Holland & Knight

2099 Pennsylvania Avenue, N.W., Suite 100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

Jonathan M. Epstein
(202) 828-1870
jonathan.epstein@hklaw.com

September 13, 2011

RIN: 0694-AF17

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

Re: Comments of KEMET Electronics Corporation on Bureau of Industry and Security Proposed Revision to the Export Administration Regulations, RIN 0695-AF17

Dear Sir/Madam:

On behalf of KEMET Electronics Corporation ("KEMET"), we submit these comments on the Bureau of Industry and Security ("BIS") proposed revisions to the Export Administration Regulations ("EAR") for items no longer warranting control on the United States Munitions List ("USML").[1]

KEMET, headquartered in Simpsonville, South Carolina, is one of the world's largest producers of capacitors. KEMET strongly supports the export reform initiative, which we believe will help U.S manufacturers like KEMET remain competitive in the international market.

KEMET supports the Proposed Rule's goal of establishing clear bright line rules that put strict controls only on those items that require such controls (because of their national security or other significance). This allows scarce Government resources to focus on controlling such sensitive items, and makes it easier for U.S. industry to comply with these requirements. To be effective, the Proposed Rule must be clear enough that it can be readily interpreted and applied on a day-to-day basis by a wide-range of industries, including sub-tier manufacturers of parts and

[1] Proposed Rule, 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), 76 *Fed. Reg.* 41958. (July 15, 2011) (hereinafter the "Proposed Rule").

components such as KEMET that produce parts for a wide range of end-items. Hence, for the reasons discussed herein, KEMET believes that the Proposed Rule could be improved by clarifications in several key areas, and therefore recommends that BIS:

- Remove the reference to "form, fit, and function" from the proposed definition of "specially designed" and instead focus on the functionality of the item.

- Modify the structure of 600 series parts and components ECCNs (as exemplified in proposed ECCN 0A606.x. and .y), so that the list of parts and components that remain subject to National Security ("NS") controls is an exclusive/positive list, rather a catch-all bucket.

- Clarify by way of example that basic building block passive electrical parts (such as capacitors, resistors, and inductors) fall within the definition of "parts" rather than "components."

- Include procedures for BIS to clarify the rules for industry sectors or item type on an ongoing basis.

## I. BACKGROUND

KEMET is one of the world's largest producers of capacitors, with origins dating back to 1919 when Union Carbide formed Kemet Laboratories. KEMET, a public company traded on the New York Stock Exchange, manufactures and sells over 30 billion capacitors each year. KEMET manufactures several hundred different types of capacitors, with thousands of specific part numbers and configurations. KEMET's customers include original equipment manufacturers (OEMs), electronics manufacturing services (EMS) providers, and electronics distributors throughout the world. Capacitors are used in virtually all electrical and electronic applications. For example, there are typically two hundred capacitors in a modern cell phone, six hundred capacitors in a modern laptop computer, and tens of thousands of capacitors in a modern commercial aircraft.

While the vast majority of the 30 billion capacitors KEMET produces each year are for civil/commercial applications, millions of capacitors are also used in military and aerospace applications. KEMET produces off-the-shelf capacitors that meet certain MILSPEC requirements for capacitors.[2] KEMET also accepts hundreds of semi-custom orders a year from customers requiring specific dimensional or other requirements not met by off-the-shelf configurations, or where the customer has specific test requirements. The customer typically transmits these specific requirements in a build-to-print requirements order. In such a case, KEMET engineers will modify specifications from a pre-existing off-the-shelf capacitor design to meet those specific customer requirements. This often involves merely changing the

[2] There are a number of MILSPECs applicable to capacitors. *See, e.g.*: http://www.interfacebus.com/Design_Capacitors_MIL.html.

dimensions or connectors. However, in some cases it does involve changes in the functionality of the capacitor to improve reliability or to meet specific performance criteria.

As a practical matter, capacitors used in military applications are almost without exception several generations older, in terms of technological advancement, and therefore typically of inferior performance to modern capacitors used in consumer electronic and automotive applications. Further, like other U.S. companies manufacturing building block passive electrical parts, KEMET competes in a price-sensitive international market against foreign competitors where there is foreign availability. Foreign capacitor manufacturing companies compete with KEMET in virtually every category of capacitor.

Under existing regulations, any capacitor modified to particular customer requirements triggers difficult classification issues for KEMET. This is because KEMET, like many sub-tier parts suppliers, is so far removed from the final end-item that determining what the end-item is, and/or the use of the capacitor in the end-item, complicates commodity jurisdiction and classification determinations. Furthermore, where capacitors are determined to be ITAR-controlled, this adds delay and costs to the capacitors.

From a regulatory perspective, building block passive electrical parts are an area where export reform could significantly reduce the licensing burden borne by both industry and the U.S. Government, with little or no impact on national security.

