9/7/11

The Bureau of Industry and Security (BIS) conducted a series of public Q&A sessions over a seven week period from July 27, 2011 through September 7, 2011. These Q&A sessions allowed any interested member of the public to submit questions regarding the proposed rule published by the Commerce Department on July 15, 2011 (76 FR 41958) titled *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).*

The purpose of these Q&A sessions was to answer basic questions the public may have had about the July 15 proposed rule in order to better inform the public comments on this publication. In this Q&A forum some members of the public submitted questions that BIS determined needed to be characterized as comments on the July 15 proposed rule. Instead of addressing those types of comments in the public Q&A sessions, BIS included those comments here in a consolidated format to allow other members of the public to see these comments that were submitted during the public Q&A sessions. BIS will evaluate these comments, along with the other public comments submitted in response to the July 15 proposed rule.

(1) I am struggling with the proposed definition of "specially designed" part/components on page No. 41980. The way the rule was explained, and elsewhere in this notice, it was implied that the definition included parts also for USML items, but under the actual definition (b) it only says CCL (I was expecting it to say "…or USML").

(b) A "specially designed" "part" or "component" is a "part" or "component" of an item

'enumerated' in a category of the CCL.

But elsewhere it implied that specially designed parts & components of USML items would also be covered

Ex. All other generic parts, components, accessories and attachments – and the technology for their "production," "development," or "use" – that are "specially designed" for an item formerly on the USML and not specifically identified on the USML will become subject to the jurisdiction of the EAR and identified on its CCL

(1) "600 series"

(A) Addition of the "600 series" on the CCL. In Supplement No. 1 to part 774 (the Commerce Control List), this rule proposes to add a

new "xY6zz" control series to the CCL to control most items formerly on the USML moved to
the CCL

Generic "parts," "components," "accessories" and "attachments" moved from the USML

> would be controlled using a similar structure in each of the "600 series" ECCNs that would be added to the CCL. Former USML "parts," "components," "accessories and attachments" that are not: (i) identified in the revised, positive USML; (ii) specifically identified in a new 600 series entry; or (iii) described in another ECCN controlled for more than AT-only reasons would be controlled at the end of each new corresponding 600 series ECCN as "parts," "components," "accessories and attachments" 'specially designed' for (i) items controlled elsewhere in [that ECCN] or (ii) defense articles controlled in [the corresponding USML category]."
>
> I am having a hard time reviewing the rule and producing productive comments when it seems to self conflict…I need to know which way is right before I can analyze and produce comments. I was advised by Tim Mooney that this is NOT a typo in the specially designed definition. I'm at a loss.

(2) Why did BIS not include the illustrative example that is provided in the definition of "required" technology in current Part 772, which also uses the phrase "peculiarly responsible"? (This is the example using production technologies A-E.)

(3) Why does proposed ECCN 0A606.y.6 include "blackout lights" as items that would be AT controlled, when "blackout lights" are listed as one of the modifications to a ground vehicle that would make it controlled under 9A018 or 0A606, according to new Interpretation 8, section 770.2(h)(2)(v)? By way of comparison, 0A606.y.16 includes tires, "except run flat", which is another modification listed in Interpretation 8, 770.2(h)(2)(i).

(4) Why does proposed ECCN 0A606.y not include exhaust pipes? For any ground vehicle, the exhaust system must be custom-made to fit that vehicle's frame and body. Thus, it seems to be "specially designed" for that vehicle. A vehicle needs an exhaust system to vent the emissions, which include poisonous gases, away from the passenger compartment. But other than keeping the driver and passengers from being killed by emissions, which all vehicles powered by internal combustion engines must do, an exhaust system has no apparent military significance. All that is required to make an exhaust pipe is take a metal tube and bend it to fit the vehicle. But by not including exhaust systems in paragraph y, they seem to be controlled under paragraph x, which covers "'parts,' 'components,' 'accessories and attachments" that are 'specially designed' for a commodity subject to control in this ECCN or a defense article in USML Category VII."

