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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 772 and 774

[Docket No. 120403245-1034-01]

RIN: 0694-AF66

“Specially Designed” Definition

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: As part of the President’s Export Control Reform (ECR) Initiative, this proposed rule, and a separate proposed rule from the Department of State, Directorate of Defense Trade Controls, being published in conjunction with this document, sets forth, as much as possible, a

common definition of the term “specially designed” for use in the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR). The term “specially designed” is used widely in the Commerce Control List (CCL) and would play an important role in the “600 series” that the Bureau of Industry and Security (BIS) has proposed to create to control less sensitive defense articles transferred from the United States Munitions List (USML) to the Commerce Control List (CCL). The revisions in this rule are part of Commerce’s retrospective plan under EO 13563 completed in August 2011. Commerce’s full plan can be accessed at: <http://open.commerce.gov/news/2011/08/23/commerce-plan-retrospective-analysis-existing-rules>.

DATES: Comments must be received by BIS no later than [INSERT DATE 45 DAYS AFTER PUBLICATION].

ADDRESSES: Comments on this rule may be submitted to the Federal rulemaking portal (www.regulations.gov). The regulations.gov ID for this rule is: BIS-2012-0021. Comments may also be submitted via e-mail to publiccomments@bis.doc.gov or on paper to Regulatory Policy Division, Bureau of Industry and Security, Room 2099B, U.S. Department of Commerce, 14th St. and Pennsylvania Ave., NW, Washington, DC 20230. Please refer to RIN 0694-AF66 in all comments and in the subject line of e-mail comments. All comments must be in writing. All comments (including any personal identifiable information) will be available for public inspection and copying. Those wishing to comment anonymously may do so by submitting their comment via regulations.gov and leaving the fields for identifying information blank.

FOR FURTHER INFORMATION CONTACT: Timothy Mooney, Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482-2440, Fax: (202) 482-3355, E-mail: timothy.mooney@bis.doc.gov.

SUPPLEMENTARY INFORMATION: The revisions in this proposed rule are part of Commerce’s retrospective plan under EO 13563 completed in August 2011.

Elsewhere in this issue of the Federal Register, BIS publishes an advanced notice of proposed rulemaking, *Feasibility of Enumerating “Specially Designed” Components*, requesting comments on the feasibility of positively identifying “specially designed” components on the CCL. That proposal is a part of a longer term project the U.S. Government intends to undertake with the multilateral export control regimes.

Background

On July 15, 2011, BIS proposed a single definition of the term “specially designed” as it would be used in the proposed “600 series” and the rest of the Commerce Control List (CCL) (the “July 15 proposed rule”) (76 FR 41958). This action would revise that proposed definition.

Additionally, the State Department is concurrently publishing a proposed rule to create, to the extent possible, a common definition of “specially designed” in the International Traffic in Arms Regulations (ITAR). After reviewing comments received in response to both proposed rules, the Departments of Commerce and State plan to publish final rules amending the Export Administration Regulations (EAR) and ITAR so that they have, to the extent possible, common definitions of the term. The revisions in this rule are part of Commerce’s retrospective plan under EO 13563 completed in August 2011. Commerce’s full plan can be accessed at: <http://open.commerce.gov/news/2011/08/23/commerce-plan-retrospective-analysis-existing-rules>.

All references to the United States Munitions List (USML) in this rule are to the list of defense articles that are controlled for purposes of export pursuant to the ITAR, 22 CFR Parts 120 *et seq.*,

and not to the list of defense articles on the United States Munitions Import List (USMIL) controlled by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for purposes of import, under its regulations at 27 CFR Part 447. Pursuant to section 38(a)(1) of the Arms Export Control Act (AECA), all defense articles controlled for export or import are part of the USML under the AECA, but, for the sake of clarity, the list of defense articles controlled by ATF for purposes of import are on the USMIL. The transfer of defense articles from the ITAR's USML to the EAR's CCL for purposes of export controls does not affect the list of defense articles controlled on the USMIL under the AECA for purposes of import controls.

A common definition of the term "specially designed" that is as clear and objective as possible is vital to the Administration's ECR Initiative. Many of the controls in the CCL use the term. Most of the new "600 series" ECCNs that have been proposed to control items the President determines no longer warrant control under the ITAR pursuant to AECA section 38(f) use the term. Several of the USML categories the State Department proposes to revise use the term as well.

The State Department has decided to revise the USML to make it more "positive." A "positive" list uses more objective parameters to describe the items controlled. As described in the ANPR referenced in the summary of this rule, BIS plans to continue the process of revising the CCL so that it is more "positive" as well.

BIS cannot, however, immediately remove all references to the term in the CCL and replace them with lists of specific items that warrant control because the lists of items controlled by the multilateral export control regimes rely on the term extensively. Most of the CCL is based on

and implements these regime lists. Moreover, BIS has not developed lists of which specific items would be “specially designed.” Such an effort would take many years to complete and would require BIS to prepare and submit proposals to the regimes and then receive approval of those proposals to change the relevant control text.

In addition, the new “600 series” ECCNs that have been proposed to control items that the President determines no longer warrant control on the USML must use a catch-all “specially designed” term to avoid inadvertently de-controlling items other than common, single unassembled parts that are now ITAR-controlled as “specifically designed, modified or configured” for a military application. As the State Department has described in its previous ANPR and proposed rules, much of the ITAR now relies upon catch-all controls. For example, the control for military electronic components, parts, components, accessories, and associated equipment is in USML Category XI(c), which controls “[c]omponents, parts, accessories, attachments, and associated equipment specifically designed or modified for use with equipment in paragraphs (a) and (b) of this category, except for such items as are in normal commercial use.” No other detail is provided. USML (22 CFR Part 121) Category XI(a) similarly uses a broad catch-all control phrase to control “[e]lectronic equipment not included in Category XII of the [USML] which is specifically designed, modified or configured for military applications.” The examples provided in the rule are not an exhaustive list of controlled items. USML Category VIII(h) similarly controls all “[c]omponents, parts, accessories, attachments and associated equipment (including ground support equipment) specifically designed or modified for the articles in paragraphs (a) through (d) of [Category VIII], excluding aircraft tires and propellers used with reciprocating engines,” other than the parts and components that are

standard equipment in civil aircraft as described in the “Note” to USML Category VIII.

Similarly, USML Category XII(e) controls “[c]omponents, parts, accessories, attachments and associated equipment specifically designed or modified for the [fire control, range finding, optical, night vision and other articles enumerated in] paragraphs (a) through (d) of this category, except for such items as are in normal commercial use.”

The “specially designed” definition proposed here would capture the items currently captured under the ITAR “specifically designed, modified or configured” for a military application catch-all. BIS understands that the issues associated with catch-all control text would largely be transferred from one set of regulations to another. However, the Administration believes that industry and government would benefit from adopting this new definition because doing so would confine the term’s use to a single set of regulations for a large volume of parts, components, and other items that do not warrant the worldwide and collateral controls of the ITAR. Moreover, this action would objectively define the catch-all term “specially designed” for such items, consistently apply the “normal commercial use” carve-outs described above, and also implement the statement of policy in ITAR section 120.3, consistent with the AECA. Under that policy, the ITAR, and by implication, the new “600 series” ECCNs, should not control items that (a) have predominant civil applications and performance equivalents to those used for civil applications and (b) do not have significant military or intelligence applicability such that control under the ITAR (or a new “600 series” ECCN) is warranted.

