**SEMI Americas**
1401 K Street, N.W., Suite 601
Washington DC 20005

Tel: 1.202.289.0440
Fax: 1.202.289.0441
semidc@semi.org
**www.semi.org**

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

RE: Proposed Revisions to Export Administration Regulations: Control of Items the President Determines No Longer Warrant Control under United States Munitions List (Federal Register Notice of July 15, 2011; RIN 0694-AF17)

Dear Mr. Mooney:

Semiconductor Equipment and Materials International (SEMI) is pleased to submit to the Commerce Department's Bureau of Industry and Security (BIS) the following comments on proposed revisions to the Export Administration Regulations (EAR) to incorporate items deemed no longer necessary of control on the U.S. Munitions List (Proposed Revisions).[1] As detailed below, SEMI urges that BIS improve the Proposed Revisions' approach to defining "specially designed," a term of critical importance in the EAR.

## Semiconductor Equipment Industry

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

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

The U.S. SME industry serves a global customer base, and SEMI members must export on a commercially reasonable basis to survive. The average U.S. maker of SME receives over

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

80 percent of its revenues from overseas sales. These firms cannot be global industry leaders or even sustainable enterprises unless they achieve substantial export sales.

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

## Export Control Reform Initiative and the U.S. SME Industry

The Proposed Revisions are part of the President's Export Control Reform (ECR) Initiative. According to the President, the initiative's objectives are:

- Focusing "resources on the threats that matter most" – higher walls around fewer items.
- Bringing "transparency and coherence to a field of regulation which has long been lacking both."
- "Enhancing the competitiveness of our manufacturing and technology sectors" so that they will "not just increase exports and create jobs, but strengthen our national security as well."

SEMI supports the ECR Initiative and looks forward to continued work with the government to help achieve its objectives.

With the goal of being constructive and supportive, SEMI urges the government to consider where the ECR Initiative stands as regards U.S. SME companies. In candor, the initiative's objectives are far from being fulfilled as they relate to our industry. For example, SEMI applauds intentions behind new License Exception STA. But that license exception's shortcomings, including a restricted set of covered export destinations, sharply limit its applicability to and utility for the SME industry. For the ECR Initiative to achieve its objectives in the context of U.S. SME companies, unnecessary license requirements on commercial SME need to be lifted. Regrettably, the proposed approach to "specially designed" discussed below threatens to expand unnecessary export controls on items – especially components – used and sold by SME companies.

## Proposed Treatment of "Specially Designed" Requires Improvement

### I. Overview

Treatment of the term "specially designed" has a major impact on SME companies. Most export licensable SME and SME-related hardware and software with which SEMI members work fall under subcategories 3B and 3D of the EAR's Commerce Control List (CCL), and the export control classification numbers (ECCNs) in these subcategories rely heavily on the "specially designed" standard in establishing what is controlled. In particular, components and accessories

for SME are controlled under ECCN 3B001 if they are "specially designed" for SME systems that are described by 3B001. In turn, classification of items in subcategory 3B determines how much SME-related technology will be classified in subcategory 3E.

The EAR does not include a generally applicable definition of "specially designed." SEMI acknowledges the need for a clear, sensible, unitary definition in the regulations given conflicting views about the term's meaning articulated by U.S. officials in court proceedings and elsewhere.

At the same time, SEMI members, through assiduous effort with BIS, have developed a reasonable understanding of how BIS applies "specially designed" in the SME context. This has resulted in extensive libraries of BIS classification determinations and informed internal judgments about which SME components and accessories are "specially designed." Consensus understandings about the meaning of "specially designed" were developed at great cost and now have critical roles in companies' operations.

SEMI commends BIS for indicating that its proposed treatment of "specially designed" is not intended to cause non-controlled items to become controlled. SEMI urges BIS to convey this expressly in the final regulatory amendment. Still, the government needs to modify and clarify the proposed definition to eliminate the likelihood of unnecessarily expanding controls on SME components, which would result in greatly expanded volumes of licensing and commodity classification requests.

