

**Prepared Remarks of Assistant Secretary of Commerce
for Export Administration Kevin Wolf
Regarding the Definition of “Specially Designed”**

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I. Reasons for Defining “Specially Designed”

The term “specially designed” is the most significant and widely used control parameter in the multilateral control lists. The regimes, other than the MTCR, have, however, not defined the term. The Wassenaar Arrangement tried to define the term, but ultimately left the issue up to its member states. Until recently, the United States had not defined the term other than with respect to MTCR-related controls. As a result, companies, practitioners, and government officials had over the decades developed their own interpretations. The interpretations varied considerably -- from something akin to a “capable for use with” standard to a subjective “significance” test, *i.e.*, only those items that had a unique and subjectively significant or sophisticated function would be controlled, regardless of changes in their form or fit specific to a controlled item. There were multiple variations among industries and government officials within these extremes. Given the ubiquity of the term (and its cousin “specifically designed or modified”) within both the munitions and dual-use control lists of the United States, these variations caused the U.S. export control system to be less reliable and predictable than it should have been.

As part of the Obama Administration’s Export Control Reform effort, the relevant U.S. government agencies wanted to develop a definition that was as objective as possible, common to the munitions and dual-use lists, and applicable to all the types of items (such as end items, materials, and components) that included the term in the applicable controls. It needed to be able to work for both the original equipment manufacturers who knew the original design intent of an item and subsequent re-sellers and users who would not necessarily know. It needed to be consistent with our understandings of the intended scope of the multilateral controls. It needed to work with both the provisions that use the term as a control parameter and those that use it as a decontrol parameter. It needed to encompass variations on the term used throughout the control lists, such as “specifically designed,” “designed,” “designed or modified,” and “modified.” Such a definition, of course, needed to control the items warranting control and not control items that did not warrant control.

I will during this discussion sometimes refer to “catch-all” controls. The U.S. government and industry use this phrase to describe controls over unspecified parts and components that use “specially designed” as a control parameter, such as “and specially designed components therefor.” They “catch” “all” unspecified parts and components that are specially designed for a listed item. I am not using the term in the Wassenaar context of an unlisted item that is controlled when it is being exported for a military end-use or to a military end-user.

II. Reasons the Definition Needed to be as Objective as Possible

The reason for the focus on more objective definitions and control parameters is the determination at the heart of the reform effort that they further the national security and foreign policy aims of the controls better than an *in terrorem* system – one that keeps exporters and reexporters uncertain about what and how items are controlled, which causes those trying to comply to be in near-constant fear of violating a control and thus seeking permission more than is legally necessary. There is arguably some virtue in such a system given how hard it is to precisely describe all items warranting control and that it is sometimes better to provoke over-controls than to allow an export or reexport to a proscribed end user or end use.

However, there is a greater virtue in reducing unnecessary regulatory burdens caused by uncertainty. Exporters and reexporters can better know from the words in the regulations (as opposed to individual, *ad hoc* decisions) what is and is not controlled, thus reducing time lost and resources spent on making such determinations. They are thus better able to focus their attentions on that which is actually controlled. Reliable, predictable rules allow for reliable, predictable U.S. exporters. This reduces disincentives to trade caused by fears of arbitrary application of the rules. U.S. and non-U.S. companies applying objective definitions are not at a competitive disadvantage to U.S. and non-U.S. companies applying liberal definitions, which are subject to more subjective interpretations. Prosecutors are better positioned to bring and prevail in enforcement actions involving violations of the controls. Defense attorneys are better able to defend against charges not consistent with the controls. Government officials are required to think more carefully about which items warrant control and why. The government spends less of its limited resources in standard-less and often highly emotional arguments and classification fights about whether an item is “specially designed” or within the scope of any other vague or undefined parameter.

III. Status of the U.S. Effort to Define the Term

After two years of internal U.S. government work involving all the relevant agencies and a massive public comment process, the United States definition of the term became effective in October 2013. But for minor differences to account for slightly different regulatory structures, the definition now is the same in our munitions controls – the International Traffic in Arms Regulations (ITAR) (22 CFR §120.41) – and in our Commerce controls (which now includes both dual-use items and many former munitions list items transferred from the ITAR as part of the reform effort) – the Export Administration Regulations (EAR) (15 CFR § 772.1).