This proposed definition would also provide the public with an as objective as possible basis for determining whether any other item on the CCL is “specially designed,” thus responding to a common industry suggestion for improving the CCL. In addition, the proposed definition

responds to a common industry request to clarify that “specially designed” does not mean merely “capable of use in” or “capable of use for” another item. For example, non-application specific general purpose integrated circuits that are not designed for a particular application would not be “specially designed” items, even if they are used in controlled end items. Rather, the extent of the controls on such circuits would be described by the technical and other parameters in Category 3 of the CCL.

Although BIS does not propose to remove references to “specially designed” that are part of multilateral control texts, it does have the discretion to define the term so long as the definition is not inconsistent with how the regimes define the term. The Missile Technology Control Regime (MTCR) is the only one of the four multilateral export control regimes to define the term. BIS believes that the proposed definition is not inconsistent with the MTCR definition, which is in EAR § 772.1. BIS asks the public to comment in particular on whether this proposed definition would result in specific items that are not now controlled for Missile Technology (MT) reasons on the CCL to become controlled for MT reasons. We also ask for public comments on whether this definition would remove from control items that are now controlled for MT reasons on the CCL as a result of the application of the MTCR definition. Additionally, as in the July 15 proposed rule, BIS asks the public to test this proposed definition to determine its ease of use, whether it meets the nine objectives identified for the term, and how it corresponds to what the public considers “specially designed” items.

Objectives for the “specially designed” definition

The July 15 proposed rule included nine objectives for the revised “specially designed”

definition. These objectives have not changed. The U.S. Government is committed to adopting a “specially designed” definition under the EAR and ITAR that would achieve these objectives.

The nine objectives are to:

- i) Preclude multiple or overlapping controls of similar items within and across the two control lists;
- ii) Be easily understood and applied by exporters, prosecutors, juries, and the U.S. Government -
- *e.g.*, by using objective, knowable, and clear requirements that do not rely upon a need to investigate and divine the intentions of the original designer of a part or the predominant market applications for such items;
- iii) Be consistent with definitions used by the multilateral export control regimes;
- iv) Not include any item specifically enumerated on either the USML or the CCL and, in order to avoid a definitional loop, do not use “specially designed” as a control criterion;
- v) Be capable of excluding from control simple or multi-use parts such as springs, bolts, and rivets, and other types of items the U.S. Government determines do not warrant significant export controls;
- vi) Apply to both descriptions of end items that are “specially designed” to have particular characteristics *and* to parts and components that were “specially designed” for particular end

items;

vii) Apply to materials and software because they are “specially designed” to have a particular characteristic or for a particular type of end item;

viii) Not increase the current control level to “600 series” control or other higher end controls of items (*i.e.*, not move items currently subject to a lower control status to a higher level control status), particularly current EAR99 items, which are now controlled at lower levels; *and*

ix) Not, merely as a result of the definition, cause historically EAR-controlled items to become ITAR controlled.

BIS believes that this proposed definition, and its counterpart published by the State Department, achieves these nine objectives. However, we invite public comments and ideas for how to define the term to meet or exceed all these objectives, and to provide additional objectives for such a term.

BIS received many responses to the proposed “specially designed” definition in the July 15 proposed rule. The comments, along with the additional review of this issue the U.S.

Government conducted in conjunction with BIS’s Technical Advisory Committees (TACs) and State’s Defense Trade Advisory Group (DTAG), identified additional changes necessary to achieve the nine objectives for “specially designed.” This rule proposes a revised definition of “specially designed” to allow this term to play the key role envisioned for it under the ECR

Initiative.

Similar to the July 15 proposed definition, this proposed definition adopts a “catch and release” approach. Paragraph (a) of the definition contains broad bases for items to be “specially designed” – the “catch” – and paragraph (b) contains various exceptions to an item’s being “specially designed” – the “release.” BIS believes that this structure creates an objective and common definition for both the EAR and ITAR, which nonetheless can be tailored and refined over time as necessary. This definition also simultaneously meets the nine objectives defined above while, with respect to the “600 series” items, also remains consistent with the policy standards set out in ITAR section 120.3 and the carve-outs in various USML categories that do not control items “in normal commercial use.” BIS believes that this approach more readily lends itself to analysis in a decision tree format, *i.e.*, with a series of “yes” and “no” questions leading to a conclusion about whether an item is “specially designed.” BIS further believes that this format will contribute to a more orderly and efficient determination about whether an item is “specially designed.” This change would, then, eventually facilitate enhanced public understanding of the definition of the term.

Summary of public comments on “specially designed”

Generally, public comments on the July 15 proposed rule supported the overall ECR Initiative and the proposed rule. In particular, commenters supported creating the “600 series,” which most commenters characterized as a sensible approach to addressing a fairly complicated problem. However, most commenters expressed concerns about the proposed “specially designed” definition, along with transition-related concerns that are being addressed in a separate

proposed rule to be published in the Federal Register. For example, commenters felt that the new definition was difficult to understand and would capture items that should not be considered “specially designed.” The comments are discussed in greater detail below in regards to the specific concerns with the July 15 proposed rule. The comments can be reviewed at:

http://efoia.bis.doc.gov/pubcomm/records-of-comments/record_of_comments_usml.pdf

BIS took into account the comments from the July 15 proposed rule when developing the revised definition of “specially designed” proposed here. BIS intends this revised definition to be evaluated on its own merits, and the public need not review the July 15 proposed rule to understand this action. Once the public comments on this rule are reviewed and responded to, BIS intends to publish a final “specially designed” definition.

However, a general summary of the July 15 definition and the responses to it provides context for this proposed definition. In the July 15 proposed rule, BIS suggested defining “specially designed” in four paragraphs. Paragraph (a) would have identified what items would be “specially designed” except for “parts” and “components.” Paragraph (b) would have identified which “parts” and “components” would be “specially designed.” The paragraph (c) and (d) exclusion paragraphs would have identified certain items that would not be “specially designed.” Most commenters supported paragraph (a) of the proposed definition. The majority of commenters suggested also adopting paragraph (a) for “parts” and “components.” Additionally, the majority of comments received indicated the public could understand and apply the paragraph (a) criteria, so BIS decided to include the same type of criteria as part of the proposed paragraph (a)(1) criteria included in this rule’s proposed definition of “specially designed.”

However, a small number of commenters indicated that the proposed paragraph (a) could result in confusion over whether an item was “specially designed,” because the definition still relied on design intent. This proposed “specially designed” definition addresses that concern by adopting a single paragraph (a) for determining what items are “specially designed.” Under the proposed structure, an item meeting one of the three listed criteria would be considered “specially designed.”

Most of the concerns with the definition related to paragraphs (b), (c), and (d), which defined non-specific “parts” or “components” could be considered “specially designed.” Of the commenters criticizing these paragraphs, most believed the exclusions in paragraphs (c) and (d) were difficult to understand and, once understood, would have resulted in items that they had not historically considered to be “specially designed” to become controlled as a result of the definition. In particular, the definition would have caused non-specific “parts” and “components” designed for controlled and uncontrolled applications or no particular application to become “specially designed,” and therefore subject to control. Thus, the definition would have resulted in some items’ control status being undefined until the items first were used in a controlled, or uncontrolled item. BIS believes the paragraphs (b)(4) and (b)(5) proposed here address those concerns.

I. Proposed Adoption of a Revised “Specially Designed” Definition

A. Discussion of each Element of the Proposed Definition and its Notes

The definition begins with introductory text to provide guidance on the proper steps for analyzing the definition. This brief introductory text would assist the public in understanding that

they must follow the sequential analysis set forth below. Specifically, the public is to begin with paragraph (a)(1) and proceed through each subsequent paragraph. This introductory text would also specify that commodities subject to the EAR described in any paragraph (b) subparagraph are not “specially designed” under this definition.