(5) Should "600 series" technology for the "600 series" "y" entries be excluded from RS1. The actual entry does not exclude it?

(6) Does the movement of items from USML to CCL mean, there will be a new international regime for global harmonization, like Wassenaar, or the Australia Group. If no, why can't these moved items be controlled under the 600 series?

(7) With respect to the 34 countries, major developing markets such as Brazil and India are not included. Why is Argentina on but Brazil off? What would it take to bring in Brazil and India?

(8) Why is STA not being used frequently?

(9) One of the records required for a re-exort or in-country transfer of an STA eligible 600 series end-item is a copy of the BIS approval of STA for the item. Could you consider mandating that the US exporter provide this? U.S. companies are reluctant to give non-U.S. companies copies of licenses.

(10) On today's call we discussed if we sell a part to Mfg. in one of the 36 STA countries, and they incorporate it into a finished good i.e. a Helicopter, and then they are going to export the Helicopter to a NON STA country, we cannot use STA Exception.

My question here is wouldn't Diminimus value kick in here, so they can re-export without and issues, and therefore we should be able to use STA? Yes?

So long as our part constitutes less than 25% of the value, or 10% as dictated.

(11) So the NPR is touting "freeing" from certain ITAR controls such as the need for TAAs (valid for 10 years). However, when my Cat VII data moves to 0E606.x I will need to get a license to export data which is only valid for 2 years. So over the course of 10 years I'll need to get 5 licenses instead of 1 (approval). Anything I'm missing that would refute this "improvement"?

(12) Realistically, will there really be only one single control list? If some SMEs will remain as ITAR, doesn't that indicate there will remain two control lists? **(***Update 2011, commenter not identified)*

(13) In page 41960, third column, did BIS inadvertently add an MT control to Canada? The introduction of a parenthesis after "Canada" seems to suggest that a license is required to that destination for MT, FC, an CB reasons.

(14) Does "Specially Designed" applies to "Modified and Configured (within existing commercially available parameters)" too?

Responding to BIS's encouragement to apply the proposed definition to "parts" and "components," that we believe are not currently covered by "specially designed", we would like to report an instance in which the proposed definition would produce different results from the current definition.

While the proposed rule lays out very helpful criteria in defining what does and does not constitute a "specially designed" part or component, we are concerned it may not exclude items that are specifically configured or modified within pre-existing commercially available parameters. Such items were previously not included in the CCL, but may potentially be controlled by the language in the proposed rule.

Take for example laser A, an uncontrolled laser, which uses an optical laser crystal 'a', and Laser B, a controlled laser, which uses a slightly different version of that laser crystal, laser crystal 'b', with a smaller diameter and material variation. Both laser crystal specifications are within the parameters pre-established by the laser crystal manufacturer, but the configuration for laser crystal 'b' may not have been purchased before. Under the old existing rule, as long as that laser crystal was not specifically designed for the controlled laser, it would not be considered controlled.

Reviewing the proposed definition, the fourth exclusion (replacement on a one-for-one replacement basis) would apply only as long as we can take the pre-established parameters of the manufacturer into consideration instead of referring to existing parts. Is this the intent of the language under (d)(4)?

Detailed Analysis

Section (b) of the "Specially Designed" definition would apply: the laser crystal is component of an item enumerated on the CCL (in this case, 6A005.b)

Section (c) would not exclude this particular item as the laser crystal is not listed as a separate ECCN (only in 6A005.e.2 which is where "specially designed" is mentioned);

Section (d) (1) would not exclude this particular item: the laser crystal in question are a single, unassembled part, but it is not used in multiple types of civil items;

Section (d) (2) would not exclude this particular item as it is not excluded from the CCL or USML;

Section (d) (3), would not exclude it either: laser crystal 'b' is currently only used in a controlled laser;

Section (d) (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 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 identical to the "part" or "component" at issue.