After two years and tens of thousands of practical applications by industry and government, the evidence and the anecdotes show that it works well. Except in extraordinarily few cases, it meets our standard for what a successful definition should be -- ten different people from industry and government with the same facts can apply it to reach the same conclusion about whether an item is within the scope of a control with a specially designed parameter. The number of classification disputes within, between, and among the U.S. government agencies has dramatically fallen. The number of disputes within and between industries has similarly fallen. Reexporters are, as a regulatory matter, on a level playing field with exporters in terms of the ability to make classification determinations. There has been no evidence of harm to the control system or leakage of items that, as a policy matter, warrant control. Prosecutors and enforcement officials are comfortable with the definition and willing to pursue cases they previously might not have. U.S. companies are more reliable and predictable. They are no longer complaining of arbitrary or unknowable applications of the term by government officials. (This does not mean that industry always likes or dislikes the final determination, only that the rules are now clear.) Companies can better focus on business and compliance. Government can better focus on policy and administration of the system. Finally, the definition is so objective that it has been reduced to free, online decision-tree tools that industry and government can use to determine whether an item is “specially designed.” If one has the facts to answer a series of yes/no questions, one can determine precisely whether an item is “specially designed,” and simultaneously create a record of the determination and the factors that went into the determination.

Indeed, there are significant and very reasonable concerns about the seeming or actual complexity of the definition. (Any written definition that replaces unwritten personal definitions will necessarily be more complex.) However, these concerns

can be addressed over time with training and refinement to account for unexpected or new fact patterns and policy considerations. I and several of my staff have spent the last four years working with industry on actual practical applications of the definition. In every case we've seen, once the company gets used to the new definition, they find that it works smoothly. It becomes intuitive and capable of reduction to a few simple concepts based on the company's product line. Ultimately, the benefits of eliminating doubt outweigh the costs of having to think through a written definition that is often different than what it applied before.

IV. Suggestion to Discuss Multilateral Application of a Definition

The U.S. Government is not proposing that the regimes adopt the U.S. definition. I would nonetheless like to begin a discussion with our multilateral export control friends and partners about whether a common, regime-based definition or guidance based on our approach and experience is something that could be developed over time. If so, I believe that the international experience would be the same as the U.S. experience. There would be initial reluctance to act because of comfort in the old, personal, highly subjective way of doing things. Everyone would try for a short definition, but soon realize that a short definition allows for too much subjectivity. The drafters would then struggle, with unnecessary complexity creeping in, to address all points of view and every conceivable fact pattern. Industry would try to influence the definition so that it controlled less. Enforcement officials would try to influence the definition so that it controlled more. There would be anxiety among industry and government officials in having to re-think past classification determinations and old habits. Government officials will want to retain the ability to control or not control items on a case-by-case basis based on subjective, gut-level, common sense determinations regardless of what the words are in the definition. I believe, however, that, in the end, there would be eventual acceptance of a more objective system that reduced overall regulatory burden, leveled the playing fields among regime partners, and generally advanced the purpose of the controls.

In making this suggestion, I am not saying that our definition is perfect. As with all export control regulations, constant refinement and reevaluation, particularly with respect to novel fact patterns, are warranted to make for an ever-better, more objective system that controls no more and no less than that which warrants control. However, our definition is structured to allow for such refinement, which is one of its virtues.

V. The Definition

The definition, in essence, states, that

- (a) except as described in paragraph (b), an item is “specially designed” if:
 - (1) as a result of development, it has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant control list paragraph; or
 - (2) it is a part, component, attachment, accessory, or software *for use in or with* a controlled item.

- (b) A part, component, accessory, attachment, or software is **not** “specially designed” if:
 - (1) the government has exercised its discretion to declare otherwise in writing,
 - (2) it is one of the listed extraordinarily minor parts, such as nuts and bolts,
 - (3) it is or was common to an uncontrolled or lesser controlled item in production,
 - (4) documentation exists evidencing that it was designed in good faith for use equally in controlled and uncontrolled items (i.e., a dual-use item), **or**
 - (5) it was or is being developed as a general purpose commodity or software, i.e., with no “knowledge” for use in or with a particular commodity.