1. Paragraph (a) identifies “specially designed” items

Paragraph (a) begins with the phrase “Except for items described in (b), an ‘item’ is ‘specially designed’ if, as a result of ‘development,’ it [is within the scope of any one of three subparagraphs discussed below].” It is the beginning of the “catch” in the “catch and release” structure of the definition. With respect to ECCNs containing the term “specially designed,” an item is “caught” as “specially designed” if any of the three elements of paragraph (a) apply and none of the elements of paragraph (b) apply. The word “items” refers to how the term is defined in the EAR, *i.e.*, any “commodity,” “software,” or “technology.”

Paragraph (a) is limited by the phrase “if, as a result of ‘development.’” The EAR defines “development” as “related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts.” Determining whether an item is “a result of development” is a threshold question for whether an item is “specially designed;” an item is considered to be “specially designed” under this paragraph only if someone engaged in any of these “development” activities with respect to that item.

Thus, there are three questions an exporter, reexporter or transferor must ask to determine if an item is within the scope of paragraph (a):

1. Does the item, as a result of “development,” have properties “peculiarly responsible for” achieving or exceeding the performance levels, characteristics, or functions described in the relevant ECCN or USML paragraph?
2. If the item is a part or component, is it, as a result of “development,” necessary for an enumerated or referenced commodity or defense article to function as designed?
3. If the item is an accessory or attachment, is it, as a result of “development,” used with an enumerated or referenced commodity or defense article to enhance its usefulness or effectiveness?

If the answer to all three questions is “no,” then the item is not “specially designed” and no further analysis of paragraph (b) is necessary. If the answer to any one of the questions is “yes,” then the exporter, reexporter or transferor must determine whether any one of the five paragraph (b) exclusions applies. If any one of the five paragraph (b) exclusions apply, then the item is not “specially designed.” If none do, then the item is “specially designed.”

Paragraph (a)(1). Paragraph (a)(1) would capture an item if, as a result of “development,” it “has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions described in the relevant ECCN or U.S. Munitions List (USML) paragraph.” This criterion is essentially the same as the one that was proposed in the July 15 rule. Based on the comments, the public found this part of the definition clear. The positive response was, perhaps, due to the fact that it is taken from the EAR’s current definition of

“required” at § 772.1. Although that definition, by its terms, applies only to technology and software, BIS believes that the principle of that definition – which is that items are not controlled merely because they are somehow capable of use with a controlled item –equally applies to commodities for purposes of the proposed definition. Therefore, even if something is capable of being used with a controlled item, it is not captured by this part of paragraph (a) unless someone did something during the item’s development so that it would achieve or exceed the performance levels, characteristics, or functions described in a referenced ECCN or USML paragraph.

Example for paragraph (a)(1): ECCN 1A007 controls equipment and devices specially designed to initiate charges and devices containing energetic materials, by electrical means. If a piece of equipment or device, as a result of “development,” has properties peculiarly responsible for initiating energetic materials by electrical means, such equipment or device would be “specially designed” under paragraph (a)(1) of the proposed definition. For example, if the equipment was designed to communicate electronically with devices containing energetic materials, such as sending a detonation signal and having safety features to ensure other electronic equipment could not detonate the device containing the energetic material, such equipment or device would be “specially designed” under this proposal.

Note to paragraph (a)(1). This rule would add a note to paragraph (a)(1) to provide an example of an item that would, as a result of “development,” meet the paragraph (a)(1) criterion. This note would also include an example of an item that would not, as a result of “development,” meeting the paragraph (a)(1) criterion. In addition to providing two concrete examples under

ECCN 2B007, this note would also specify that similar to the definition of “required” the peculiarly responsible for criterion in paragraph (a)(1) would not be limited to exclusive use.

Paragraph (a)(2). Paragraph (a) would capture a part or component if, as a result of “development,” it “is necessary for an enumerated or referenced commodity or defense article to function as designed.” This element is similar to (a)(1), but it must be listed separately because not all descriptions of commodities on the USML and the CCL include performance levels, characteristics, or functions as a basis for control. Paragraph (a)(2) would capture parts and components that are necessary for another item on the CCL or the USML to function “as designed.” If an item would function “as designed” without the part or component at issue, then that part or component is not captured by paragraph (a)(2).

BIS has deliberately separated the terms ‘enumerated’ and ‘referenced’ in paragraph (a)(2), which are unique to the EAR’s definition of the term. As described below, an ‘enumerated’ item is one that is controlled on the USML or the CCL (except for AT-only items) for reasons other than being “specially designed.” The CCL, however, contains notes that exclude from control parts and components “specially designed” for uncontrolled items. Such uncontrolled items are merely ‘referenced’ but not ‘enumerated.’ Note 2 to ECCN 1A002 provides an example of items excluded from control based on being “specially designed” for a referenced item. Under Note 2 to 1A002, if the semi-finished item was “specially designed” for a referenced sporting goods item, such as a golf club designated as EAR99, such a semi-finished item is excluded from 1A002.

Example for paragraph (a)(2): ECCN 7A001.b controls angular or rotational

accelerometers specified to function at linear acceleration levels exceeding 100 g and, according to the heading, specially designed components therefor. The heading of 7A001 is an example of a catch-all control for “specially designed” components for the accelerometers subject to control in 7A001.b. In this case, if a component, as a result of “development,” is necessary for an accelerometer enumerated in 7A001.b to function as designed, such component would be considered “specially designed” as a result of paragraph (a)(2), unless the component was excluded from “specially designed” on the basis of paragraph (b) of the proposed definition.

Paragraph (a)(3). Paragraph (a)(3) would capture an accessory or attachment if, as a result of “development,” it “is used with an enumerated or referenced commodity or defense article to enhance its usefulness or effectiveness.” BIS takes this phrase from the ITAR’s current and the EAR’s proposed definition of “accessory” and “attachment.”

Example for paragraph (a)(3): ECCN 3B001 controls specific types of equipment for manufacturing semiconductor devices or materials, and specially designed components and accessories therefor. ECCN 3B001.i controls imprint lithography templates designed for integrated circuits by 3A001. If, as a result of “development,” an accessory is used with equipment enumerated in 3B001.i to enhance its usefulness or effectiveness, such an accessory would be “specially designed” under the catch-all control for “specially designed” accessory included in the heading of 3B001, unless the accessory was excluded from “specially designed” on the basis of paragraph (b) of the proposed definition.

2. Paragraph (b) identifies exclusions from “specially designed”

BIS proposes adopting a simplified, single paragraph structure for excluding certain parts, components, accessories and attachments from the “specially designed” definition. Under this proposal, any “part,” “component,” “accessory,” or “attachment” described in an exclusion paragraph under (b)(1), (b)(2), (b)(3), (b)(4) *or* (b)(5), would not be controlled by a ‘catch-all’ provision of an ECCN.

The five exclusions under paragraph (b) would refine the set of “parts,” “components,” “accessories” and “attachments” that would be subject to the ‘catch-all’ controls on the CCL. In this way, paragraph (a) and (b) are inextricably linked and together identify the “parts,” “components,” “accessories,” and “attachments” that are “specially designed” for purposes of the ‘catch-all’ controls on the CCL.

