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VIA E-MAIL AND FEDERAL RULEMAKING PORTAL

Regulatory Policy Division
Bureau of Industry and Security, Room 2099B
U. S. Department of Commerce
14th St. and Pennsylvania Avenue
Washington, DC 20230

Re: Comments of Continental Tire and Continental Automotive
June 19, 2012 Proposed Definition of "Specially Designed"
RIN No. 0694-AF66, Docket No: 120403245-1034-01

Dear Sir/Madam:

We respectfully submit this comment letter on behalf of Continental Tire the Americas LLC ("**Continental Tire**") and Continental Automotive, Inc. ("**Continental Auto**") (collectively with their affiliates and subsidiaries, "**Continental**"). This letter comments on the definition of the term "specially designed" proposed by the Bureau of Industry and Security ("**BIS**") on June 19, 2012 (the "**Proposed Rule**"). Continental appreciates the continued work of BIS to update the nation's outdated export control regulations.

Continental contributes materially to the U.S. market for automotive parts and components, including a broad range of products that are suitable for use on military and non-military vehicles. Continental submitted detailed comments concerning the proposed rules published by BIS on July 15, 2011 and December 6, 2011 and appreciates the opportunity to comment on the Proposed Rule.

These comments support the definition proposed by BIS in a number of important respects while suggesting that the definition be fine-tuned to achieve the stated goals of the Export Control Reform initiative ("**ECR Initiative**"). In particular, we suggest that BIS revise the proposed definition to reflect the ECR Initiative goals of building "higher walls around fewer items" and not applying "600 series" controls to items that are currently subject to a lower control status. We believe that BIS can do much to accomplish these goals through several minor changes to the proposed definition without compromising important U.S. national security interests, as described below.

Executive Summary

BIS explained in the Proposed Rule that the intent of the "specially designed" definition is "to allow this term to play the key role envisioned for it under the ECR Initiative." 77 Fed. Reg. 36,411. The term "specially designed," if defined in an appropriate manner, has the potential to help industry better understand U.S. export controls and help ensure that U.S. export controls focus on what is important. Defined over-broadly, however, the term would (1) increase the control status of items currently subject to lower control status, (2) continue to put U.S. companies at a disadvantage with respect to exports and economic recovery, (3) result in scarce resources being devoted to licensing and enforcement for harmless parts and components (at a time when there are far more real threats to U.S. security interests), and (4) most importantly, constitute a major hindrance to the U.S. military's efforts to update its vehicle fleet and better equip our troops in a cost-efficient manner.

The proposed "specially designed" definition is quite precise in some respects while being over-broad in the way it applies to standard commercial parts and components that are modified for use on a military vehicle. We agree that parts and components that have significant military or intelligence capability or are particularly responsible for a achieving a controlled performance level should be subject to export restrictions. However, under the proposed definition, not only those parts, but virtually any part or component that is modified in any way for a military vehicle would require a license or license exception for export to all countries except Canada. This would include parts and components that clearly have no military significance whatsoever, have equivalents found in civilian vehicles throughout the world, and over which the Directorate of Defense Trade Controls ("**DDTC**") would never have asserted jurisdiction under current regulations.

Many parts and components, even if modified to work on a military vehicle, do not warrant control, at least, not beyond the Anti-Terrorism level. For example, Continental has pointed out in prior comments that the following items do not involve significant U.S. national security related issues even if modified for use on a military vehicle: gauges such as speedometers; instrument panels/clusters; vehicle/engine sensors; vehicle/engine monitoring sensors; displays and their associated sensors such as check engine lights; electronic braking systems such as anti-lock brakes; multiplexing systems to limit vehicle wiring; tire pressure monitoring systems; and wheels.

Like many other automotive parts and components, these items may require small changes and calibrations for use on any vehicle, without changing the performance capabilities of the items. Under the proposed definition, if these items are modified, even in form or fit, for use on military vehicle, they would potentially be "specially designed" (unless they are specifically listed in the appropriate ".y" ECCN subparagraph). Even if the only change were moving a wiring harness, entering a variable used in all civilian vehicles, or using a different size brake hose with an anti-lock braking system, a license would be required for exports to most countries except Canada.

