

DDTC Publicly Discusses Prospective Definition of “Specially Designed” Items for Control Under the ITAR

May 16, 2011

The US Department of State, Directorate of Defense Trade Controls (DDTC), informally revealed a new definition for the term “specially designed” military items on May 3, 2011. Items (e.g., hardware, software, or technical data) that are “specially designed” for military, satellite, or intelligence applications are subject to US export control restrictions under the International Traffic in Arms Regulations (ITAR). The new definition, which is still in draft form, is intended to reduce the number of items subject to the ITAR. DDTC’s Managing Director, Robert Kovac, discussed the draft definition during a recent meeting of the Defense Trade Advisory Group (DTAG). This definition is still under inter-agency review, and the official version is scheduled to be issued shortly in a proposed rule.

The draft definition discussed during the DTAG meeting is part of the President’s export control reform initiative. Mr. Kovac said that it is intended to cover only items that must be controlled for export because of their potential use as weapons or because they contribute to the functioning of weapons. As part of the effort to harmonize the two US export control lists, the intent is to develop a new definition of “specially designed” that will apply to both the ITAR and the Export Administration Regulations (EAR), which are overseen by administered by the US Commerce Department, Bureau of Industry & Security (BIS). This new definition will replace the term “specifically designed,” which is currently used in the ITAR, because “specially designed” is the term used in several multilateral export control regimes, including the EAR.

The new definition discussed by Mr. Kovac has two parts – one applicable to end items, and one for parts and components. It is anticipated that the new definition will be published as follows.

- A “specially designed” item would be defined as one “that is enumerated on the USML [US Munitions List] or CCL [Commerce Control List] and as a result of ‘development’ has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions of the referenced item identified in the USML.”
- A “specially designed” part or component would be defined as one that is “used (as defined by its form, fit and function) in or with an item enumerated in a category of the USML.”
- However, “an item is not considered specially designed in any category of the USML or CCL if it is separately enumerated in a USML subcategory or an ECCN [Export Control Classification Number] that does not have ‘specially designed’ as a control criterion.”

The first component of the definition – for specially designed military items – would apply to end items listed on the USML or CCL. The term “development” is expected to follow the current definition in Part 774 of the EAR, namely – “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.”

The second component of the definition appears to apply to items otherwise on the CCL that are used “in or with” a military item on the USML. This definition may be focused on items that are intended to be transferred from the USML to the CCL in the future and new classification numbers that may be created

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for such transferred items.

A part or component that is separately listed on the USML or CCL is not covered by the “specially designed” definition.

The new definition also contains five exclusions for products that are not considered “specially designed” military items.

1. A “single, unassembled part used in multiple types of civil and military items.”

This includes items such as bolts, wires, and screws, according to the DTAG discussion. So a bolt, even if specially designed to hold an F-22 fuselage intact, will not be controlled under the ITAR.

2. Items “specifically excluded from control on the USML or CCL.”

This includes items such as propellers for reciprocating engines, classified under Category VIII, and aircraft tires classified under Category X, though this category of items may expand as the USML and CCL are reorganized.

3. Items determined to be EAR99 as a result of an interagency review process.

An EAR99 item is one that is not ITAR-controlled, does not meet the criteria of any ECCN on the CCL, and is therefore subject to the least restrictive export and reexport controls. Note that this provision would not, by definition, apply to self-classified products. Moreover, this exclusion would not necessarily include EAR99 items assigned a Commodity Classification Automated Tracking System (CCATS) designation by BIS, because CCATS requests are not all staffed through an interagency process.

4. Parts and components “used as a part or component of an end item in ‘serial production’ and not enumerated on the USML or CCL, 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 has begun.”

Mr. Kovac gave the example of a part or component, not specifically enumerated on the USML or CCL, that is designed for use in a commercial vehicle that is in serial production. It is currently being debated whether to limit this exclusion to serial production located in the United States.

5. Part and components “that can be exchanged with an EAR99 or AT-only [Anti-Terrorism] controlled part or component on a one-for-one replacement basis without modification to the form or fit of the EAR99 or AT-only part or component, and the EAR-99 or AT-only part’s or component’s function is identical to the part or component at issue.”

This exclusion would apply to commercial-origin parts that are used, without modification, for an identical function in a military application. AT-only controlled products are generally less sensitive products, subject to control under the EAR for Anti-Terrorism reasons, and therefore restricted for export only to terrorist-supporting states, prohibited end-uses, or prohibited end users. For example, Mr. Kovac stated that this exclusion would apply to a fuel pump for a commercial truck that is used, without modification, for an identical function in a military vehicle. However, it would seem that nearly any modification to form or fit for the military vehicle, even if the function is identical, would remove such an item from the exclusion (i.e., make it subject to the “specially designed” rule).

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While the new definition would serve to reduce the scope of items subject to the ITAR, its lack of clarity in some areas may make it difficult for exporters to interpret and implement, and may not provide exporters with greater certainty in their efforts to correctly classify their products. The proposal also appears to be unduly complicated as a definition. Moreover, an overly broad definition and use of "specially designed" would appear to run counter to the "positive list" concept that underpins the export control reform effort. It is possible that the definition will be modified from its current draft form prior to being released as a proposed rule.

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The official version of this definition is expected to be released shortly in a proposed or interim rule. At that time, DDTC will accept public comments on the definition, likely for a period of 60 to 90 days. Should you have questions about this development, or wish to submit public comments, please contact Ed Krauland at 202-429-8083, Meredith Rathbone at 202-429-6437, or Jack Hayes at 202-429-6491 in our Washington, DC office; or Andy Irwin at 202 429 8177 in our Washington office or 310-734-1926 in our Century City/Los Angeles office.