Paragraph (a), described above, would create objective tests for what “items,” as a result of “development,” would be “specially designed” based on the criteria identified in (a)(1), (a)(2) *or* (a)(3). Paragraph (b) would create objective tests for what “parts,” “components,” “accessories,” and “attachments” are excluded from “specially designed” under the exclusion criteria identified in (b)(1), (b)(2), (b)(3), (b)(4) *or* (b)(5). Together, the objective criteria identified in paragraph (a) and the objective exclusion criteria identified in paragraph (b) allow the proposed “specially designed” definition to achieve the nine objectives identified above for the definition.

Paragraph (b) codifies the principle in ITAR section 120.3 that, in general, a commodity should not be ITAR controlled if it has a predominant civil application or has performance

equivalent (defined by form, fit, and function) to articles used for civil applications. If such an article nonetheless warrants control under the ITAR because it provides the U.S. with a critical military or intelligence advantage or for another reason, then it is or should be enumerated on the USML, as described in the “bright line,” “positive list” objectives listed in the Department of State’s December 10, 2010 Federal Register notice, *Revisions to the United States Munitions List* (75 FR 76935).

Another purpose of paragraph (b) is to apply the ITAR concept of “in normal commercial use” equally and consistently to all non-specific, catch-all controls with respect to the “600 series.” Under the current USML, this concept of exclusions for certain items “in normal commercial use” is variously worded in multiple catch-all paragraphs in the current USML. For example, Category XI(c), by its terms, does not control electronic components, parts, accessories, attachments or associated equipment specifically designed or modified for military electronics if they are “in normal commercial use.” Similarly, Category XII(e) does not control components, parts, accessories, attachments or associated equipment specifically designed or modified for fire control systems, military lasers, ITAR-controlled night vision equipment, military inertial navigation equipment, and other items controlled by Category XII(a) through (d) that are “in normal commercial use.” Categories XVI(b) and XIV(n)(2) have similar carve-outs for items in normal commercial use. In addition, Category VIII(h), by virtue of a note, does not control parts, components, accessories, or attachments specifically designed or modified for military aircraft or engines if they are, among other things, standard equipment in certain civil aircraft.

These five exclusions under paragraph (b) play an important role in the proposed “specially designed” definition and are described below in greater detail. The description below includes examples of parts, components, accessories and attachments that would be excluded from “specially designed” under each of the respective paragraph (b) exclusions.

Exclusion paragraph (b)(1). Paragraph (b)(1) would exclude any “part,” “component,” “accessory,” or “attachment” from a ‘catch-all’ provision of an ECCN if the “part,” “component,” “accessory” or “attachment” is enumerated in a USML paragraph. This exclusion also addresses an important concept regarding how the USML and CCL relate to each other, and the correct order in which the public should review the two control lists. When determining an item’s proper jurisdiction and classification, before reviewing the CCL, a person must examine the ITAR to determine that the item is not subject to the ITAR, or to the exclusive jurisdiction of any of the other departments or agencies of the U.S. Government identified in § 734.3(b)(1)(i) of the EAR.

Paragraph (b)(1) would clarify that any “part,” “component,” “accessory,” or “attachment” enumerated on the USML, is excluded from the definition of “specially designed,” because it would remain subject to the ITAR and would not be controlled under a catch-all provision of an ECCN. Under the current USML, most of its categories end with a broad catch-all control on “parts,” “components,” “accessories,” and “attachments” that were specifically designed or modified for the particular USML category. Under the USML categories being proposed under the USML-to-CCL process, in most cases these broad catch-all controls would no longer be used. Instead, these items would be enumerated on the revised USML’s “positive” control list.

This change will make the paragraph (b)(1) exclusion more useful by more clearly defining the line between control under the USML and CCL. The items in former ‘catch-all’ controls found at the end of most of the USML categories would be added to the CCL under the “600 series” .x paragraphs that are being created under the USML-to-CCL process and would include “specially designed” criteria.

Example of a “component” excluded under paragraph (b)(1). On December 6, 2011, the Department of State proposed a rule, *Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VII* (76 FR 76100) that, among other things, would control ground vehicle components, parts, accessories, attachments, and associated equipment identified in paragraphs (g)(1)-(14) of the rule. Under proposed paragraph (g)(5), reactive armor parts and components would be controlled under USML Category VII. If a company uses reactive armor components enumerated on the USML in producing the EAR item, such a component would not be captured under a ‘catch-all’ control on the CCL, because the reactive armor components would be enumerated on the USML and would therefore be subject to the ITAR, not the EAR. Paragraph (b)(1) of this proposed rule would make this existing policy explicit by excluding such USML enumerated “parts,” “components,” “accessories,” or “attachments” from the definition of “specially designed.”

Exclusion paragraph (b)(2). Paragraph (b)(2) would exclude any single unassembled “part” that is of a type commonly used in multiple types of commodities not enumerated on the USML or the CCL. The paragraph (b)(2) exclusion would include an illustrative list of the types of “parts” excluded under this paragraph. These “parts” include threaded fasteners (e.g., screws,

bolts, nuts, nut plates, studs, inserts), other fasteners (*e.g.*, clips, rivets, pins), basic hardware (*e.g.*, washers, spacers, insulators, grommets, bushings, springs), wire, and solder.

In preparing this proposed rule, BIS evaluated the merits of expanding the scope of this exclusion to cover minor components, but ultimately determined that the expansion would not be warranted, particularly in light of the other exclusions and the proposed criterion in paragraph (a)(2). However, BIS determined it should clarify the illustrative list of single unassembled “parts” that would be excluded from the definition of “specially designed” on the basis of the exclusion paragraph (b)(2).

Paragraph (b)(2) would adopt the phrase “used in multiple types of commodities not enumerated on the CCL or the USML” instead of the phrase “used in multiple types of civil items.” BIS believes the former phrase is more specific than the latter, and would clarify this exclusion. BIS also proposes to change the illustrative list of single unassembled “parts” that may be excluded from “specially designed” on the basis of paragraph (b)(2). BIS further proposes using the term “basic hardware” instead of the term “common hardware,” and to include the term “springs” in the parenthetical examples of basic hardware. Finally, BIS proposes to add the term “solder” as another type of “part” that would be within the scope of this exclusion paragraph (b)(2).

Example of a “part” excluded under paragraph (b)(2). ECCN 8A992 controls vessels, marine systems or equipment, not controlled by 8A001, 8A002 or 8A018, and specially designed parts therefor. A company developing a new vessel that would be controlled under 8A992 needs to modify nut plates for use in it. The modified nut plate is an example of a single unassembled

“part” that meets the necessary criteria in paragraph (a)(2). However, if the modified nut plate is of a type commonly used in multiple types of commodities not enumerated on the USML or the CCL, it would not be “specially designed” on the basis of paragraph (b)(2). Although, as a result of “development” the “part” may have some unique characteristic, such as being a cut-to-length nut plate, substantively the “part” is common to multiple types of commodities not enumerated on the USML or the CCL. For example, a similar type of nut plate may also be used for assembling self-assembled furniture designated as EAR99.

Exclusion paragraph (b)(3). Under paragraph (b)(3), a “part,” “component,” “accessory,” or “attachment” that would otherwise be controlled by a ‘catch-all’ provision of an ECCN would not be controlled if it has the same performance capabilities as a “part,” “component,” “accessory,” or “attachment” used in or with a commodity that (i) is or was in “production” (*i.e.*, not in “development”) *and* (ii) is either not enumerated on the CCL or USML, or is enumerated in an ECCN controlled only for Anti-Terrorism (AT) reasons. In the context of paragraph (b)(3), an item in an ECCN controlled only for AT reasons is considered enumerated provided it is not controlled in a ‘catch-all’ paragraph.