Further, supplying the above items often requires that the company obtain basic information about the vehicle or system in which the parts and components will operate — for example, the size of the slot into which a part must fit. Thus, it is important that the final rule not control the information needed to supply an item at a level above the item itself where the item has no significant military or intelligence applicability.

On December 6, 2011, BIS indicated in the Federal Register that it is considering recommendations to "limit the controls on form, fit and function data needed to provide militarily insignificant items for military vehicles to the anti-terrorism reason." 76 Fed. Reg. 76,088. Unless this clarification is made as part of the "specially designed" definition, many small and large companies operating in the U.S., who have foreign employees, will effectively be precluded from competing to supply commercial parts and components to the U.S. military. This is because they would have to treat basic specifications and information they receive as subject to U.S. export control laws, even when it is the same type of information used to produce and supply parts and components for any civilian customers. Potentially hundreds of thousands of employee licenses, millions of dollars in IT system changes, and many thousands of licenses for suppliers and subcontractors, could be required to deal with this issue if it is not addressed. Also, just as importantly, the complexity and expense involved in complying with restrictions on specifications and information needed to supply commercial parts and components to the U.S. military could ultimately keep many suppliers from offering their most advanced, efficient, and cost-effective technologies to the U.S military.

The proposed definition would continue to put the U.S. military and companies operating in the U.S. at a distinct disadvantage. This is because many other countries do not strictly regulate exports of items that are basically just commercial parts or the information needed to supply them. Over-broad regulation would also result in (a) numerous unnecessary license and classification requests being filed with BIS, (b) companies having to undertake expensive and complex compliance measures even to supply basic parts and components to the U.S. or a foreign military, (c) reduced access by the U.S. military to these important products and technologies, and (d) military parts and components that continue to be far more expensive and less available than their commercial sector equivalents.

Although quite significant, these issues can be addressed through very minor changes to the wording proposed by BIS and a brief interpretive note, as suggested in more detail below.

Proposed Definition and Suggested Changes

For convenience, the definition of "specially designed" provided in the Proposed Rule, and our proposed edits are as follows:

(a) Except for items described in (b) of this definition, an "item" is "specially designed" if, as a result of "development," it:

(1) Has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions stated in the relevant ECCN or U.S. Munitions List (USML) paragraph;
(2) Is a part or component necessary for an enumerated or referenced commodity or defense article to function as designed; or
(3) Is an accessory or attachment used with an enumerated or referenced commodity or defense article to enhance its usefulness or effectiveness.

(b) A "part," "component," "accessory," or "attachment" that would be controlled by paragraph (a) of this paragraph is not "specially designed" if it:

(1) Is enumerated in a USML paragraph;
(2) Is a single unassembled "part'" that is of a type commonly used in multiple types of commodities not enumerated on the CCL or the USML, such as threaded fasteners (e.g., screws, bolts, nuts, nut plates, studs, inserts), other fasteners (e.g., clips, rivets, pins), basic hardware (e.g., washers, spacers, insulators, grommets, bushings, springs), wire, and solder;
(3) Has equivalent~~the same form, fit, and~~ performance capabilities as a part, component, accessory, or attachment used in or with a commodity that:
(i) Is or was in "production" (i.e., not in "development"); and
(ii) Is either not enumerated on the CCL or USML, or is enumerated in an ECCN controlled only for Anti-Terrorism (AT) reasons;
(4) Was or is being developed with a reasonable expectation of:
(i) Use in or with commodities described on the CCL and commodities not enumerated on the CCL or the USML; or
(ii) Use in or with commodities not enumerated on the CCL or the USML; or
(5) Was or is being developed with no reasonable expectation of use for a particular application.

Note Regarding "Technology." Specifications and other information necessary to provide a part, component, accessory, or attachment for an enumerated or referenced commodity or defense article will not be considered "technology" necessary for the "development," "production," or "use" of an enumerated or referenced commodity or defense article if the specifications or information are of the type commonly used to provide equivalent parts, components, accessories, or attachments used in multiple types of commodities not enumerated on the CCL or the USML and the parts, components, accessories, or attachments themselves are either (i) not "specially designed" or (ii) are controlled only for Anti-Terrorism reasons under the CCL. For example, information about the size of the slot in a military vehicle that a commercially available part must fit into or the voltage available to power it will not be considered "technology" necessary for the "development," "production," or "use" of the military vehicle if the same types of information are commonly used to provide such a part for use in civilian vehicles

not enumerated in the CCL or USML and the part itself is not "specially designed" or is listed in the ".y" paragraph of the applicable "600 Series" ECCN.