This would apply, if we can take the pre-established parameters of the manufacturer into consideration instead of existing parts. For example, if the diameter is between 3 and 10 mm, and laser crystal b is 3.75mm, it could be replaced by a part of same diameter,

(15) The proposed rule makes reference to "ultimate end use" in the context of using STA with 600 series items, but does not define it. Currently 772 defines "end user"; how is the "end user" is different from the "ultimate end use(r)", particularly in the OEM context? Under current regs, the OEM IS the end user. Are you intending to look beyond the OEM with the concept of "ultimate end use(r)? If YES, I view this as burdensome, since in applying the EAR to date, once has not had to look beyond the "end user" to determine licensing & exception applicability.

Ex. one intends to export a 0A606 component to German Tank OEM. Eventually the German Tank OEM will sell his tank to someone. Who is the "end user" and who is the "ultimate end use(r)"?

[N.B. the rule does not mention "ultimate end useR", but rather states that the ultimate end use must be a variety of Gov't agencies, apparently making them the "ultimate end useR"]

End-user. The person abroad that receives and ultimately uses the exported or reexported items. The end-user is not a forwarding agent or intermediary, but may be the purchaser or ultimate consignee.

(16) Proposed Sec. 740.2 (E) "Restrictions on All License Exceptions" describes certain ultimate end-uses performed by a government identified on the list of the STA-36. Most of these end-uses are understandable, such as "armed forces", "law enforcement", "customs", but I can find no definition of what is meant by a government "correctional" end use for which License Exception STA is available for export/reexport of a "600 Series" end item. What is the intended meaning of a government "correctional" activity?

(17) "Form fit and function" obviously come from ITAR but the concept is rigid and not obviously objective in application. Use of "form/fit/function" can result in the exercise of

control over parts and components having little or no military or NS significance. Why not (a) replace "and" with "or"; or (b) eliminate entirely the concept of "fit" (since fitting a part into an end item usually involves insignificant alteration)?

(18) As an example of "form/fit/function," the tubing for an MOCVD reactor is hard tubing. It is bent by hand or using a simple jig to enable the reactor and its piping fit into the framework holding the reactor in the tool. The technology to bend the tubing is irrelevant to the technology for the reactor itself. Hard tubing could be replaced by flexible tubing at a slightly higher cost. But would the form/FIT/function be "the same"? Would a drawing showing the layout for hard tubing around the reactor be controlled?

(19) The 10% De Minimis threshold seems restrictive, especially if the goal was to decrease the portion of the foreign end product which would be subject to US re-transfer control. What does BIS envision would fall under the 10% rule?

(20) Is the "Specially designed" definition intended to capture "dual use" designed parts not yet in serial production?

Example #1:
An aircraft fuel pump prototype designed to be used in commercial and military aircraft without change to form or fit. The related new commercial aircraft model is still in development. The fuel pump is not currently usable for a non aircraft purposes or for an existing commercial aircraft already in serial production.

Specially Designed definition analysis:
(a) - Not applicable since this is a part
- Applicable since the fuel pump will be used on military aircraft which are enumerated on the USML (USML items should have been included along with the CCL items in (b) per comment form K. Wolf at the 7-27-11 telecom)
(c) - Not applicable because a fuel pump is not specifically enumerated on the CCL or USML
(d)(1) - Not applicable because the fuel pump is not a single unassembled item
(d)(2) - Not applicable because the fuel pump is not currently excluded from the USML or CCL
(d)(3) - Not applicable because the part is not yet used in serial production on an AT controlled commercial aircraft
(d)(4) - Not applicable because there currently are no existing EAR99 or AT-only controlled compatible replacement part
Thus it appears this fuel pump prototype would fall into a "specially designed" part section of a 9A606x type category and would be expected to be controlled for

Is the "Specially designed" definition intended to capture "dual use" designed parts not yet in serial production?

(21) Example #2 as a follow on to Question #5:
An aircraft fuel pump prototype designed to be used in commercial and military aircraft without change to form or fit. The fuel pump is not currently usable for a non aircraft purposes and is not yet in serial production.