Proposed paragraph (b)(3) would use the phrase “performance capabilities” instead of the term “function,” which was in the July 15 proposal. Several comments to the July 15 proposed rule suggested using this alternative term because performance capabilities is a well understood concept under the EAR, and is easier to understand than function. BIS agrees.

In addition, paragraph (b)(3)(i) would simplify the exclusion by removing the term “serial

production,” and substituting the EAR-defined term “production,” along with a parenthetical explanation that if an item is in “production” it is no longer in “development.” Some of the comments in response to the July 15 proposed rule did not see a sufficient distinction between serial production and “production” to warrant adding a new EAR definition and creating another concept the public would need to understand to apply the “specially designed” definition. After further consideration, BIS agrees that this suggested change would clarify the intent of exclusion paragraph (b)(3) and further simplify the definition.

Paragraph (b)(3)(ii) would expand the scope of what was included in the July 15 proposed rule with the second criterion extending to ECCNs controlled only for Anti-Terrorism (AT) reasons. The July 15 exclusion was limited to EAR99 items. BIS made this change because such a “part,” “component,” accessory” or “attachment” crosses over into broader commercial applicability and thus does not warrant being treated as “specially designed.” This crossing over into broader commercial applicability occurs when a “part,” “component,” “accessory,” or “attachment” has the same form, fit and performance capabilities as a “part,” “component,” “accessory,” or “attachment” used in or with an item that is either not enumerated on the CCL or USML or is only controlled for AT reasons. If such an item nonetheless warranted control because of certain capabilities or potential uses of concern for national security, foreign policy, or other reasons, then the item would be enumerated on either the USML or the CCL.

Note to paragraph (b)(3). This proposed rule would add a note to clarify the applicability of paragraph (b)(3). This note would specify that commodities in “production” that are subsequently subject to “development” activities, such as those pertaining to quality

improvements, cost reductions, or feature enhancements, remain in “production.” However, any new models or versions of such commodities developed from such efforts that change the basic performance or capability of the commodity are in “development” until and unless they enter into “production.” This proposed rule would use the term “production” instead of “serial production” to conform to the use of “production” in paragraph (b)(3).

This Note to paragraph (b)(3) further clarifies the relationship between “production” and “development” in the context of this exclusion. When an item enters “production,” there may still be some peripheral “development” activities for the next generation of the item in which the “part,” “component,” “accessory,” or “attachment” is used. This note would provide guidance on when the exclusion would no longer apply and when a separate determination would need to be made regarding whether a particular “part,” “component,” “accessory,” or “attachment” would no longer be excluded.

Example of excluded component under paragraph (b)(3). A company manufactures a fire truck designated as EAR99. The manufacturer uses a radiator originally designed in the 1980s for use in large military transport vehicles. The cost of the original 1980s radiator has now dropped significantly, so the company incorporates that same radiator into a fire truck that went into “production” in 2010. Under this example, although the radiator is not a “specially designed” “component” because it is necessary for large military transport vehicles to function as designed, it might nonetheless be caught by the criteria in paragraph (a)(2). However, because the “component” with the same form, fit and performance capabilities is used in the “production” of an EAR99 fire truck, it would be excluded from the “specially designed” definition by

paragraph (b)(3). If, for some reason, such radiators warranted control for national security, foreign policy, or other reasons, then it would be enumerated on either the USML or the CCL. It would thus be controlled regardless of its use in a civil or military end item.

Exclusion paragraph (b)(4) and (b)(5). This proposed rule would add paragraphs (b)(4) and (b)(5) to address aspects of unintended overreaching identified in the definition of “specially designed” in the July 15 proposed rule. The comments identified one unintended result of eliminating design intent from the criteria used to identify a “specially designed” “component” or “part” is that the first use of a part or component could result in a part or component being considered “specially designed” under the rule. This result could occur even if the “part” or “component” had been originally developed for a general purpose that was not specific to the ‘enumerated’ item for which the “part” or “component” would have been “specially designed” under the July 15 definition.

To address this unintended overreach, BIS decided that some element of design intent should be included in the proposed “specially designed” definition. Through paragraph (b)(4), this rule proposes excluding “parts,” “components,” “accessories” and “attachments” if they were or are being developed with a reasonable expectation of (i) use in or with commodities described on the CCL *and* commodities not enumerated on the CCL or the USML, *or* (ii) use in or with commodities not enumerated on the CCL or the USML. As discussed below, through paragraph (b)(5), this rule proposes excluding “parts,” “components,” “accessories,” and “attachments” if they were or are being developed for no particular application.

Although these exclusion concepts under paragraphs (b)(4) and (b)(5) are new to the proposed definition of “specially designed,” they are little more than a restatement of BIS’s application of the term “specially designed” now. BIS had not included these two exclusions in the July 15 proposed rule in an effort to avoid overtly design-intent based aspects of the definition. The public comments, however, as noted above made it clear that without such carve-outs proposed in this rule under (b)(4) and (b)(5), the EAR would likely over-control items based on their first uses. Thus, the proposed paragraphs (b)(4) and (b)(5) are intended to allow people who know or who can determine the design intent of their “part,” “component,” “accessory,” or “attachment” to exclude it from the definition of “specially designed” when it was or is being developed for the items identified in (b)(4)(i), or (ii), or (b)(5). These exclusion paragraphs (b)(4) and (b)(5) would not create a burden to know the original design intent, but they would allow those who know the original design intent to exclude those “parts,” “components,” “accessories,” or “attachments” from being controlled as “specially designed.” This change is not a departure from the current BIS position on the subject. It is, however, a specific, precise written articulation of the practice that would become part of the EAR.

Example of a “component” excluded under paragraph (b)(4)(i). An example of a component that would not be “specially designed” and excluded under (b)(4)(i) is one that was or is being developed to be interchangeable between a military vehicle enumerated in ECCN 0A606.a *and* also a vehicle that is not described on the USML or the CCL, such as an EAR99 civilian vehicle. One example would be a component that a company designs that is used in both military vehicles as well as in firetrucks. Another example of a component that would not be “specially designed” as a result of (b)(4)(i) is one that was or is being developed to be

interchangeable between a military aircraft enumerated in ECCN 9A610.a and also a civilian aircraft that is controlled for AT-only reasons in ECCN 9A991.b, such as an aircraft actuator developed for use in military aircraft in ECCN 9A610.a and civil transport aircraft in 9A991.b.

Even though a component may be used interchangeably and meet the paragraph (b)(4) exclusion and thus not be “specially designed,” it does not necessarily mean that the component is exempt from export controls. The component may, for example, be positively identified on the USML and ITAR controlled, regardless of whether it is common to a vehicle or aircraft not enumerated on the CCL. The jurisdictional and classification status of any particular component must be determined by reviewing the full scope of the control lists to determine the appropriate jurisdiction and classification. Paragraph (b)(4)(i) merely states that such a component would not be within the scope of a ‘catch-all’ paragraph of an ECCN (i.e., would not be “specially designed”) based on its commonality with components not identified on the CCL or controlled for AT-only reasons.

Example of a “part” excluded under paragraph (b)(4)(ii). An example of a “part” that would not be “specially designed” as a result of (b)(4)(ii) is one that was or is being developed for use in or with commodities not enumerated on the CCL or the USML, such as a “part” being developed for use in a mining truck designated as EAR99. Again, the application of (b)(4)(ii) does not necessarily mean that such a part is uncontrolled. As a result of its characteristics or capabilities it may be positively listed on the USML or CCL and, as such, controlled by the applicable provisions. The jurisdictional and classification status of any particular component must be determined by reviewing the full scope of the control lists to determine the appropriate

jurisdiction and classification. Paragraph (b)(4)(ii) merely states that such a part would not be within the scope of a ‘catch-all’ paragraph of an ECCN (i.e., would not be “specially designed”) based on its development for use in or with commodities not enumerated on the CCL or the USML.