Should BIS determine that it will not adopt the changes proposed above, Continental suggests that BIS consider the alternatives suggested in this comment letter and, at the very least, (a) create a process by which additional parts and components can be added to the ".y" paragraph of each "600 series" ECCN in the future and (b) clarify that the specifications and information needed to provide items listed in such ".y" paragraphs should not be treated as "technology" subject to export restrictions if it is of the type commonly used to provide parts, components, accessories, or attachments used in multiple types of commodities not enumerated on the Commerce Control List ("**CCL**") or the United States Munitions List ("**USML**").

There are hundreds of thousands, or perhaps even millions, of parts and components for military vehicles and other military platforms that have predominant civil uses, civil equivalents, and no military or intelligence applicability. DDTC has historically determined that such items are not subject to the USML and they have been designated as "EAR99" if not specifically enumerated in the CCL or USML. Unless BIS excludes these items (and the specifications and information necessary to supply them) from the "specially designed" definition, or adopts a process to reduce the control status of these items in the future, BIS could see a very significant increase in the number of classification requests and license requests it processes, bogging down the system and further harming U.S. economic interests. The number of additional classification requests and license requests could go well beyond the number of licenses and commodity jurisdiction requests historically processed by DDTC and BIS relating to such parts and components, because manufacturers will not be able to determine on their own or through government guidance whether specific types of changes can be made without rendering an item subject to strict licensing requirements.

Support for Several Features of the Proposed Definition

We commend BIS for several features of this proposed definition. The hard work that went into drafting it is obvious and its resultant sophistication and clarity on a number of significant points represents a significant step forward in the ECR Initiative. More specifically:

(1) Under proposed paragraph (a)(1), Continental agrees that items that are particularly responsible for achieving performance levels, characteristics, or functions specifically stated in the CCL or USML should be considered to be "specially designed" if not released as part of the second part of the proposed definition.

(2) Under proposed paragraph (b)(2), Continental agrees that unassembled parts that are of a type commonly used in multiple types of commodities not enumerated on the CCL or the USML should not be considered "specially designed." We suggest below that not only unassembled parts, but also other parts, components, accessories, and attachments of a

type commonly used in items that are not export-controlled do not merit control at the "national security" and "regional stability" level.

(3) Under proposed paragraph (b)(3), Continental agrees that parts, components, accessories, and attachments should not be considered "specially designed" if they have the same form, fit, and performance capabilities as a part, component, accessory, or attachment used in or with commodities that are in production and are not listed on the CCL or USML, or that are listed on the CCL but controlled only for Anti-Terrorism reasons. As discussed below, however, Continental believes that manufacturers should be able to modify the form and fit of an item, or even its performance capabilities within the range of capabilities offered for civilian use, without rendering it "specially designed."

(4) Under proposed paragraphs (b)(4) and (b)(5), Continental agrees that items should not be considered "specially designed" if they are developed with a reasonable expectation of being used in both enumerated or referenced commodities and defense articles on the one hand or, on the other, items that are not subject to export restrictions. Items developed with no expectation of a particular use should also not be controlled at a high control level, as proposed by BIS.

(5) Under proposed paragraph (b)(1), Continental agrees that items enumerated on the USML should not be considered "specially designed" under the Export Administration Regulation ("**EAR**"). This is important to ensure clarity and avoid jurisdictional disagreements.

Suggestions for Improving the Definition

Continental appreciates and supports the above features of the proposed "specially designed" definition, but several other features could benefit from further refinements that would require only the minor re-wording suggested above or certain alternative clarifications discussed in this comment letter.