As detailed below, the Proposed Revisions would forgo a definition of "specially designed" for components and affirmatively neutralize the term as it applies to components in, for example, ECCN 3B001. As a starting point, all components of controlled SME systems would be controlled, regardless of whether they are, in fact, specially designed for the systems. Exporters, both sophisticated and unsophisticated, would then be left to interpret and apply a series of opaque exceptions as they struggle to divine whether non-specially designed components can be treated as being non-controlled.

The proposal's treatment of components would have several adverse implications. First, as indicated above, it would run counter to the ECR Initiative's objective of reducing unnecessary export controls (focusing "resources on the threats that matter most"). The proposal could result in new controls on components that are benign from any reasonable export control policy perspective. Such benign components could include, for example, simple assemblies (i.e., components and accessories) that have no relevance to any scientific or technological aspect of "achieving or exceeding the controlled performance levels, characteristics or functions" of any controlled end-item.

In sum, the ECR Initiative's regulatory changes are supposed to reduce exporters' burden in complying with export controls. The Proposed Revisions' approach to "specially designed" components would instead add to that burden.

Second, and specifically, the proposal would undermine informed views about application of the "specially designed" standard to SME components, including reliance on vast numbers of BIS classification determinations. This could be enormously costly. It also would

result in confusion about what is controlled. The proposal is complicated, hard to understand, and difficult to interpret and apply. The proposal's treatment of components would be confusing even for relatively large SME companies with sophisticated export compliance functions. For smaller exporters, or non-native English-speaking exporters or re-exporters, the proposal would be even more problematic.

Third, the proposal would no doubt exacerbate the extent to which U.S. controls on components conflict with those of other Wassenaar Arrangement participating countries, notwithstanding that all participants are working with the same control list text. This, in turn, would add to U.S. SME companies' costs as they negotiate the export controls of the many jurisdictions in which they do business.

Finally, and as a related matter, the proposal would encourage industry to locate manufacturing operations outside the United States to avoid the challenge of EAR-regulated components. Much has been written about the phenomenon of "ITAR-free" products: sale and marketing of products on the basis that they do not include ITAR-controlled parts or components. As currently drafted, the Proposed Revisions could entice producers to seek to ensure that their products are "EAR-free."

## II. "Specially Designed" Definition Should Apply to Components

SEMI urges the government to adjust the Proposed Revisions so that the substance of the definition of "specially designed" at paragraph (a) applies to all items, including components and parts.

BIS has announced that it is creating a "single, clear, and objective" definition of "specially designed."[2] The definition it has proposed is not "single," as different meanings of "specially designed" are assigned to (i) parts and components, and (ii) all other items.

For items other than components and parts, the proposed definition is at least arguably "clear and objective." Under paragraph (a), an item that is not a component or a part is generally to be considered to be "specially designed" for another item if, "as a result of 'development,' [it] has properties *peculiarly responsible for achieving or exceeding* the controlled performance levels, characteristics, or functions of the referenced item identified in the CCL."[3] That definition gives meaning to "specially designed," and seems to comport with the SME industry's understanding of how the term should be applied. SEMI urges BIS to make the substance of this definition "single" and apply it to components and parts.

As regards components and parts, the Proposed Revisions inexplicably forgo a "specially designed" definition. Rather, paragraph (b) would provide that a "'specially designed' part or component is a part or component of an item 'enumerated' in a category of the CCL." In other

[2] Proposed Revisions at 41,968.

[3] Proposed Revisions at 41,980 (emphasis added). It is understood that this portion of the definition applies to accessories. That fact should be made explicit in the definition.

words, the government would deem a component or part to be "specially designed" for the item into which it is incorporated regardless of whether the component or part is actually specially designed for the item

Unless the definition of "specially designed" applicable to components incorporates the "peculiarly responsible" language contained in paragraph (a), the definition likely would capture components that are inconsequential not only to the control criteria of the end items in which they are incorporated, but also to the primary functions of those end items.