The definition is the same in both our munitions controls and in our dual-use controls. It, however, cascades under our order of review, and would similarly need to do so with regime members because they also have both munitions and dual-use controls. That is, one first applies to the definition in the munitions controls to see if the item at issue is caught by any munitions list entry using the

term “specially designed.” If not, then one must apply the same definition in the dual-use controls to see if the item is caught by any of the dual-use catch-all entries. (As always, an item controlled by entry that does not use the term “specially designed” means that the item is controlled by that entry regardless of the outcome under a “specially designed” analysis.)

The definition in U.S. law is written a little differently to account for terms and structures unique to the U.S. system, unilateral US controls, and that we have two separate control lists. This is why the EAR and ITAR definitions are, admittedly, complex and spook people considering applying them. The foregoing definition is, however, the essence of our definitions’ paragraph (a) “catch” and its paragraph (b) “release” approach. It is just without the trappings of U.S.-specific terms and issues. The usual reaction I get after training people on the definition is along the lines of “It’s actually a lot more simple than I thought.” I believe that regime partners will come to the same conclusion after considering it for use in their own systems.

The following is a summary of each element.

A. Paragraph (a)(1)

Paragraph (a)(1) is a one-sentence definition that applies to all types of items and tracks with the existing Wassenaar Arrangement’s definition of “required.” Basically, it asks whether someone developed it to do that which is described in a control paragraph. Given the long-time application of the Wassenaar’s definition of “required,” exporters and reexporters have been able to easily apply it in most cases. (We do, however, plan to clarify that the reference to “characteristics” and “functions” is not limited to entries that use specific technical parameters. The characteristics and functions of an item are, absent a specific regulatory definition, a standard dictionary’s definition of the item.) As a practical matter, the paragraph is primarily used for end items, systems, and materials. (We are, however, considering whether to move materials to paragraph (a)(2) so that the release provisions of paragraph (b) would apply to them.) If the item being classified is not a part, component, accessory, attachment or software, paragraph (a)(1) is the entire definition. It has not resulted in any inadvertent over- or under-controls.

B. Paragraph (a)(2)

We found that the one-sentence definition based on “required” did not work well with the catch-all controls on unspecified parts, components, accessories, attachments, and software – the types of controls that affect that vast majority of items exported and reexported. (Again, we are discussing whether we should add materials to this list as well.) Exporters and reexporters often do not know the reasons why such items were developed, which is the primary reason we tried to move away from design intent-based controls. We tried many other, equally short approaches, but they failed because inevitably they relied upon subjective concepts, such as “substantial” modifications, or concepts requiring information unknowable to many exporters and reexporters, such as whether the item had “predominate” civil or lesser controlled applications. A “predominate” approach also fails because it means that an item’s control status can change over the years as the ratio of controlled and uncontrolled applications changes based on consumer demand. Having a standard requiring one to determine whether the item provides military utility to the end item is intensely subjective and, thus, unworkable.

Because most exporters know (or are supposed to know) the item into which a part, component, accessory, attachment, or software is to be incorporated, we made that the standard for a very broad “catch,” *i.e.*, the broad criterion used for determining what would be presumptively “specially designed” under paragraph (a)(2). Thus, for example, if a component is for use in or with a munitions list item, it is presumptively within the scope of the components control for that item. If it is for use in or with a controlled dual-use item, and there is a “specially designed” catch-all parameter connected with the control, then the component is caught by that dual-use control. This is a completely objective test – the item either *is* for use in or with a controlled item or it *isn't*.

With this approach, an exporter or reexporter who knows nothing about the design history of a component, whether it has predominate civil applications elsewhere, or whether it was substantially modified for a controlled application will be able to presumptively know whether it is within the scope of a control if it is for use in or with a controlled item. The approach is thus conservative and helps prevent inadvertent unlicensed exports in low-information settings.

