§ 120.39 Regular employee.

(a) A regular employee means for purposes of this subchapter:

(1) An individual permanently and directly employed by the company, or

(2) An individual in a long term contractual relationship with the company where the individual works at the company’s facilities, works under the company’s direction and control, works full time and exclusively for the company, and executes nondisclosure certifications for the company, and where the staffing agency that has seconded the individual has no role in the work the individual performs (other than providing that individual for that work) and the staffing agency would not have access to any controlled technology (other than where specifically authorized by a license).

(b) [Reserved]

§ 120.40 Affiliate.

An affiliate of a registrant is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such registrant.

Note to §120.40: For purposes of this section, “control” means having the authority or ability to establish or direct the general policies or day-to-day operations of the firm. Control is rebuttably presumed to exist where there is ownership of 25 percent or more of the outstanding voting securities if no other person controls an equal or larger percentage.

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§ 120.41 Specially designed.

(a) Except for commodities or software described in paragraph (b) of this section, a commodity or software (see §121.8(f) of this subchapter) is specially designed if it:

(1) As a result of development, has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions described in the relevant U.S. Munitions List paragraph; or

(2) Is a part (see §121.8(d) of this subchapter), component (see §121.8(b) of this subchapter), accessory (see §121.8(c) of this subchapter), attachment (see §121.8(c) of this subchapter), or software for use in or with a defense article.

(b) For purposes of this subchapter, a part, component, accessory, attachment, or software is not specially designed if it:

(1) Is subject to the EAR pursuant to a commodity jurisdiction determination;

(2) Is, regardless of form or fit, a fastener (e.g., screws, bolts, nuts, nut plates, studs, inserts, clips, rivets, pins), washer, spacer, insulator, grommet, bushing, spring, wire, or solder;

(3) Has the same function, performance capabilities, and the same or “equivalent” form and fit as a commodity or software used in or with a commodity that:

(i) Is in production (i.e., not in development); and

(ii) Is not enumerated on the U.S. Munitions List;

(4) Was or is being developed with knowledge that it is or would be for use in or with both defense articles enumerated on the U.S. Munitions List and also commodities not on the U.S. Munitions 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 (e.g., a F/A–18 or HMMWV) or type of commodity (e.g., an aircraft or machine tool).

Note to paragraphs (a) and (b): The term “commodity” refers to any article, material,
or supply, except technology/technical data or software.

Note to paragraph (a)(1): An example of a commodity that as a result of development hastened or made available is one that is generally available to the public. This is a commodity that is peculiarly responsible for achieving or exceeding the controlled performance levels, functions, or characteristics in a U.S. Munitions List category, and which is not subject to the EAR. This includes the following: a commodity that has been specially designed for or supplied with a product, configuration, or assembly line for multiple commodities (including the concept design, configuration design, integration design, layouts.

Note 2 to paragraph (b)(3): Commodities in “productivity” that are specifically subject to “productivity” activities, such as those that would result in enhancements or improvements only in the reliability or maintainability of the commodity (e.g., an increased mean time between failure (MTBF)), including those pertaining to quality improvements, 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 “productivity” until and unless they enter into “production.”

Note 3 to paragraph (b)(3): The form of a commodity is defined by its configuration (including the geometrically measured configuration), material, and material properties that uniquely characterize it. The fit of a commodity is defined by its ability to physically interface or connect with or become an integral part of another commodity. The function of a commodity is the action or actions it is designed to perform. Performance capability is the measure of a commodity’s effectiveness to perform a designated function in a given environment (e.g., measured in terms of speed, durability, reliability, pressure, accuracy, efficiency). For software, the form means the design, logic flow, and algorithms. The fit is defined by its ability to interface or connect with a defense article. The function means the action or actions the software performs directly related to a defense article or as a standalone application. Performance capability means the measure of the software’s effectiveness to perform a designated function. Note 5 to paragraph (b)(3): With respect to a commodity, “equivalent” means its form has been modified solely for fit purposes.

Note 1 to paragraphs (b)(4) and (5): For a defense article not to be specially designed on the basis of paragraph (b)(4) or (5) of this section, documents contemporaneous with its development, in their totality, must establish the elements of paragraph (b)(4) or (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 (5).

Note 2 to paragraphs (b)(4) and (5): For the purpose of this definition, “knowledge” includes not only the positive knowledge a circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person’s willful avoidance of facts.


§ 120.42 Subject to the Export Administration Regulations (EAR).

Items “subject to the EAR” are those items listed on the Commerce Control List in part 774 of the EAR and all other items that meet the definition of that term in accordance with §734.3 of the EAR. The EAR is found at 15 CFR parts 730 through 774.

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