(1) Achieving Stated Goals Regarding Parts and Components with Civil Equivalents, Predominant Civil Uses, and No Significant Military or Intelligence Applicability

Although the Proposed Rule is quite precise on a number of points, there appears to be an inconsistency between the goals stated in the preamble and the wording in the proposed "specially designed" definition itself. The preamble could give the impression that parts and components that have civil equivalents, predominant civil uses, and no military or intelligence applicability will not be considered "specially designed." However, this is not reflected in the proposed definition itself.

The preamble to the Proposed Rule states that items should not be controlled by the new "600 series" ECCNS if they have predominant civil applications, have performance equivalents with respect to items used for civil applications, and do not have significant military or intelligence applicability. 77 Fed. Reg. 36,410. It also indicates that the intent of paragraph (b)(3) of the "release" part of the proposed definition is to release parts, components, accessories, and attachments "that would otherwise be controlled by a 'catch-all' provision of an ECCN" if it has the same performance capabilities as an item that is or was in production and is either not enumerated on the CCL or USML or is controlled only for Anti-Terrorism reasons. 77 Fed. Reg. 36,414. The preamble further notes that BIS considered excluding "minor components" but decided this was not warranted in light of the other exceptions and the proposed criterion in paragraph (a)(2) of the definition, suggesting that these features of the definition would release some minor components that otherwise would be considered "specially designed." 77 Fed. Reg. 36,413-4. Additionally, BIS has proposed that each new set of "600 series" ECCNs include a ".y" paragraph for parts and components of military platforms that have "little or no military significance" — which items would be subject only to limited restrictions for Anti-Terrorism reasons. Based on these statements and statements in the preamble relating to International Traffic in Arms Regulation ("**ITAR**") Section 120.3 (see below), it is clear that BIS recognizes that items should not be considered "specially designed" simply because they are modified to work on a military platform, if the item has civil equivalents, predominant civil application, and no significant military or intelligence applicability.

The Proposed Rule also states that it applies several "normal commercial use" carve-outs included in the ITAR and "implements the statement of policy in ITAR section 120.3, consistent with the AECA." Continental agrees that the standards set forth in Section 120.3 of the ITAR, as interpreted by DDTC pursuant to prior commodity jurisdiction requests, are a helpful guide. Section 120.3 provides, in pertinent part:

> An article or service may be designated or determined in the future to be a defense article (see §120.6) or defense service (see §120.9) if it:
> (a) Is specifically designed, developed, configured, adapted, or modified for a military application, and
> (i) Does not have predominant civil applications, and
> (ii) Does not have performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications; or
> (b) Is specifically designed, developed, configured, adapted, or modified for a military application, and has significant military or intelligence applicability such that control under this subchapter is necessary.

(Emphasis added.)

In practice, under this rule, DDTC has consistently determined (in response to commodity jurisdiction requests) that civilian-use parts and components designed, configured, or modified in minor ways for use in military platforms do not become subject to the ITAR because of such changes — even if their form or fit are changed.

Notwithstanding the above, the proposed definition of "specially designed" as applied to parts and components of military vehicles (as well as many other military platforms) would include numerous items that do in fact have civil equivalents, predominant civil uses, and no significant military or intelligence applicability. In fact, the proposed definition of "specially designed" appears to include virtually all parts and components that are modified in any way at all for use on a military vehicle (or other platforms), because the only parts or components that are released by paragraph (b)(3) of the proposed definition are those that have the "same" form, fit, and performance capabilities as parts used with a non-controlled item that is in production. In other words, no changes to a part or component are allowed by paragraph (b)(3) — not even changes to form and fit that DDTC has routinely determined would not render parts and components subject to the USML.

One potential "release valve" for newly "caught" or unnecessarily controlled parts and components involves paragraph (b)(3) of the definition. At first glance, proposed paragraph (b)(3) seems to provide some relaxation of export restrictions with respect to items that have civil equivalents. However, paragraph (b)(3) and the preamble to the Proposed Rule currently indicates that only items that have the "same" form, fit, and performance capabilities as a non-controlled (or AT-controlled) item will be released from the definition under paragraph (b)(3). 77 Fed. Reg. 36,414, 36,419 (emphasis added). This is different from the less severe "equivalent" standard under the ITAR and suggests that items with any changes to their form, fit, or performance capabilities would be "specially designed."