Exclusion paragraph (b)(5). As noted above, this rule would also add a paragraph (b)(5) to address another aspect of the unintended overreach identified in the definition of “specially designed” in the July 15 proposed rule. This paragraph (b)(5) exclusion is intended to address potential overreach that could occur even if the “part” or “component” had been originally developed for a general purpose that was not specific to the ‘enumerated’ item for which the “part” or “component” would have been “specially designed” under the July 15 definition. BIS would address this by excluding from “specially designed” on the basis of paragraph (b)(5) “parts,” “components,” “accessories” and “attachments” if they were or are being developed with no reasonable expectation of use for a particular application.

Example of a “component” excluded under paragraph (b)(5). An example of a component that would not be “specially designed” as a result of (b)(5) is one that was developed for general or multi-purpose applications. For example, many catalog electronic components are designed as basic building blocks for other equipment, regardless of whether the equipment is military or civilian, controlled or uncontrolled. Again, application of (b)(5) does not necessarily mean that such a component is uncontrolled, and as result of its characteristics or capabilities it may be positively listed on the USML or

CCL and, as such, controlled by the applicable provisions. The jurisdictional and classification status of any particular component must be determined by reviewing the full scope of the control lists to determine the appropriate jurisdiction and classification.

Paragraph (b)(5) merely states that such a component would not be within the scope of a ‘catch-all’ paragraph of an ECCN (i.e., would not be “specially designed”) based on its not having been designed for a particular application.

Note to paragraph (b)(4) and (b)(5). This proposed rule would also add a note to paragraph (b)(4) and (b)(5) to specify for a commodity not to be “specially designed” on the basis of paragraph (b)(4) *or* (b)(5), documents contemporaneous with its “development,” in their totality, must establish the elements of paragraph (b)(4) *or* (b)(5). The proposed note would also provide an illustrative list of documents that may be pointed to to demonstrate the applicability of the exclusions under (b)(4) or (b)(5). Such documents may include concept design information, marketing plans, declarations in patent applications, or contracts. Lastly, the note would specify that absent such documents, the “commodity” may not be determined to be excluded from the definition of “specially design” by virtue of paragraphs (b)(4) *or* (b)(5).

Proposed paragraphs (b)(4) and (b)(5) would create an incentive for parties responsible for making jurisdictional and classification determinations to maintain such documents for the life of the product in order to be able to demonstrate without ambiguity that it was or was not “specially designed” for a controlled item or application. The creation of such incentives would help national security by emphasizing the need for those responsible for making jurisdictional and classification self-determinations to do so in a reliable, consistent, documented way that is

consistent with the relevant export control regulations. The creation of such incentives would also help make U.S. exporters more reliable and predictable because they would be able to make and demonstrate with more certainty determinations regarding whether a commodity is or is not controlled by virtue of a “specially designed” catch-all in the regulations.

Note to paragraph (b)(5). This rule would also add another note to paragraph (b)(5) to specify that if one has “knowledge” that the commodity was or is being developed for a particular application, one cannot rely on paragraph (b)(5) to determine that a commodity was not “specially designed.” BIS would use the EAR defined term “knowledge” in this note to paragraph (b)(5) to establish a clear standard for when the commodity would not be eligible for being excluded from “specially designed” on the basis of paragraph (b)(5).

Note 1. This proposed rule would also add a new Note 1 to define ‘enumerated’ for purposes of the proposed “specially designed” definition. This note would read: ‘Enumerated’ means any item (i) on either the USML or CCL not controlled in a ‘catch-all’ paragraph and (ii) when on the CCL, controlled for more than AT-only reasons, except in the context of paragraph (b)(3), where an item in an ECCN controlled only for AT reasons is considered enumerated when it is not controlled in a ‘catch-all’ paragraph.

Examples of enumerated items. The law enforcement end items controlled in the heading of ECCN 0A978 are examples of enumerated commodities on the CCL. ECCN 0A978 specifies that it controls law enforcement striking weapons and includes six examples for the types of law enforcement striking weapons that are subject to control

under 0A978. The fiber optic hull penetrators and connectors controlled in ECCN 8A002.c are additional examples of enumerated commodities on the CCL. The ECCN specifies the hull penetrators controlled are limited to fiber optic hull penetrators or connectors.

Note 2. This proposed rule would also add a Note 2 to define ‘catch-all’ for purposes of the proposed “specially designed” definition. This note would read as follows: A ‘catch-all’ paragraph is one that does not refer to specific types of parts, components, accessories, or attachments but rather controls non-specific “parts,” “components,” “accessories,” or “attachments” because they were “specially designed” for an enumerated item. BIS is aware that the term ‘catch-all’ has also been used informally by the public to refer to the part 744 end-use and end-user controls that impose a license requirement on all items subject to the EAR. In preparing this proposed rule, BIS considered adding a new part 772 definition to clarify the two different contexts under which the term ‘catch-all’ would be used, but decided simply noting this in the preamble of this proposed rule would be sufficient.

Examples of catch-all controls. The phrase “and specially designed components therefor” in the heading of ECCN 1A005 is an example of a catch-all control on the CCL; it reaches all components that have been “specially designed” for the body armor enumerated in 1A005. The phrase “and specially designed components therefor” used in ECCN 3A001.c is another example of a catch-all control on the CCL. That catch-all control reaches all components that have been “specially designed” for the acoustic wave devices enumerated in 3A001.c.

3. Guidance for “specially designed” in the context of de-control notes.

Some ECCNs, such as 1A002, state that an item is *not* controlled if it is “specially designed” for a particular type of item, purpose, or application. As indicated by the introduction to paragraph (b) explained above, an item that would be “specially designed” under paragraph (a) and would not be controlled as a result of such a de-control provision in an ECCN nonetheless remains “specially designed” and, thus, uncontrolled regardless of whether any aspect of paragraph (b) would apply to it. The basis for this conclusion is that paragraph (b) states that it only applies to items that “would be *controlled* by a catch-all provision of an ECCN.”

II. Other Definition to Assist Public’s Review of the “Specially Designed” definition

This rule proposes to revise the definition of “end item” included in the July 15 proposed rule by proposing a definition that would more closely correspond with the ITAR definition of end item, although be EAR specific. BIS made this change because several commenters indicated that the July 15 definition, with the inclusion of the term ‘stand-alone,’ would cause confusion over whether an item was an “end item” or a “component.” BIS determined the best and simplest approach would be to revise the definition to more closely correspond to the “end item” definition used in the ITAR. This rule proposes defining “end item” as follows:

End item. This is an assembled commodity ready for its intended use. Only ammunition, fuel or other energy source is required to place it in an operating state. Examples of end items include ships, aircraft, firearms, and milling machines.

This rule also proposes splitting the proposed definition of “accessories and attachments” included in the July 15 proposed rule into separate but identical definitions for the terms “accessories” and “attachments.” As there will be locations in the EAR where either “accessories” or “attachments” but not both will be used, this change would avoid any potential confusion as to whether the definition applies to the terms when used separately. While “accessories” and “attachments” would have the same definitions, both would include a note at the end of each definition to indicate that the definition of “accessories” and “attachments” are the same. This rule proposes defining “accessories” and “attachments” as follows:

Accessories. These are associated items for any “component,” “end item,” or “system,” and which are not necessary for their operation, but which enhance their usefulness or effectiveness. For example, for a riding lawnmower, accessories and attachments will include the bag to capture the cut grass, and a canopy to protect the operator from the sun and rain. For purposes of this definition, accessories and attachments are the same.