SEMI questions establishing a regulatory term that is devoid of prescriptive meaning. The government has agreed that there needs to be a unitary, generally applicable definition of "specially designed," and it should proceed on this basis. The substance of paragraph (a) of the proposed definition should apply to all items, including components and parts. SEMI urges the government to do so.

## III. Exceptions Need to be Expanded and Clarified

In addition to making the substantive revision to the "specially designed" definition discussed in the prior section, BIS should mitigate adverse implications of that definition through expansion and clarification of the exceptions at paragraph (d) of the definition. SEMI also proposes that the government include an additional exception for items that merely facilitate operation or use of the system into which they are incorporated.

### A. Establish that New Approach to "Specially Designed" Will Not Undermine Existing BIS Guidance

As described above, SEMI members are concerned that the proposal would make unreliable the learning that they have developed about how to apply the "specially designed" standard to SME components. The government has indicated that it does not intend this result – that is, the proposal should not move "items currently subject to a lower control status to a higher level control status."[4] This position should be written into the regulations by including the following in a "note" to the "specially designed" definition:

> A part or component shall not be considered to be covered by an ECCN on the basis that it is specially designed for an item covered by that ECCN if BIS has issued a classification determination or other written guidance that the part or component is not covered by that ECCN.

SEMI urges the government to reinforce and expand on this point in supplementary guidance included with the final rule. That guidance should make it clear that the regulatory amendments do not affect exporters' ability to rely on and extrapolate from classification determinations.

[4] Proposed Revisions at 41,968.

B. Exception at Paragraph (d)(1) Should Include Components

SEMI commends BIS's inclusion of the exclusion at paragraph (d)(1) of the "specially designed" definition. Inconsequential items should not be treated as being "specially designed." However, the proposed exception is unnecessarily limited to single, unassembled parts. If an item does not warrant license requirements, it should not be controlled, whether it is a part, a component or an accessory. At minimum, the exception should cover simple assemblies, such as components comprised of two or three connected parts (provided they satisfy other terms of the exception).

C. Exception at Paragraph (d)(3) Should Be Clarified and Expanded

The proposed exception at paragraph (d)(3) would be limited to certain parts and components the "form, fit and function" of which have not been altered and that are incorporated in end-items in "serial production." First, this exclusion should apply to accessories as well as parts and components. Second, it may be appropriate to limit eligibility to parts, components and accessories the *functionality* of which has not been altered for an enumerated end-item. But there is no reason to include a limitation based on modified form or fit. Finally, the exclusion should apply whenever the part, component or accessory is produced in significant quantities, even if the end-item is not yet in serial production.

D. Exception at Paragraph (d)(4) Should Be Clarified and Expanded

As with paragraph (d)(3), paragraph (d)(4) should apply to accessories and should not be restricted based on the form or fit of an item. In addition, the "one-for-one replacement" requirement in paragraph (d)(4) is needlessly limiting. The exception should cover any part, component or accessory that can be exchanged with an EAR99 or AT-only controlled part, component or accessory on a replacement basis, provided the function of the replacement item is the same as that of the item being replaced.

E. Exception for Facilitating Parts, Components and Accessories Should Be Included

BIS should also include an exception that excludes from the "specially designed" definition items that merely facilitate the use or operation of a controlled item. Examples of such items in the SME industry might include certain tubing, cables and frames for SME. It is often impractical to use or operate a semiconductor production tool without such items, but they do not contribute to the performance, characteristics or functionality of the tool that led to it being controlled. Such an exception would ensure that controls do not extend to items not otherwise excluded for which there is no need for license requirements.

SEMI recommends the following text for this additional exception:

> (5) An item incorporated into an end-item to facilitate the use or operation of the end-item that does not cause the end-item to achieve performance levels, have characteristics or have functionality that results in the end-item being controlled in the CCL.