## II. SPECIFIC COMMENTS AND JUSTIFICATION

### A. CLARIFY OR REMOVE THE TERMS "FORM," "FIT," AND "FUNCTION" FROM THE DEFINITION OF "SPECIALLY DESIGNED"

#### 1. Proposed Changes

- In Section (d)(3)and (4) of the proposed definition of "specially designed" in Section 772.1 make the following change:

  *(3) A "part" or "component" used as a "part" or "component" of an end-item in "serial production" and not "enumerated" on the USML or CCL (i.e., the end item is an EAR99 item), and the part's or component's functionality ~~form, fit, and function have~~ has not been modified ~~altered~~ for use in another end item enumerated on the USML or CCL after "serial production" of the end item not enumerated on the USML or CCL has begun; A modification of the functionality means changes to one or more of the basic design characteristics (e.g., improvements to the accuracy, capability, performance, or productivity); or*

  *(4) A "part" or "component" that can be exchanged with an EAR99 or AT-only controlled "part" or "component" on a one-for-one replacement basis*

*without modification to the functionality ~~form, fit and function~~ of the EAR99 or AT only "part" or "component" and the EAR99 or AT-only part's or component's function is substantively identical to the "part" or "component" at issue.*

2. Justification

The export community has long struggled with the application of the "form, fit, and function" test in the commodity jurisdiction context. To provide an objective, bright-line definition, BIS should move away from the form, fit, and function analysis that has historically been viewed as highly subjective. Even under the current regulations, the trend in commodity jurisdiction determinations has been to focus less on form and fit, and more on the functional difference between commercial products and such products when modified for use in a specific defense article. This more pragmatic approach would substantially cut down on the number of unnecessary restrictions where an item is controlled solely because of a minor change in connectors, relocating bolt holes, *etc.*

We therefore propose to use the term "functionality." The concept of no upgrade in functionality is found in certain exceptions in both the EAR and ITAR. In fact, the language KEMET proposes comes from the proposed change to EAR § 740 in the Proposed Rule. With this proposed change, at least with respect to the parts and components, form and fit would not be considered.

B. RECOMMENDATION TO MOVE TO A POSITIVE LIST OF PARTS AND COMPONENTS REQUIRING A LICENSE UNDER 600 Series ECCNS

1. Proposed Change:

- Modify the proposed ECCN 0A606 x. and y. as follows:

*x. Specific "Parts" "Components," "accessories and attachments" that are "specially designed" for a commodity subject to control in this ECCN or a defense article in USML Cat. VII, that have military application with no civil equivalent, these items include:*
*x.1 weapon systems (including mounting, targeting, and stabilization systems)*
*x.2 sensor systems (other than collision avoidance or parking sensors systems)*
*x.3 communication systems (other than communication systems designed to work with civil communication systems).*
*x.4 [etc.].*

y. ~~*Specific*~~ *"Parts" "Components," "accessories and attachments" that are "specially designed" for a commodity subject to control in this ECCN or a defense article in USML Cat. VII but which have little or no military significance* ~~*(see list of items controlled)*~~ *and/or no civil equivalent, including but not limited to:* . . . .y.1 . . . .

2. Justification

As currently written, ECCN 0A606.x is essentially a "not elsewhere specified" default bucket for specially designed parts and components of items controlled under this ECCN. Because these items remain subject to NS controls, a license would generally be required for export to most countries. Hence, it is not clear that moving the licensing requirement for such parts and components from DDTC to BIS (presumably with interagency coordination with DDTC) will result in a substantial reduction in the licensing burden to both industry and Government agencies. Further, ECCN 0A606.x is anything but an exclusive/positive list of controlled parts and components. Rather, the positive list is found in ECCN 0A606.y. (enumerating specific vehicle systems that generally would not require a license because these items are only subject to AT controls). Hence, as proposed by BIS, capacitors specifically designed to delay the windshield wiper of certain vehicles will require a license, but not a capacitor used to regulate the lighting system of the same vehicle, because windshield wipers are not specifically enumerated in ECCN A606.y.

We propose that in ECCN 0A606 and other 600 series ECCNs, parts and components be subject only to AT controls, unless they are specifically identified as being parts or components for systems requiring control for NS reasons. It would appear that at least with respect to military vehicles, the types of military specific systems warranting controls are clearly distinguishable from those having a clear civil equivalent.

C. CLARIFICATION REGARDING WHAT IS A "PART" VERSUS COMPONENT WITH RESPECT TO BUILDING BLOCK PASSIVE ELECTRICAL PARTS

1. Proposed Change:

- Add at the end to the proposed definition of "Part" in Section 772.1.