If, however, the “for use in or with” standard were the last word on what is controlled, it would wildly *over*-control parts, components, accessories, attachments, and software. That is, it would impose controls on extraordinarily insignificant items, common consumer items used in controlled items, and also

items deliberately developed for both controlled and uncontrolled items. Thus, we created a paragraph (b) carve-out with specific “releases” from the broad “catches” in paragraph (a) to achieve the policy objectives of a catch-all control on unspecified parts, components, accessories, attachments, and software. The approach also reflects the fact that we were better able to describe with precision which items are *not* “specially designed” than to describe which items *are* “specially designed.”

A short-cut built into the definition is that it allows exporters or reexporters to skip the analysis in paragraph (a) if they know that one of the paragraph (b) releases is applicable. If, for example, your component is common to a civil aircraft in production and not otherwise specified on one of the control lists, you can conclude without further analysis that it is not within the scope of a catch-all control containing “specially designed” as a parameter.

C. Paragraph (b)(1)

Paragraph (b)(1) retains for the government the authority to exercise its discretion for any reason that an item does not warrant being treated as “specially designed.” In our experience, some U.S. exporters had developed the bad habit of unilaterally determining that an item that was unique and deliberately designed for a controlled item was not “specially designed” for the item because they concluded that it was not particularly significant or sophisticated – or that it had the same basic function as an uncontrolled item. Paragraph (b)(1) retains the flexibility to make subjective determinations, but reserves that right to the government, not the exporter or reexporter. For the exporter or reexporter, the question is still a yes/no objective question – has the government determined in writing that the item is not “specially designed” for any reason? If yes, then it is not “specially designed.” If no, then one should examine the other provisions of the definition to make such a determination. Although we have not received many requests to make such determinations, our thought is that we would see over the years the results and then eventually revise the control text accordingly so that paragraph (b)(1) determinations become rare.

D. Paragraph (b)(2)

Paragraph (b)(2) identifies certain parts and minor components that are not within the scope of the definition regardless of what they are made of, what they were developed for, or what item on a control list they are used in or with. The minor parts we have, to date, identified as being within the scope of this paragraph are

regardless of their form or fit, fasteners (*e.g.*, screws, bolts, nuts, nut plates, studs, inserts, clips, rivets, pins), washers, spacers, insulators, grommets, bushings, springs, wires, and solder. These are the lowest level parts and minor components and, regardless of their form or fit, do warrant controls for national security or foreign policy matters. Their listing in the carve-outs helps to focus the specially designed controls by not burdening the control lists with unspecified parts and minor components that are not of concern.

This is an exclusive list, not illustrative list. (We did, however, include representative examples of what fasteners are.) If an exporter or government official believes that a type of basic part is so insignificant that it does not warrant control and it is not listed in this paragraph, then the process is to ask the government under paragraph (b)(1) to exercise its discretion to make such determination. It is not for the exporter to use its judgment to decide whether an item is so basic that it doesn't warrant control. Eventually official (b)(1) determinations would further populate -- to reiterate -- the exhaustive (*i.e.*, not representative) list in paragraph (b)(2). We, for example, are considering whether to expand the list to include items such as shims.

We did not develop specific definitions of each of these terms. Rather, we are leaving the meanings to industry-standard, dictionary definitions of the term. Although there was initially some uncertainty about what the words meant, common meanings have developed.

E. Paragraph (b)(3)

A part, component, accessory, attachment, or software not described on a control list is released from "specially designed" catch-all controls if it is common to a lesser controlled or uncontrolled item in production. Thus, for example, if a part used on a military item is also used in a dual-use or civil item in production, the part is not within the scope of the munitions list's catch-all controls. If a part used on a controlled dual-use item is common to an uncontrolled item in production, it is not within the scope of the dual-use list's catch-all controls. This is an objective standard and does not depend upon knowing the design history of the item. It is the key provision preventing dual-use items from being controlled on a munitions list's catch-all controls and uncontrolled civil items from being caught by a dual-use list's catch-all control.

The determination is to be made as of the time of export or reexport. Thus, if a part originally designed for and used in a military aircraft becomes common to

civil aircraft in production, the item is released from the paragraph by that fact. If the item is nonetheless so significant that it warrants control, it should be identified by the government on the relevant control list in a paragraph that does not use “specially designed,” not caught by a catch-all provision. The limitation to items in “production” is important in that it prevents circumvention from control merely by installing the item in one-off items or prototypes, which is a significant limitation on the use of the MTCR definition for other types of controlled items. This approach is thus a surrogate for the general proposition that dual-use or civil items should not be on munitions lists and common consumer items in normal commercial use should not be within the scope of catch-all controls in dual-use lists.

