federal Register Notice.

**(1) 600 Series**

The proposed 600-series structure applies different levels of control within the same ECCN, depending on the paragraph. For example, in proposed ECCN 0A606, end-items, parts and components designated as 0A606.a through 0A606.x are subject to RS1, NS1, and AT1 controls. Parts and components identified in proposed 0A606.y are subject to AT1 controls only.

Different levels of control within an ECCN can cause confusion and administrative burdens. It is difficult to explain to a customer or supplier that a different level of control applies to parts and components classified under the same ECCN. It is much simpler to differentiate levels of controls with a different ECCN. Further, a lack of detailed understanding of the proposed paragraph-level differences could lead to over-

controlling or under-controlling of items classified under the same ECCN. While differentiation based on paragraph or sub-paragraph may be necessary when dealing with certain ECCNs where multilateral controls are involved, there is no reason to enhance the complexity of the unilaterally created 600 series in the same way.

To address these issues, BIS could simply establish a separate ECCN to apply to decontrolled parts and components of USML/600 series ECCNs that are subject to AT-only controls. For example, instead of placing AT-only parts and components of USML Category VII/ECCN 0A606 end-items into 0A606.y, ECCN 0A696 could be used.

Other AT-only categories on the CCL end in "9x", so using a similar numbering sequence for AT-only items in the 600 series would be more intuitive and easier to administer. The potential for exporters to miss the fact that some parts and components are classified under 0A606.x and some under 0A696 could be addressed through Related Controls notes or appropriate cross-references within the ECCN to alert exporters they need to look at both ECCNs.

**Proposed de minimis level**

The proposed de minimis level of 10% for the “600 series” parts and components incorporated into foreign end items increases the complexity and opportunity for error in the calculations by the foreign manufacturer. Furthermore, we do not understand the logic of limiting it to 10% for all destinations. We believe that the 25% limit for closer allies would be entirely appropriate and defensible.

Additionally, it is unclear how the proposed 10% level would apply to end items incorporating both 600 series components and other Commerce controlled parts. We understand the rule to mean that the 10% de minimis threshold for U.S. content only applies to the 600 series items, and that any 600 series content would count against the 25% de minimis limit for all other Commerce controlled items embedded within the end item. We would welcome a clarification in the regulation regarding this matter.

**(2) Creation of ECCN 0Y521 as an Equivalent to USML Category XXI**

TechAmerica has no comments for this section.

**(3) Changes to EAR Definitions to Address the Movement of Items from the USML to the CCL, Including Adopting a Single Definition of “Specially Designed”**

**Components and “Specially Designed”**

As conveyed in our comments on the December 2010 proposed rulemakings related to CCL and USML criteria, TechAmerica believes that the export control treatment of parts and components should undergo major reform as the Administration pursues it export control reform initiative. Parts and components, including

semiconductors, should not be subject to a separate control category within the USML, CCL or proposed CML, but rather should be controlled in association with the end products, systems or equipment in which they are to be incorporated. In this context, parts and components should only be covered by a control list to the extent they are application specific or custom-designed,[1] peculiarly responsible for the specific features of a controlled end item that produce a military or intelligence advantage, and not general commercially applied. This principle is highly germane to the structure and scope of the definition of "specially designed" in the proposed rulemaking on transfer of USML items to the CCL.

The rulemaking's proposed definition of "specially designed," while laudably intended to prevent overreaching application of that term, is unfortunately ambiguous and may result in increased controls on commercial parts and components. The baseline definition under paragraph (a) contains reasonable definitional criteria that apply to many items, but excludes parts and components. Instead, parts and components are covered under paragraph (b) of the definition in a manner that avoids the delimitation under (a), including whether an item "has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions of the referenced item identified in the CCL." This creates an affirmative presumption that all parts and components of enumerated items are captured by the "specially designed" definition under (a) and (b) unless they satisfy certain exemptions that follow under (c) and (d).