## IV. Other Definitions

SEMI commends the proposal's inclusion of definitions for a variety of other terms employed by the regulations, especially the term "part." Definitions of these terms should help limit confusion and misunderstandings about application of the EAR.

As to the definition of "equipment," SEMI suggests replacing the phrase "assembled for a specific purpose" with "gathered, collected or compiled for a specific purpose" to avoid confusion about whether sets of tools or devices are assemblies.

## Grace Period

Regardless of the extent to which the government adopts the SEMI recommendations described above, BIS should establish that the new treatment of "specially designed" will not become effective for 180 days following publication of the final rule. This would provide much needed time for exporters to fully assess the final rule and adjust their licensing and classification practices appropriately.

* * * * *

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

Sincerely,

Karen Savala
President, SEMI Americas

# RPTAC September 2011

# SEMI Comments on “Specially Designed”

Maggie Hershey, Senior Director for Public Policy, mhershey@semi.org

# About the industry

- SEMI: industry association with about 2,000 member companies that provide equipment, materials and services used to manufacture semiconductors, photovoltaics, displays and related technologies. About 500 members in United States.
- Mass volume manufacturing; main customers are large, well-known semiconductor manufacturers
- Export intensive: equipment companies derive over 80 percent of revenues from overseas
- EAR: Equipment is found in Category 3B
  - "Equipment for the manufacturing of semiconductor devices or materials, as follows (see List of Items Controlled) and specially designed components and accessories therfor"

# General reaction

- Current proposal has two key elements:
  - For items:  "specially designed" definition for items
  - For parts and components, assumes that all are controlled unless they meet at least one of four exclusions – this is where our concerns are

- Difficult to understand and interpret:
  - SEMI supports RPTAC interest in adding "plain English" language to the regulation
  - Would be very difficult for smaller exporters and non-native English speakers to understand
  - Our experts group has differing views of what would be covered
  - Could result in many new classification requests given uncertainties

# Main concern and implications

- Main Concern: Current proposal threatens to expand controls on inconsequential items -- especially components -- used and sold by SME companies

- Recommendation: Proposal indicates that the new definition is not intended to cause non-controlled items to become controlled and that this would happen only in rare cases; we urge BIS to expressly state this in the final regulation

- Some implications:
  - Counter to objective of focusing resources on what matters the most
  - Adds to exporters' burden
  - Would undermine informed views developed over the years about application of specially designed
  - Could pose difficulties with Wassenaar – means different things in different places
  - Encourage companies to locate manufacturing overseas

# Create a single definition

- SEMI urges BIS to apply paragraph (a) "peculiarly responsible . . ." language to components and parts

- Current proposal does not meet goal of a "single" definition since it doesn't provide a definition for parts and components and applies different concepts

- Starting point is to assume parts and components are controlled, then work through confusing exceptions to determine if a (many times non-specially designed) part or component can be treated as non-controlled.

- We considered proposing “specially designed” be deleted from 3B header and instead create positive list of specific parts and components to be controlled;  problematic for many reasons

# Additional recommendations

- 1) Establish that new approach will not undermine existing BIS guidance
  - Add a note to the definition that existing classifications and written guidance should continue to apply
  - Include in supplementary guidance that the new regulation should not affect exporters' ability to rely on and extrapolate from classification determinations

- 2) Paragraph (d)(1) should include components
  - Good start, but it is limited to single, unassembled parts
  - Expand to cover simple assemblies with two or three connected parts, as long as other terms of the exception are met

# Additional recommendations

- 3) Paragraph (d)(3) should focus on function, but not form or fit

- 4) Add exemption for "facilitating" parts, components, and accessories
  - For things that facilitate the use or operation of an end-item that does not cause the item to achieve performance levels, have characteristics or functionality that results in being controlled
  - Examples include tubing, cables and frames for SME

- 5) Establish a grace period of 180 days for transition