Specially Designed definition analysis:
(a) - Not applicable since this is a part
- Applicable since the fuel pump will be used on military aircraft which are enumerated on the USML (USML items should have been included along with the CCL items in (b) per comment form K. Wolf at the 7-27-11 telecom)
(c) - Not applicable because a fuel pump is not specifically enumerated on the CCL or USML
(d)(1) - Not applicable because the fuel pump is not a single unassembled item
(d)(2) - Not applicable because the fuel pump is not currently excluded from the USML or CCL
(d)(3) - Not applicable because the part is not yet used in serial production on an AT controlled commercial aircraft
(d)(4) - Not applicable because there currently are no existing EAR99 or AT-only controlled compatible replacement part
Thus it appears this fuel pump prototype would fall into a "specially designed" part section of a 9A606x type category and would be expected to be controlled for NS, RS, UN, and AT.
However, once the fuel pump entered production in commercial aircraft, the (d)(3) exclusion would then apply and the fuel pump would no longer be "specially designed" and revert to ECCN 9A991.
Is this analysis correct?
However, once the fuel pump entered production in commercial aircraft, the (d)(3) exclusion would then apply and the fuel pump would no longer be "specially designed" and revert to ECCN 9A991.
Under current regulations, this fuel pump would be dual use and not subject to NS and RS controls while in development so it looks like controls would increase on these types of parts if this rule is implemented.
Is this analysis correct?

(22) The proposed category 0A606 (Ground Vehicle, “Parts” and “Components”) has a carve out for 0A606.y from the NS and RS controls that are applied to the rest of the category.

Why doesn’t the category 0D606 (Software “specially designed” for . . . 0A606) have a similar carve out from its NS and RS controls for software specially designed for 0A606.y parts and components?

(23) Because of the unique and additional documents required under 748.8 for the STA eligibility request, may the applicant be involved in open discussions with the interagency eligibility review group as a license applicant may be in interagency discussions?

(24) Mr. Wolf has stated that the proposed rule was drafted as much as possible not to introduce new concepts. (For example, the meaning of "peculiarly responsible" is taken from the definition of "required" technology in Part 772 of the EAR.)

> Would you please explain the intent behind certain references, made in the rule, which implicate a concept--a possibly new concept--of government and government agencies? Specifically, under the proposed rule for a 600 series item, STA eligibility is limited to ultimate end use by certain identified "agencies" of an STA-36 country government: the armed forces, police, paramilitary, law enforcement, customs and border protection, correctional, fire, or search and rescue agencies. (See 76 Fed. Reg. 41,958, 41,973, 41,975 (and Background discussion re same) (July 15, 2011).) BIS has explained that GOV is an alternative to STA when a government is implicated. The EAR, through GOV, already contain a definition of "government": "Agency of a cooperating government includes all civilian and military departments, branches, missions, and other governmental agencies of a cooperating national government." 15 C.F.R. § 740.11(b)(3)(ii). What was the intent behind the decision not to adopt the latter concept of government and government agencies in the proposed rule (limiting STA eligibility)?

(25) As a follow up to the previous question, with respect to the same concept of government and government agencies in the proposed rule (limiting STA eligibility), would you please explain the intent behind it not including certain international organizations? For example, it seems that a license would be required to export a 600 series item to NATO in Belgium, yet if the same item were being exported to the Belgian MoD or armed forces the export could be STA-eligible. Is that the intent of the proposed rule?

(26) Would you please walk through the analysis for the following transaction? A U.S. exporter, of a 600 series component, will export to a U.K. OEM, which will incorporate the component into an end-item to be procured by, and delivered to, the U.S. DoD in the United States. With respect to the export from the United States, STA doesn't seem to apply because the U.S. government itself is not one of the STA-36 countries, and GOV doesn't seem to apply because the component is not "consigned to and for the official use of any agency of the U.S. Government." 15 C.F.R. § 740.11(b)(2)(ii). However, it seems that STA could apply if the end-item were for delivery to the MoD or armed forces of an STA-36 country. Is that the intent of the proposed rule?

