



U.S. DEPARTMENT OF COMMERCE
BUREAU OF INDUSTRY AND SECURITY

The Definition of “Specially Designed”

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Note: This presentation is merely a summary of official statements and final rules published by the Departments of Commerce and State. Final rules, as well as the Export Administration Regulations and International Traffic in Arms Regulations, must be reviewed to determine the full scope of any applicable requirements.

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The published definition



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- Read pages 22728 and 22729 of Commerce’s Federal Register notice published on April 16, 2013 (78 Fed. Reg. 22660)
- The “specially designed” definition will be common to the EAR and ITAR, although slight differences in wording to make definition EAR and ITAR specific.

Goals



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- Wanted to develop something so that if ten different people in industry and government got the same set of facts then they would all come to the same conclusion.
- Necessary to define clearly what would be caught by new “catch-all” controls moving to the CCL from the USML and also to harmonize definition throughout the CCL and the USML.
- Wanted a structure that would allow for evolution and clarification as put in to practice.

Reason for structure



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- In working through options for a definition, became clear that it was easier to clearly describe what was not “specially designed” than what was.
- One sentence definitions left too much room for ambiguity and subjectivity.
- So, we established broad “catches” (paragraph (a)) and specific, objective “releases” (paragraph (b)).

Take a breath



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- We realize this is a new approach and will, at first, seem complicated.
- Based on our testing, it becomes much easier to apply than the “design intent” aspects of currently undefined term.
- The content is not radical, but rather codifies existing concepts and good faith applications of the term to further USG policy objectives.

Steps



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- To determine whether an item is “specially designed,” one answers a series of yes/no questions.
- Be sure to apply existing EAR definitions (such as “development,” “production,” and “knowledge”) and also new EAR definitions (such as for “part,” “component,” and “end item.”)

Paragraph (a)(1) “catch”



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- Paragraph (a)(1) ‘catches’ any item that:

*as a result of “development” 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.

Paragraph (a)(1) comments



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- Paragraph (a)(1) is mainly used for determining whether an end item or material is “specially designed,” although it also applies to other items subject to the EAR.
- For end-items and material, paragraph (a)(1) is the entire “specially designed” definition – meaning (a)(1) acts as the ‘catch’ and ‘release.’ If your end item or material is not ‘caught’ under (a)(1), then it is NOT “specially designed.”
- For “parts,” “components,” “accessories,” “attachments,” and “software,” before determining not ‘caught’ under “specially designed,” paragraph (a)(2) should be reviewed.

Paragraph (a)(2) “catch”



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- Paragraph (a)(2) ‘catches’ any “part,” “component,” “accessory,” “attachment” or “software” that:

Is for use in or with a
commodity or defense article
‘enumerated’ or otherwise described
- **on the CCL** or
- **the USML.**

Understanding *the 'release'* - introduction to paragraphs (b)(1)-(b)(6)



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- Paragraph (b) is only used for ‘releasing’ “parts,” “components,” “accessories,” “attachments” or “software.”
- A “part,” “component,” “accessory,” “attachment,” or “software” that meets the criteria of one or more of the paragraphs under (b) is ‘released’ from “specially designed.”
- If you are reviewing a decontrol on the CCL that uses “specially designed,” stop at paragraph (a) in your analysis. Do not review paragraph (b) for decontrols on the CCL that use “specially designed.”

Quick cut questions for when *it may be beneficial* to review (b) first



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Quick cut question	It may be beneficial to review paragraph (b) first - <i>if answer is “yes”</i>
Was it identified in a past Commodity Jurisdiction (CJ) determination or approved interagency CCATS under EAR pursuant to Section 748.3(e)?	<p>Yes</p> <p><u>QUICK TIP: See (b)(1).</u></p> <p><i>Note: Also will need to review the CJ or CCATS in question.</i></p>
Is it a fastener (<i>e.g.</i> , screw, bolt, nut, nut plate, stud, insert, clip, rivet, pin), washer, spacer, insulator, grommet, bushing, spring, wire, solder?	<p>Yes</p> <p><u>QUICK TIP: See (b)(2).</u></p>
Is it being used in or with an item in “production” that is lowest level commodities or software (EAR99 or AT-only ECCNs)?	<p>Yes</p> <p><u>QUICK TIP: See (b)(3).</u></p>
Was or is it being developed for use in or with controlled items as well as lowest level items (EAR99 or AT-only ECCNs?)	<p>Yes</p> <p><u>QUICK TIP: See (b)(4) and (b)(6). (b)(6) only if developed for AT-only and EAR99 or EAR99 only.</u></p> <p><i>Note: Requires documentation from development.</i></p>
Is it a general purpose commodity or software (meaning not for particular commodity or type of commodity)?	<p>Yes</p> <p><u>QUICK TIP: See (b)(5).</u></p> <p><i>Note: Requires documentation from development.</i></p>

Paragraph (b)(1) “release”



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Paragraph (b)(1) criteria	Meets (b)(1) criteria	Does not meet (b)(1) criteria
<u>CJs</u> . Has it been identified in an ECCN paragraph that does not contain “specially designed” or as an EAR99 item in a CJ determination?	Yes. <u>NOT</u> “specially designed.”	No. <u>NOT</u> ‘released’ under (b)(1). Review other (b) ‘releases.’
<u>748.3(e)</u> . Has it been identified in an ECCN paragraph that does not contain “specially designed” or as an EAR99 item in an interagency-cleared (CCATS) pursuant to § 748.3(e)?	Yes. <u>NOT</u> “specially designed.”	No. <u>NOT</u> ‘released’ under (b)(1). Review other (b) ‘releases.’