The exemptions, however, are very limited. Paragraph (c) indicates that an item, including a part or component, would not have "specially designed" as a control criterion if it is separately enumerated in a USML subcategory or ECCN. Yet, the definition of "enumerated" does not include EAR99 or AT control-only items, ensuring that many parts and components (e.g., integrated circuits under EAR99 or microprocessor microcircuits under 3A991) would not be eligible for the exemption.

Paragraphs (d) (1) - (4) contain other exemptions that are not only narrow, but unclear and susceptible to differing interpretations. For example, widely commercially available integrated circuits historically classifiable as EAR99 or 3A991 that meet the baseline definition of "specially designed" could fail to qualify under these exemptions as follows:

***(d)(1)*** - No affirmative indication that the IC's would be treated as parts.[2]

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[1] In the area of integrated circuits, only those devices considered by the industry as either application specific ICs (JEDEC definition of an "ASIC") or "custom" ICs (an integrated circuit developed or produced to conform to a single customer's unique requirements) and are peculiarly responsible for enabling military/intelligence applications should be subject to a control list.

[2] TechAmerica nonetheless believes that minor components should be treated as functionally the same as parts. IC's, for example, are for all intents and purposes indivisible and therefore not subject to disassembly. The fact that IC's are subject to assembly in the production process should not make a difference. Item (d)(1) is therefore deficient in restricting the exemption to parts and excluding minor components..

***(d)(2)*** – 3A991 items would not be excluded from control on the USML or CCL. While an EAR99 item is technically excluded from the lists, it is unclear that an integrated circuit (IC) meeting the proposed "specially designed" definition would qualify for EAR99 in the first instance.

***(d)(3)*** – Many IC's deployed in computers, telecommunications and other enumerated end items would not be subject to this exclusion. This would occur because IC's are frequently deployed in activities that precede the serial production[3] of an end item (e.g., prototyping, product development activities, customer-related testing and debugging activities prior to market entry of an end item). In addition, even a very minor change, modification or enhancement to the form or functionality of an IC would preclude qualification under (d) (3), even if a "new" device will be used in an EAR99 end item. This could result in an EAR99 or 3A991 device (in terms of its function and features) that may be used in EAR99 end equipment and/or a 4X001 or 5X001 end equipment being subject to higher level controls than what would apply under the existing regulatory construct.

***(d)(4)*** – Many IC's are likely not to have one-for-one replacements in terms of form, fit or function. For instance, IC's fabricated and distributed before production of an end item may well represent the latest generation of devices with no counterparts elsewhere.

The overall result is that components may in many cases become subject to the "specially designed" definition and, hence, greater levels of control. The impact would exact particularly severe consequences to the extent an item commonly falling under EAR 99 or an AT-only control becomes a "specially designed" part or component of a 600-series end item, where presumably Tier 1 controls would apply. This would mark a fundamental shift in export control policy and regulation affecting civilian components.

In addition, the exemptions inject complexity and convoluted language into the definition of "specially designed," that make it hard to understand and apply. Terms like "form, fit and function," "altered for use in another end item," or "one-for-one replacement" also raise interpretative issues. Such complexity and ambiguity may well prompt exporters to press BIS for classification-related decisions and other advice, adding delays and burdens to the export control process.

**Proposed Definition for "Specially Designed"**

TechAmerica urges BIS to very substantially revise the proposed definition of "specially designed" to remove potential for increased controls on components and also to remove unnecessary complexities and ambiguities. Our view is that the text of the

[3] TechAmerica is unclear on the policy rationale for imposing a temporal constraint in the form of limiting (d)(3) items actually in serial production, as opposed to using much more flexible language like "parts or components designed or developed for incorporation into items in serial production."

definition should be short, easy to understand, and as self-executing as possible. To this end, BIS should delete all of the text after paragraphs (a) and (b), while revising paragraph (b) and adding a related note. In particular, the definition would read as follows:

**(a) A ``specially designed'' item, other than a ``part'' or ``component,'' is an item that is enumerated on the CCL and, as a result of ``development,'' has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions of the referenced item identified in the CCL.**