(27) A bit confused on how the ITAR embargoed countries moving over to the CCL for 600 series items would impact this scenario. I want to export 600 series items to a foreign manufacturer in Germany who will incorporate it into an end item destined for China. I

understand from the NPR that BIS would NOT license my 600 series component if I requested a license to ship direct to China – that is crystal clear. But if I want to export to a German OEM "end user" (per EAR definitions) who will consume the item in manufacturing, will that license application/ transaction be approved?

(28) And then that OEM can apply standard de minimis calculations to its end item pertaining to the export to China of their end item?

(29) What is the definition of "large scale production" as referenced below? Presumably "large scale production" for a large company will be considerably different to "large scale production" for a small company. Does this term need to be clarified, e.g. changed to "intended scale"?

> § 772.1 Definitions of terms as used in the Export Administration Regulations (EAR).
>
> Specially designed.—
>
> (d) Items that are not so separately 'enumerated' for purposes of this definition, are also not considered ''specially designed'' in any category of the CCL if they are:
>
> (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 form, fit, and function have not been 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;
>
> Note to Exclusion Paragraph Number 3:
>
> ''Serial production'' is defined in section772.1 as a type of production where the ''items'' being produced are no longer in ''development.'' In this type of production the ''items'' have passed production readiness testing (i.e., an approved, standardized design ready for large scale production) and are being or have been produced based on the approved, standardized design, including and especially on assembly lines.

(30) In your opinion, is it advisable for companies to begin submitting Commodity Jurisdictions (CJs) for parts and components that are currently controlled under any USML parts and component category (e.g. VIII(h), X(d), XI(c), etc.) that are expected to transfer to the Commercial Munitions List (CML - what I refer to as the mini-ITAR)? Or do you recommend we sit back and wait so not to put additional burden on the licensing staff? If you require in-depth details regarding this question, please feel free to call me at the number below.

(31) I am writing to describe an instance in which I think the proposed definition of "specially designed" results in an increase in controls relative to the current situation. I will submit a comment to address this change, but I would appreciate your thoughts on whether I have missed something in my application of the new definition.

> Our clients currently export 9A018/9D018/9E018 commodities to Country Group B countries. For 9A018, we use license exception LVS, as applicable; for 9D018 and 9E018 we use license exception TSR, as applicable, with the requisite end use assurance.
>
> The new definition of "specially designed" will result in the 9A018 commodity (parts and components of a suspension system for a non-combat, military ground transport vehicle) being classified as 0A606.x. The LVS exception is not available for this ECCN (LVS is restricted to 0A606.a, .b, .c only), and the other available exceptions do not apply in most of the situations faced by our clients. Thus, the new "specially designed" definition would require us to obtain a license to export our item to country Group B countries.
>
> Similarly, the 9D018 and 9E018 software and technology that accompany our clients' 9A018 items will now be classified 0D606.x and 0E606.x. License exception TSR is not available for those ECCNs (and the available exceptions do not apply). So, if I am interpreting the proposed definition correctly, our clients would need to obtain a license to export those items to Country Group B countries as well. Thank you for your insight,

(32) The Obama Administration laid out general plans for reviewing and revising the CCL and the USML and to accomplish this objective by making the lists more ''positive,'' ''aligned,'' and ''tiered.'' However, in the July 15, 2011, 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)", it reads: Generic ''parts,'' ''components,'' ''accessories'' and ''attachments'' moved from the USML would be controlled using a similar structure in each of the ''600 series'' ECCNs that would be added to the CCL. Former USML ''parts,'' ''components,'' ''accessories and attachments'' that are not: (i) identified in the revised, positive USML; (ii) specifically identified in a new 600 series entry; or (iii) described in another ECCN controlled for more than AT-only reasons would be controlled at the end of each new corresponding 600 series ECCN as ''parts,'' ''components,'' ''accessories and attachments'' 'specially designed' for (i) items controlled elsewhere in [that ECCN] or (ii) defense articles controlled in [the corresponding USML category].'' The question is: what happened to making the lists more "positive"? Doesn't this proposed rule simply move the 'catch-all' provision from the USML to the CCL?