Attachments. These are associated items for any “component,” “end item,” or “system,” and which are not necessary for their operation, but which enhance their usefulness or effectiveness. For example, for a riding lawnmower, accessories and attachments will include the bag to capture the cut grass, and a canopy to protect the operator from the sun and rain. For purposes of

this definition, attachments and accessories are the same.

As with the proposed “specially designed” definition, BIS requests comments on the proposed definitions of “end item,” “accessories,” and “attachments.” Any comments received on these three proposed definitions will be considered and addressed in the final rule adding these three definitions to the EAR.

BIS does not propose here to re-define the terms “part,” and “component,” that were included in the July 15 proposed rule.

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as extended by the Notice of August 12, 2011, 76 FR 50661 (August 16, 2011), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the

importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action,” but not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

2. Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB control number. This proposed rule would affect two approved collections: Simplified Network Application Processing + System (control number 0694-0088), which includes, among other things, license applications, and License Exceptions and Exclusions (0694-0137). Total burden hours associated with the PRA and OMB control numbers 0694-0088 and 0694-0137 are not expected to increase as a result of this rule. As part of the President’s Export Control Reform (ECR) Initiative, this proposed rule, and a separate proposed rule from the Department of State, Directorate of Defense Trade Controls being published in conjunction with this rule, sets forth, as much as possible, a common definition of “specially designed” for use in the EAR and the ITAR. This proposed rule would not move any items from the USML to the CCL, although the revised definition included here would play an important role in the “600 series” that would be used to control items transitioned from the USML to the CCL.

As stated in the July 15 proposed rule (76 FR 41958), BIS believed that the combined effect of all rules to be published adding items to the EAR that would be removed from the ITAR as part

of the administration's Export Control Reform Initiative would increase the number of license applications submitted by approximately 16,000 annually. As the review of the USML has progressed, the interagency group has gained more specific information about the number of items that would come under BIS jurisdiction whether those items would be eligible for export under license exception. As of [INSERT DATE OF PUBLICATION], BIS believes the increase in license applications may be 30,000 annually, resulting in an increase in burden hours of 8,500 (30,000 transactions at 17 minutes each) under control number 0694-0088.

3. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

4. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Chief Counsel for Regulations, Department of Commerce, submitted a memorandum to the Chief Counsel for Advocacy, Small Business Administration, certifying that proposed rule published on July 15, 2011, will not have a significant impact on a substantial number of small entities.

This proposed rule re-proposes, with certain changes, the definitions of “specially designed,” of “end item,” and of “accessories and attachments” that BIS originally proposed in the July 15 proposed rule. The changes proposed here do not impact the original certification.

Consequently, BIS has not prepared a regulatory flexibility analysis. A summary of the factual basis for the certification is provided below.

Number of Small Entities.

The Bureau of Industry and Security (BIS) does not collect data on the size of entities that apply for and are issued export licenses. Although BIS is unable to estimate the exact number of small entities that would be affected by this rule, it acknowledges that this rule would affect some unknown number.

Economic Impact

This rule will not have a significant impact on a small number of entities, and in fact will reduce the burden on small entities by facilitating enhanced public understanding of a key term used extensively on the Commerce Control List (CCL). This rule proposes a single definition for the term “special designed” and slightly revised definitions for the terms “end item,” “accessories,” and “attachments” BIS proposed in the July 15 proposed rule.

The proposed definition of “specially designed” would provide clear guidance to small entities, and all other entities, on the meaning of this term wherever it is used on the CCL. The term

“specially designed” is used extensively throughout the CCL, but up to this point the only definition included in the EAR has been under the Missile Technology Control Regime (MTCR) context. Outside of the MTCR context, the First Circuit’s ruling in *United States v. Lachman*, 387 F.3d 42, 52-53 (2004) provides a definition of the term “specially designed,” but for small entities, and all other entities, this requires reviewing the *Lachman* decision to understand the court-provided definition outside the MTCR context.

BIS is aware that some small entities, and other entities, instead of relying on the *Lachman* definition for the term “specially designed” outside the MTCR context have simply decided to submit classification requests to BIS for ECCNs where the term “specially designed” is used. Others have made subjective determinations of which types of items are “special” to or for a controlled end item. The CCL is intended to allow exporters to self-classify their items. If the *status quo*, where the term is not defined in the regulations, creates an incentive for the public to submit additional classification requests or make self-determinations that expose exporters to compliance risks, then the rule places a burden on all entities, large and small. All entities should be able to confidently self-classify their items on the CCL. BIS believes it should take steps to alleviate any concerns the public may have with self-classifying their items, including providing definitions for key terms used on the CCL, which is being done in this proposed rule and not making small entities and other entities to consult outside legal decisions in order to determine the meaning of a key term used under the EAR.

This proposed rule would reduce burdens on small entities and all other entities by proposing a single definition of the term “specially designed” to part 772 that would apply wherever the term is used. In the past, small entities, and other entities, have urged BIS to add a single definition of the term “specially designed” to the EAR. This proposed definition is consistent with the scope

of the other two definitions of the term “specially designed” that are currently in use.

Specifically, this rule’s proposed definition is consistent with the “specially designed” MTCR definition defined at § 772.1 of the EAR, and with the *Lachman* decision. BIS believes this rule’s proposed “specially designed” definition comes closest to encompassing the scope and intent of both the *Lachman* and the MTCR definitions, while also allowing this term to play the key role envisioned for it under the larger Export Control Reform (ECR) Initiative. This proposed rule identifies nine objectives for the term “specially designed” and encourages the public to submit comments on whether they agree with BIS that this proposed definition best achieves the nine objectives and whether the public may have any alternative that would better achieve the nine stated objectives.

The ECR Initiative is making fundamental changes to the U.S. export control system. These fundamental changes will protect and enhance U.S. national security interests, while at the same time also easing the burdens on small entities and all other entities. One of the key objectives of the ECR Initiative is to draw a bright-line between the USML and the CCL, including transitioning items that no longer warrant ITAR control to the CCL.

A bright-line between the two control lists will be a key benefit to small entities and all other entities. When small entities, and other entities, have difficulty in determining the jurisdiction and/or classification of their item, it creates a burden on such entities. The proposed definition of “specially designed” included in this rule is a key term being used to develop the bright-line between the USML and the CCL. Using this proposed “specially designed” definition in the “600 series” .x and .y paragraphs is a key structural element that will create a more “positive” USML and ensure that munitions items transitioned from the USML to the CCL are appropriately controlled in the applicable “600 series” ECCNs.

This rule is based on a simple catch-and-release concept. The proposed definition would allow for small entities, and all other entities, to use a simple set of “yes/no” questions to make determinations whether an item is or is not “specially designed.” The “release” portion of the proposed definition will also allow for items that no longer warrant being considered “specially designed” to be removed from “specially designed” once they have crossed over into broader commercial applicability. The five proposed paragraph (b) exclusions included in the proposed rule would allow the public to objectively know when an item would no longer be “specially designed.”

Conclusion

BIS is unable to determine the precise number of small entities that would be affected by this rule. Based on the facts and conclusions set forth above, BIS believes that any burdens imposed by this rule would be offset by the benefits that will occur with the fundamental changes being made to the U.S. export control system under the Export Control Reform Initiative and the USML-to-CCL process, which the definition of “specially designed” will be an important role. In addition, any burdens would be offset by the benefits of defining this key term used extensively on the CCL. For these reasons, the Chief Counsel for Regulations of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities.