  "*Parts also include basic building block electrical parts, including for example, capacitors, resistors, connectors, and thermistors, that are passive single-function parts (e.g., excluding active components such as integrated circuits that perform active, and in some cases, multiple functions).*"

- Add to the proposed definition of "specially designed" - Note to Exclusion Paragraph Number 1 after "and wire":
  "; *and basic building block electrical parts.*"

2. Justification

The Proposed Rule introduces a definition for "part," which for certain purposes is treated differently than "component." The examples given in the proposed definition of "part" are fairly clear for fasteners and general hardware. However, there is nothing that addresses when or whether basic building block passive electrical parts fall within the definition of "part." Further, while the examples given in the definition of "part" should be read as being exemplary rather than exclusive, in practice, since there are many examples of such a narrow category of items, it may be misinterpreted to imply that only such fasteners and basic hardware can be considered parts.

Capacitors, along with resistors, inductors, thermistors, *etc.*, are single function – in the sense that they can only function in one way (*e.g.*, a capacitor may store and release electrical energy at a single value), and passive, in that they do not amplify or switch signals. This is distinguishable from integrated circuits, semiconductors and other smart components that perform multiple functions and are active, in that they control (and can change or switch) the flow of electricity or have gain, and typically perform multiple functions. KEMET recognizes that transistors, diodes, vacuum tubes, etc. are also considered "active" items.

Single function, passive electrical parts are used in virtually every electrically powered device, and make up the basic building blocks of circuits used to make components. Certain of these items are specifically enumerated on the CCL. For example, with respect to capacitors, certain high voltage capacitors are controlled under ECCN 3A001.e.2., while certain pulse discharge capacitors are controlled under ECCN 3A201.a.[3] However, the vast majority of these building block passive electrical parts would be classified as EAR99, if classification was based solely on quantitative performance criteria (*e.g.*, voltage, capacitance, *etc.*). While most building block passive electrical parts contain more than a single element,[4] they are typically manufactured into a single item that cannot be disassembled. For example, a typical capacitor is monolithic in construction in that the connectors are either fused or glued to the dielectric layer(s) and any attempt to take a capacitor apart would destroy the capacitor.

D. CONSIDER ALTERNATIVE WAYS TO CLARIFY CLASSIFICATION CRITERIA FOR CERTAIN PARTS AND COMPONENTS THAT CUT ACROSS NUMEROUS ECCNS

As set forth the in the preamble of the Proposed Rule, the definition of "specially designed" "must be single, clear, and objective." Unfortunately, the definition of specially designed, with the various notes, comes close to 1000 words, making it a challenge even for the export professional. For parts and component suppliers, such as KEMET, that make the same

[3] ECCN 3A999.c. controls high voltage capacitors used in flash X-ray machines, but these would not be considered "specifically enumerated" under the Proposed Rule.
[4] Fasteners and common hardware also may have more than one element, and may have specialized coatings.

type of parts for a wide spectrum of end-items, classification under the Proposed Rule will be challenging.

1. In addition to providing a short exemplary list of what constitutes a part in the definition of "part," KEMET suggests BIS build some regulatory flexibility into the EAR by referring to a secondary list, to be updated from time to time by BIS. This list would contain both examples of items that BIS determines fall within the definition of "part"; and parts that BIS determine should be eligible for the carve out of the "Note to Exclusion Paragraph 1 in the definition of Specially Designed."

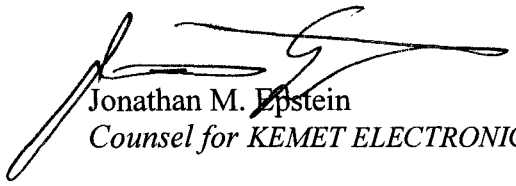
   These types of lists, which can easily be amended, can be very useful. For example, BIS publishes an illustrative list of EAR99 medical devices eligible for licensing to certain embargoed countries.[5] Another helpful list is BIS's specific identification of categories of items decontrolled from Cat. 5 Part 2 (encryption).[6] We believe the mechanism for creating and amending such lists should be codified in the rule, so that there is a clear mandate/authority for such lists and interagency agreement that such lists should be created.

2. Another approach would be to develop industry specific interpretive guidance to be published in EAR § 770.2 that provides more specific guidelines on how to apply the definition of "specially designed" to similar type parts and components (*e.g.*, passive electrical parts).

Thank you for your consideration of these comments. If you have any questions please contact the undersigned at (202) 828-1870 or jonathan.epstein@hklaw.com.

Sincerely,

HOLLAND & KNIGHTLLP



Jonathan M. Epstein
*Counsel for KEMET ELECTRONICS CORPORATION*

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[5] *See* http://www.bis.doc.gov/policiesandregulations/tradesanctionsreformexportenhancementact.html.
[6] *See* http://www.bis.doc.gov/encryption/enc_faqs.htm .