(33) Under the proposed rule, it shows TSR: N/A for technology under 0E606. Does this mean that a Deemed Export License will be required for all non-US persons to access the technical data/technology associated with the "specially designed" components for these defense contractors? In other words, are we correct in understanding that we will be required to continue to apply the same access restrictions to US Persons only for technology under ECCN 0E606 as currently applied to USML Category VII?

(34) The Federal Register Notice from July 15 includes the following two potential ECCNs: (emphasis added)

0A606.y.16 - Tires, except run flat

0A606.y.17 – Windows, except those for armored vehicles

Both of these ECCNs describe a part/component with an exception attached. My question is, if run flat tires and armored windows are not captured here in these ECCNs, where are they captured? If you could please answer in general terms where would someone in industry be expected to go next? Do we move back to ECCN 0A606.x and the broader bucket of parts and components? Some in industry might move directly to EAR99 since the items are not elsewhere specified in the CCL. Or is it the intent to move industry away from the EAR altogether and back to the USML? Without seeing the proposed changes to the USML's Category VII it is difficult to assume intent.

(35) My second question is, if reversion to the ITAR is implied in this case, would additional language to the Related Controls be appropriate? The proposed language in Related Controls (6) does not include strong or descriptive language about leaving the EAR for the ITAR when dealing with these types of carve outs. Other ECCNs have more direct language. I refer you to the language in ECCNs 7A103 and 6A002 Related Controls which delineate certain portions of the ECCN entry that are to be covered by the USML and refer industry to a different licensing authority.

<u>7A103</u>

**Related Controls:** For rockets, missiles, or unmanned aerial vehicles controlled under the U.S. Munitions List (22 CFR part 121), items described in 7A103.b are subject to the export licensing authority of the U.S. Department of State, Directorate of Defense Trade Controls (See 22 CFR part 121). 2.) Inertial navigation systems and inertial equipment, and specially designed components therefor specifically designed, modified or configured for military use are subject to the export licensing authority of the U.S. Department of State, Directorate of Defense Trade Controls. (See 22 CFR part 121.)

<u>6A002</u>

**Related Controls:** The following commodities are subject to the export licensing authority of U.S. Department of State, Directorate of Defense Trade Controls (22 CFR part 121): 1.) "Image intensifiers" defined in 6A002.a.2 and "focal plane arrays" defined in 6A002.a.3 specially designed, modified, or configured for military use and not part of civil equipment; 2.) "Space qualified" solid-state detectors defined in 6A002.a.1, "space qualified" imaging sensors (e.g., "monospectral imaging sensors" and "multispectral imaging sensors") defined in 6A002.b.2.b.1, and "space qualified" cryocoolers defined in

6A002.d.1, unless, on or after September 23, 2002, the Department of State issues a commodity jurisdiction determination assigning the export licensing authority to the Department of Commerce, Bureau of Industry and Security.

(36) Given the emphasis and aggressive goals that the administration has establish for export (NEI), and since we hear that the great majority of US small business do NOT export....would it be possible to create a simple online tool (perhaps with drop down menus, etc) which could guide a business person to determine the export-licensing status of a commodity or product or service?

(37) The Dept. of State advance notice of proposed rulemaking includes a Tier 3 definition that seems problematic. Their definition of "significant" uses the term "reasonable" – is there not a less subjective definition that can be used? The judgment of an individual responsible for not making a mistake, e.g., a regulator, can be biased and perhaps unreasonable – will this format risk a return to defending nothing while trying to defend everything or will it needlessly punish US exports?

For example, suppose I manufacture an electrolyte sports drink. One could argue that this item provides a significant or reasonable military advantage (for troop stamina) and should therefore be subject to license. Do the current proposals lead to this conclusion and if so, is that our desire?