



STEPTOE OUTSIDE COUNSEL

Ten years on from “ECR” – insights on “specially designed”

On 15 October 2013, as part of the US government’s “Export Control Reform” (“ECR”) initiative, the Commerce Department’s Bureau of Industry and Security (“BIS”) and the State Department’s Directorate of Defense Trade Controls (“DDTC”) implemented the “specially designed” rule in the Export Administration Regulations (“EAR”) and the International Traffic in Arms Regulations (“ITAR”), respectively. This rule fundamentally altered the landscape for classifying products. Initially, there was a great deal of frustration and confusion about the rule. But now, with nearly a decade of experience working with it, there are some insights that can be offered. This column provides a few highlights, focusing on the more broadly applicable EAR rules.

As background, classifying a product under the EAR means determining which if any export control classification number (“ECCN”) applies. This is critical because it dictates among other things the general licensing requirements that apply in exporting the product. Following ECR, many ECCNs now turn on whether the product is “specially designed” for a particular purpose.

The “specially designed” definition has two sub-rules: one for “parts”, “components”, “accessories”, and “attachments”, and another for everything else. Taking the second rule first, because it is simpler (at least on its

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face), the only question in essence is whether the product’s development process provided it with properties that make it fit within the criteria in the relevant ECCN (e.g., for “600 series” equipment, being suited for a military application). But in many cases it is not clear which properties are responsible for making a product meet the control criteria. BIS guidance says the focus is on properties that have a “direct and proximate causal relationship that is central or special for achieving or exceeding the” criteria in the ECCN. This analysis often requires a detailed

understanding of the market for related products and their characteristics in order to understand which are “central or special” for military applications or other control criteria in a way that is “direct and proximate.” This highly vague language leaves a lot of room for judgment to be applied. Moreover, as the market and technological standards change over time, there may be opportunities to revisit the classification.

The parts and components rule in the definition of “specially designed” is a bit more clear, operating under a “catch and release” structure: if a product is used in or with the controlled item in the relevant ECCN, it is “caught”, but if one of several “releases” applies the product is ultimately not “specially designed”. One of the most common releases, at paragraph (b)(3), is for products also used in non-controlled applications. In order for this release to apply, the part or component used in non-controlled applications needs to have the same “function” and “performance capabilities” as the product being analyzed. So any difference in functionality or performance can rule out this release. However, it may still be possible to ask whether such a difference is material. For example, a different tolerance or other performance feature that is merely detectable in a lab study but that would not be relevant to a user arguably may not be enough to rule out this release – this question of materiality can be a grey area. There can also be differences in the “form” and “fit” of the two products that may not rule out reliance on this release, although they need to be “equivalent”, meaning the “form” (e.g., shape) has only been modified in order to achieve the necessary “fit” with the equipment where the part or component is being used. But there is often a grey area around whether a particular characteristic relates to “function” or “performance capabilities”, or merely “form” and “fit”. For example, if a metal plate is built flexibly so it does not crack and lose its position, it may be possible to argue that is a mere “form” characteristic that helps keep the part in place, in which case that feature may not rule out the release.

When working with the ambiguities of these rules, it will often be prudent to seek a classification (“CCATS”) determination from BIS. In this author’s experience, BIS is often willing to accept the proposed classification in a well-argued CCATS request. ■

About the author:

Peter Jeydel is Of Counsel in the Washington, DC office of Steptoe.

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