List of Subjects

15 CFR Part 772

Exports.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

Accordingly, parts 772 and 774 of the Export Administration Regulations (15 CFR parts 730-774) are proposed to be amended as follows:

Part 772 - [AMENDED]

1. The authority citation for 15 CFR part 772 continues to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

2. Section 772.1 is amended:

- a. By revising the definition of “specially designed;” and
- b. By adding definitions for the terms “accessories,” “attachments,” and “end item”.

The revision and additions read as follows:

§ 772.1 Definitions of terms as used in the Export Administration Regulations (EAR).

Accessories. These are associated items for any “component,” “end item,” or “system,” and which are not necessary for their operation, but which enhance their usefulness or effectiveness.

For example, for a riding lawnmower, accessories and attachments will include the bag to capture the cut grass, and a canopy to protect the operator from the sun and rain. For purposes of this definition, accessories and attachments are the same.

Attachments. These are associated items for any “component,” “end item,” or “system,” and which are not necessary for their operation, but which enhance their usefulness or effectiveness.

For example, for a riding lawnmower, accessories and attachments will include the bag to capture the cut grass, and a canopy to protect the operator from the sun and rain. For purposes of this definition, attachments and accessories are the same.

End item. This is an assembled commodity ready for its intended use. Only ammunition, fuel or other energy source is required to place it in an operating state. Examples of end items include ships, aircraft, firearms, and milling machines.

Specially designed. When applying this definition, follow this sequential analysis:

Begin with paragraph (a)(1) of this definition and proceed through each subsequent paragraph. If an item would not be controlled as a result of the application of the standards in paragraph (a) of this definition, then it is not necessary to work through paragraph (b) of this definition. If an item would be controlled as a result of paragraph (a), then it is necessary to work through each of the elements of paragraph (b). Items subject to the EAR described in any of paragraphs (b)(1) through (5) of this definition are not “specially designed” items subject to the EAR.

(a) Except for items described in (b) of this definition, an “item” is “specially designed” if, as a result of “development,” it:

(1) Has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or U.S. Munitions List (USML) paragraph;

(2) Is a part or component necessary for an enumerated or referenced commodity or defense article to function as designed; *or*

(3) Is an accessory or attachment used with an enumerated or referenced commodity or defense article to enhance its usefulness or effectiveness.

(b) A “part,” “component,” “accessory,” or “attachment” that would be *controlled* by paragraph (a) of this paragraph is not “specially designed” if it:

(1) Is enumerated in a USML paragraph;

(2) Is a single unassembled “part” that is of a type commonly used in multiple types of commodities not enumerated on the CCL or the USML, such as threaded fasteners (*e.g.*, screws, bolts, nuts, nut plates, studs, inserts), other fasteners (*e.g.*, clips, rivets, pins), basic hardware (*e.g.*, washers, spacers, insulators, grommets, bushings, springs), wire, and solder;

(3) Has the same form, fit, and performance capabilities as a part,

component, accessory, or attachment used in or with a commodity that:

- (i) Is or was in “production” (*i.e.*, not in “development”); *and*
 - (ii) Is either not enumerated on the CCL or USML, or is enumerated in an ECCN controlled only for Anti-Terrorism (AT) reasons;
- (4) Was or is being developed with a reasonable expectation of:
- (i) Use in or with commodities described on the CCL *and* commodities not enumerated on the CCL or the USML; *or*
 - (ii) Use in or with commodities not enumerated on the CCL or the USML;
- or*
- (5) Was or is being developed with no reasonable expectation of use for a particular application.

Note 1: ‘Enumerated’ means any item (i) on either the USML or CCL not controlled in a ‘catch-all’ paragraph and (ii) when on the CCL, controlled by an ECCN for more than AT-only reasons, except in the context of paragraph (b)(3), where an item in an ECCN controlled only for AT reasons is considered enumerated when it is not controlled in a ‘catch-all’ paragraph. An example of an ‘enumerated’ ECCN is 2A226, which controls valves with the following three characteristics: a “nominal size” of 5 mm or greater; having a bellows seal; *and* wholly made of or lined with aluminum, aluminum alloy, nickel, or nickel alloy containing more than 60% nickel by weight. The CCL also contains notes excluding from control parts and components “specially designed” for uncontrolled items. Such uncontrolled items are merely ‘referenced’ and are not

‘enumerated.’ Note 2 to ECCN 1A002 is an example of items excluded from control based on being “specially designed” for a referenced item.

Note 2: A ‘catch-all’ paragraph is one that does not refer to specific types of parts, components, accessories, or attachments but rather controls non-specific “parts,” “components,” “accessories,” or “attachments” because they were “specially designed” for an enumerated item. For example, ECCN paragraph 9A610.x is a catch-all, because it controls “parts,” “components,” “accessories,” and “attachments” “specially designed” for military aircraft, but does not identify specific types of parts, components, accessories, or attachments within its control. Another example of a ‘catch-all’ is the heading of 7A102, which controls “specially designed” components for the gyros enumerated in 7A102, but does not identify the specific types of components within its control.

Note to paragraph (a)(1): Items that as a result of “development” have properties peculiarly responsible for achieving or exceeding the performance levels, functions or characteristics in a relevant ECCN paragraph may have properties shared by different products. For example, ECCN 2B007.a controls “robots” capable in real time of full three-dimensional image processing or full-three dimensional ‘scene analysis’ to generate or modify “programs” or to generate or modify numerical program data [and specially designed controllers and “end effectors” therefor] . An example of a component not meeting the peculiarly responsible standard under paragraph (a)(1) is a component that as a result of “development” has properties that allow the component to conduct 2D image processing for use in a “robot.” This component is not “specially designed” for purposes

of 2B007.a because the component even if used in a “robot” does not have properties peculiarly responsible for a “robot” achieving or exceeding the performance levels, functions or characteristics in 2B207.a. Conversely, another component that as a result of “development,” has properties that allow the component to perform in real time of full three-dimensional image processing for use in a “robot,” is an example of a component that is peculiarly responsible because as a result of “development” the component has a direct and proximate causal relationship in the “robot” that is central or special for achieving or exceeding the performance levels, functions or characteristics identified in 2B207.a.

Note to paragraph (b)(3): Commodities in “production” that are subsequently subject to “development” activities, such as those pertaining to quality improvements, cost reductions, or feature enhancements, remain in “production.” However, any new models or versions of such commodities developed from such efforts that change the basic performance or capability of the commodity are in “development” until and unless they enter into “production.”

Note to paragraph (b)(4) and (b)(5): For a commodity not to be “specially designed” on the basis of paragraphs (b)(4) or (b)(5), documents contemporaneous with its “development,” in their totality, must establish the elements of paragraphs (b)(4) or (b)(5). Such documents may include concept design information, marketing plans, declarations in patent applications, or contracts. Absent such documents, the “commodity” may not be excluded from being “specially designed” by either paragraph (b)(4) or (b)(5).

Note to paragraph (b)(5): If you have “knowledge” that the commodity was or is being developed for a particular application, you may not rely on paragraph (b)(5) to conclude that the commodity was or is not “specially designed.”

Part 774 - [AMENDED]

3. The authority citation for 15 CFR part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 et seq., 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 15 U.S.C. 1824a; 50 U.S.C. app. 5; 22 U.S.C. 7201 et seq.; 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

Supplement No. 1 to Part 774 [Amended]

4. In Supplement No. 1 to part 774 (the Commerce Control List) wherever the term “specially designed” occurs, add quotation marks around the term “specially designed.”

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