Paragraph (b)(2) “released”



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Paragraph (b)(2) criteria	Meets (b)(2) criteria	Does not meet (b)(2) criteria
Is the “part” or minor component, regardless of ‘form’ or ‘fit,’ a fastener (<i>e.g.</i> , screw, bolt, nut, nut plate, stud, insert, clip, rivet, pin), washer, spacer, insulator, grommet, bushing, spring, wire, or solder?	Yes. <u>NOT</u> “specially designed.”	No. NOT ‘released’ under (b)(2). Review other (b) ‘releases.’

Paragraph (b)(3) “released”



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Paragraph (b)(3) criteria	Meets (b)(3) criteria	Does not meet (b)(3) criteria
<p>Does the “part,” “component,” “accessory,” “attachment,” or “software” have same function, performance capabilities, and same or ‘equivalent’ form and fit, as a commodity or software used in or with an item that:</p> <p>(i) is or was in “production” (i.e., not in “development”); <u>and</u></p> <p>(ii) is either not ‘enumerated’ on the CCL or USML, or is described in an ECCN controlled only for Anti-Terrorism (AT) reasons?</p>	<p>Yes.</p> <p><u>NOT</u> “specially designed.”</p>	<p>No.</p> <p><u>NOT</u> ‘released’ under (b)(3). Review other (b) ‘releases.’</p>

(b)(3) comments



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- It tracks the existing releases in ITAR categories, such as XI(c) and VIII(h), so it's not a new concept.
- Does not require research in to design history because limited to items that are or were in "production."
- Note 2 to paragraph (b)(3) is new since proposed rule. With respect to a commodity, 'equivalent' means that its form has been modified solely for 'fit' purposes. Meant to be a very narrow carve out.
- EAR adopts the ITAR's definitions of "form" and "fit."

Paragraph (b)(4) “release”



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Paragraph (b)(4) criteria	Meets (b)(4) criteria	Does not meet (b)(4) criteria
<p>Was or is "part," "component," "accessory," "attachment," or "software" developed with "knowledge" it would be for use in or with commodities or software:</p> <p>(i) described in ECCN <u>and</u></p> <p>(ii) also commodities or software either not- 'enumerated' on CCL or USML (e.g., EAR99 commodity or software) or commodity or software described in ECCN controlled only for AT?</p>	<p>Yes.</p> <p><u>NOT</u> “specially designed.”</p>	<p>No.</p> <p><u>NOT</u> ‘released’ under (b)(4). Review other (b) ‘releases.’</p>

Paragraph (b)(5) “release”



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Paragraph (b)(5) criteria	Meets (b)(5) criteria	Does not meet (b)(5) criteria
<p>Was or is the "part," "component," "accessory," "attachment" or "software" developed a general purpose commodity or software, i.e., with <u>no "knowledge" for use in or with:</u></p> <p>particular commodity (e.g., an F/A-18 or HMMWV) <u>or</u></p> <p>type of commodity (e.g., an aircraft or machine tool)?</p>	<p>Yes.</p> <p><u>NOT</u> “specially designed.”</p>	<p>No.</p> <p><u>NOT</u> ‘released’ under (b)(5). Review other (b) ‘releases.’</p>

Paragraph (b)(6) “release”



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Paragraph (b)(6) criteria	Meets (b)(6) criteria	Does not meet (b)(6) criteria
<p>Was or is the "part," "component," "accessory," "attachment," or "software" being developed with "knowledge" that it would be for use in or with commodities or software:</p> <p>(i) described in ECCN controlled only for AT reasons and also for EAR99 commodities or software, <u>or</u></p> <p>(ii) exclusively for use in or with EAR99 commodities or software?</p>	<p>Yes.</p> <p><u>NOT</u> “specially designed.”</p>	<p>No.</p> <p><u>NOT</u> ‘released’ under (b)(6). Review other (b) ‘releases.’</p>

Note to (b)(4), (5), and (6)



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- *For a commodity or software to be not “specially designed” on the basis of paragraphs (b)(4), (b)(5) or (b)(6), documents contemporaneous with its “development,” in their totality, must establish the elements of paragraphs (b)(4), (b)(5) or (b)(6). 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 paragraphs (b)(4), (b)(5) or (b)(6).*