F. Paragraph (b)(4)

Paragraph (b)(4) addresses the “development” phase. If contemporaneous documentation exists to demonstrate that a part, component, accessory, attachment, or software was developed to be common to munitions and non-munitions items, it is not within the munitions list’s catch-all category. If such documentation exists that demonstrates it was developed for both dual-use and non-controlled civil items, it is not within the scope of the dual-use list’s catch-all controls. Again, if the item is nonetheless so significant that it warrants control, it is up to the regimes or member states to list the item on the appropriate control lists. If such documentation does not exist, the exporter or reexporter may not rely on paragraph (b)(4). In this way, this otherwise design intent-based standard is objective.

G. Paragraph (b)(5)

Paragraph (b)(5) also addresses the “development” phase for when a part, component, accessory, attachment or software is being “developed,” but the criterion for what is not “specially designed” under this paragraph focusses on identifying when a part, component, accessory, attachment or software was or is being developed as a general purpose commodity or software. A commodity or software is general purpose when it was designed with no knowledge of the particular commodity (e.g., a MiG-29 or HMMWV) or type of commodity (e.g., an aircraft or machine tool) with which it would be used.

VI. A Definition or Guidance Common to the Regimes

If the regimes were to adopt a definition or common guidance that would be common across their controls, it would look something like the following:

“Specially designed.”

- (a) Except for items described in (b), an “item” is “specially designed” if it:
 - (1) As a result of “development,” has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant paragraph of a ‘national control list;’ or
 - (2) Is a “part,” “component,” “accessory,” “attachment,” “material,” or “software” for use in or with a commodity on a ‘national control list.’
- (b) A “part,” “component,” “accessory,” “attachment,” material,” or “software” that would be controlled by paragraph (a) is not “specially designed” if it:
 - (1) Has been determined by the government in writing to not be controlled on a ‘national control list;’
 - (2) Is, regardless of ‘form’ or ‘fit,’ a fastener, washer, spacer, insulator, grommet, bushing, spring, wire, or solder;
 - (3) Is common to a commodity or software used in or with an item that (i) is or was in “production” (i.e., not in “development”), and (ii) is not on a ‘national control list;’
 - (4) Was or is being developed with “knowledge” that it would be for use in or with commodities or software (i) described in a ‘national control list’ paragraph and (ii) also commodities or software not on a ‘national export control regime control list;’ or
 - (5) Was or is being developed as a general purpose commodity or software, i.e., with no “knowledge” for use in or with a particular commodity or type of commodity.

NOTE 1: A ‘national control list’ is an export control list used by a member or adherent to one of the four export control regimes -- Wassenaar Arrangement, Missile Technology Control Regime (MTCR), Australia Group (AG), and Nuclear Suppliers Group (NSG) – the European Union, or an export control treaty. A ‘national control list’ may include additional items at the discretion of a particular multilateral export control regime member or adherent.

NOTE 2: There is a Control List Order of Review for when “specially designed” is reviewed in relation to the different controls on a national control list(s). Munitions list controls take precedence over dual use controls. Paragraphs within each list that do not use the phrase “specially designed” take precedence over paragraphs that use the phrase “specially designed.” This means that one must first apply to the definition on the munitions list. If an item is common to an item in production on the dual use list, then the item is not caught by the munitions list catch-all control. Then, if an item is common to item on both the dual-use list and an unlisted item, then item is not within the scope of a control with a “specially designed” parameter.

NOTE 3: For a commodity or software to be not “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). 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 paragraph (b)(4) or (b)(5).

VII. Conclusion

If the regimes are interested in discussing a pan-regime common definition or guidance, we can go into vastly more detail on the earlier ideas that we tried and rejected, and all the regulatory cul-de-sacs we went down in trying to develop a definition that is consistent with a set of “yes/no” objective decisions. For now, though, I leave you with the proposition that, although not yet perfect, our approach works and works well. Law governs, not lore.