



August 3, 2012

Regulatory Policy Division
Office of Exporter Services
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
Washington, DC 20230

RE: "Specially Designed" Definition (BIS-2012-0021; RIN 0694-AF66)

To Whom It May Concern,

I am writing on behalf of the Association of University Export Control Officers (AUECO), a group of senior export practitioners at twenty-five accredited institutions of higher learning in the United States. AUECO members monitor proposed changes in laws and regulations affecting academic activities and advocate for policies and procedures that advance effective university compliance with applicable U.S. export controls and trade sanction regulations.

AUECO is specifically interested in contributing to the export reform effort in order to ensure that the resulting regulations do not have an adverse impact on academic pursuits. As a result, AUECO is providing the following comments with respect to the U.S. Department of Commerce's request for public comments on its proposed definition for "specially designed".

The development of positive lists with objective parameters to described controlled items is important for the export community. AUECO applauds the Department's intent to develop a list of specific items rather than the continued use of the catch-all "specially designed"; this approach promotes compliance with the regulations by removing ambiguity for the export community.

AUECO supports the goal of providing a clear single definition of "specially designed" that would be applicable throughout the entire Commerce Control List (CCL). AUECO also supports the effort to have the definition of "specially designed" in the Export Administration Regulations (EAR) be as close as possible to that in the International Traffic in Arms Regulations (ITAR). We concur with BIS that a clear, common, and objective definition of "specially designed" is important to the export reform initiative, particularly as items are moved from the USML to the CCL.

AUECO recognizes the necessity of using "specially designed" in some descriptions because of its use in the Missile Technology Control Regime (MTCR), the Wassenaar Arrangement (which does not define the term), and other multilateral regimes. However, we note that the proposed EAR definition is much more complex and expansive than the MTCR definition. The MTCR definition requires that equipment be regarded as "specially designed" only if it has no other function or use than for the pre-determined purpose that makes it "specially designed", and consequently catches few items in the definition. In contrast, the catch and release approach proposed for the EAR and the ITAR captures most items as

potentially “specially designed”, and then goes through an exercise to determine if an item may be released from the designation. While this may be a reasonable approach for the ITAR, where the set of what must be captured is limited to items related to or used with defense articles, its application to all items potentially subject to the EAR requires a broad analysis for the release of items through paragraph (b).

Recommendations

AUECO strongly urges the Department to restrict its use of “specially designed” to only those instances where it is required under a multilateral agreement or in rare cases when no other reasonable option is available. It would also be helpful if BIS were to provide clearer guidance, especially in regard to the inclusion or exclusion of items controlled only for AT reasons.

We suggest that paragraph (a)(2) be modified to focus only on those parts and components responsible for creating or generating the performance characteristic or attribute which is the specific reason for control. As proposed, paragraph (a)(2) brings in all part[s] or component[s] necessary for an enumerated or referenced commodity or defense article (hereinafter, item) “to function as designed”. This wording would include design attributes having nothing to do with the reason for control of the item, we recommend rephrasing paragraph (a)(2) as follows: “Is a part or component necessary for creating or generating the specific attribute(s) which are the basis of control for an enumerated or referenced commodity or defense article”. Alternatively, this issue could be addressed in the release paragraph (b).

We suggest a change to paragraph (a)(3) for the sake of readability. Paragraph (a)(3) is written as “an accessory or attachment used with an enumerated or referenced commodity or defense article to enhance its usefulness or effectiveness”. The proposed definitions for “accessories” and “attachments” include the enhancement of usefulness or effectiveness of the end item as an element of the definition. The qualifying phrase “to enhance its usefulness or effectiveness” in (a)(3) is thus repetitive. We suggest changing to (a)(3) to read as follows: Is an accessory or attachment used with an enumerated or referenced commodity or defense article.

Paragraph (b) of the proposed definition clarifies which items swept into the realm of potentially “specially designed” in paragraph (a) may be released from the designation. Subsections (b)(4) and (b)(5) focus on design intent as criteria for release from the “specially designed” designation. We find the note to paragraph (b)(4) and (b)(5) useful for interpreting how to evaluate design intent. We believe that additional guidance on suggested practices for record-keeping as well as a clear statement of any record-keeping requirements associated with exclusion of items as “specially designed” based on design intent would be useful to the export community. In particular, we are concerned that absent such guidance, the definition may fail to meet the objective of being easily understood and applied by exporters, prosecutors, juries and the U.S. Government.

Paragraph (b)(5) is designed to address potential overreach of the “specially designed” designation to parts, components, accessories or attachments originally developed for a general purpose not specific to the related enumerated item. The proposed language is “Was or is being developed with no reasonable expectation of use in a particular application”. This language could also describe many basic research activities, but in the university environment, such activities typically fall under the definition of fundamental research, and would thus be outside the scope of the EAR. We find the proposed language confusing with respect to applied research, as it is hard to imagine an item being developed without

consideration of potential applications. We suggest that the wording of (b)(5) be changed to “Was or is being developed with no reasonable expectation that its predominant use would be in an application which would cause it to be “specially designed” in (a)”. This change would clarify that the consideration is limited to the particular reference causing the evaluation of the part, component, accessory or attachment.

AUECO is concerned that the focus on design intent will result in an increased compliance burden for universities. Often universities are involved in research related exports of items that were not created at the university. In such cases, the university would be unable to divine design intent for the item to be exported and would not be able to determine if the items could be excluded under (b)(4) or (b)(5). Absent the provision of information from the original manufacturer, this will result in increased requests for commodity classifications and increased license applications from the university community, which already bears a large compliance burden given the broad range of activities and items on our campuses that are impacted by the U.S. export control regulations.

Closing

AUECO supports the goals of the export reform initiative, particularly the effort to create positive lists and “bright lines” for controlled items. We believe that such positive lists promote export compliance, and that every effort should be made to limit the use of catch-all descriptions of items controlled on the CCL. We understand that complete elimination of the “specially designed” catch-all is not possible at this time and appreciate the adoption of a clear definition of the term. We thank the Department of Commerce for the opportunity to comment on the proposed definition.

Sincerely,



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