**(b) A ``specially designed'' ``part'' or ``component'' is an item that is specific to an end item enumerated on the CCL and, as a result of "development," has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions of the specified end item identified in the CCL.**

***Note to Definition under (b): In the area of integrated circuits, the term "specific to an end item" applies only* to *an application-specific or custom integrated circuit that is peculiarly responsible for enabling the controlled features of an enumerated end item. The term does not apply to general purpose or general commercially applied integrated circuits. In addition, the term only covers application-specific and custom integrated circuits developed or produced to conform to a single customer's unique requirements.***

This simplified, consolidated approach would prevent situations in which largely decontrolled or lesser controlled components become subject to more severe controls under ECCN's covering specially designed components for enumerated items. It would also vastly simplify the construction of the definition, removing complexities and associated burdens for both exporters and the government. In sum, this model would move considerably in the direction of TechAmerica's recommendations for the export control treatment of components and parts.

**Definition of "End Item"**

There is a potential ambiguity in the phrase 'ready for its stand-alone use' in the sense that an item can be ready for its stand-alone use, while still being intended for incorporation into a foreign end item. A safety beacon for an aircraft dinghy might be an example. We suggest the addition of a note on the lines: 'an item otherwise satisfying the definition of an "end item", if intended for incorporation into a foreign end item, is to be treated as a "component".

**(4) Other Changes to Assist in the Structural Alignment of the USML and the CCL**

**Treatment of Software**

The proposed rule provides virtually no guidance as to the specific treatment of software. Under the proposed definition, software, such as analytic software could be an end product, or it could be a component, part or accessory/attachment to other products. Compliance officers, either within companies that sell the software, purchase the software for incorporation into other products, or compliance officers within the government, are given no direction as to how to assess the status and treatment of these products. As an example, the proposed Section 772.1 definition of component reads "Component. This is an item that is useful only when used in conjunction with an 'end item.' Components are also commonly referred to as assemblies. … There are two types of 'components': 'Major components' and 'minor components.' A 'major component' includes any assembled element without which the end item is inoperable. For example, for an automobile, components will include the engine, transmission, and battery. If you do not have all those items, the automobile will not function…."

This is but one example in the proposed rule that specifically addresses the treatment of tangible items. And, given the above example's simplicity, provides no clarity or guidance as to how analytical software, either independently purchased, or integrated into larger systems should be addressed and classified. As such, the proposed rule is not any more clear or helpful than the current bifurcated system in which compliance officers are left guessing as to whether the company's software products are controlled by the EAR or ITAR. Similarly, because the guidance is limited, we are concerned that software that is considered to be an "end product" might receive different licensing treatment from software that is integrated as a component, even though the functionality and intended end uses are the same. As such, TechAmerica would strongly recommend that BIS consider including specific guidance and definitions—(preferably an illustrative list of examples for software) particularly in the definitions of "specially designed", "accessories and attachments", "components" and "end items" that directly relate to how intangible products like software should be assessed.

**600 Series Handbook**

As the incorporation of this new rule into the CCL is inevitably complex, and many defense companies will be forced to navigate the unfamiliar structure of the EAR for the first time, we think it would be helpful for exporters and importers of '600 series' items, if BIS were to create a special handbook covering those elements of the EAR applicable to the treatment of such items. We believe that should the DDTC decide to issue RWA's for USML items that have been moved over to the 600 series in the CCL,

applicants could be directed towards the aforementioned handbook in order to guide them in what could very well be their first experience with the Commerce Regulations.

**Existing DOS Authorizations**

Should this proposed rule be published as final and the appropriate notifications to Congress made for the items being transferred to the CCL from the USML, we request a period during which existing DOS authorizations would remain valid, preferably until the license expires, even though the item or technology would have been transferred to the Commerce Department, and no additional authorization from the Commerce Department be required. This would avoid potential disruptions to the foreign customer.

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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