Another potential "release valve" for newly "caught" or unnecessarily controlled parts and components relates to a proposed technical note relating to paragraph (b)(3). Unfortunately, this potentially useful "release valve" also appears to be blocked. The preamble to the Proposed Rule and proposed Note to paragraph (b)(3) say that "activities, such as those pertaining to quality improvements, cost reductions, or feature enhancements, remain in 'production'" as opposed to in "development," and therefore do not make an item "specially designed." 77 Fed. Reg. 36,414, 36,419 (emphasis added). The Proposed Rule goes on to indicate that "any new models or versions of such commodities developed from such efforts that change the basic performance or capability of the commodity are in 'development' until and unless they enter into 'production.'" *Id.* (emphasis added). Unfortunately, as drafted, this language does not say that a manufacturer can change anything about an item to use it with an enumerated or referenced item without the item being considered back in "development" and becoming "specially designed." Rather, the examples provided suggest that BIS may have had in mind only changes of a general nature that are not specific to an enumerated or referenced item. In light of the "releases" contained in paragraph (b)(4) and (b)(5), which already "release" items that have been developed without use on a controlled item in mind, it is not clear that the language quoted above regarding what constitutes "development" has the effect of releasing anything that would otherwise have been controlled. If only general changes are made to a part or component for no particular application, paragraphs (b)(4) and (b)(5) would already release the item.

Paragraph (b)(4) of the Proposed Rule initially seems to offer a third "release valve" for newly "caught" or unnecessarily controlled parts and components. Proposed paragraph (b)(4) would "release" certain items from the definition of "specially designed" if they are developed with a reasonable expectation of being used in both controlled and un-controlled applications, such as a military vehicle and a civilian vehicle. However, BIS has suggested that paragraph (b)(4) of the "release" will only release items being developed to be "interchangeable" between CCL or USML-listed commodities or defense articles and other items not subject to such export restrictions. 77 Fed. Reg. 36,415. Thus, any changes to the form or fit of a part, component, accessory or attachment that are made with a military vehicle in mind would also appear to render that part, component, accessory or attachment "specially designed," regardless of whether the item has civil equivalents, military or intelligence applicability, or predominant civil use. This standard unnecessarily stresses design intent over military and intelligence applicability as the standard for determining control level.

In the end, the language of the proposed definition appears to boil down to this: any change to an item made so that it can work on a military vehicle or other controlled platform renders the item "specially designed," no matter how inconsequential the changes, and even if the resultant item has (i) no military or intelligence capability, (ii) civil equivalents, and (iii) predominant civil uses. Indeed, after the publication of the Proposed Rule BIS indicated in a public forum that any part or component that is changed at all for use on an enumerated or referenced commodity or defense article would be considered "specially designed" (no matter how small the change).

If the proposed definition is finalized without modification, the EAR would not only appear to control strictly some items that do not warrant such control, but also to control a greater array of parts and components than those over which DDTC has historically asserted jurisdiction (and without a commodity jurisdiction process by which applicable controls could be reduced). We do not believe that this is the intent of the ECR Initiative and would request that BIS clarify this in the final rule. Perhaps the best way to accomplish the appropriate clarification would be to adopt the changes proposed above, replacing the word "same" in paragraph (b)(3) with the word "equivalent" (as per the ITAR), and removing the words "form" and "fit." This would preserve the concept of "equivalence" from the ITAR provisions cited in the Proposed Rule and account for the fact that changes to form and fit that do not change the basic performance capabilities of a commercially available part or component do not render the item a threat to U.S. national security. Another way to achieve the same goal would be to make paragraph (b)(2) apply to all parts and components, not just unassembled ones. This point is discussed in greater detail below.

(2) Re-used Military Items Treated More Favorably than Modified Civilian Items

Continental believes that paragraph (b)(3) of the Proposed Rule may result in an unintended result — namely, the "specially designed" definition could treat re-used military parts and components more favorably than civilian parts and components that are later modified in form or fit for use on a military vehicle.

The Proposed Rule provides the example of a radiator that was originally designed for a heavy military transport truck that is later used in a fire truck that goes into production. 77 Fed. Reg. 36,414. BIS concludes that the item would cease to be "specially designed." However, if there are hundreds of versions of a radiator that are in use on civilian vehicles — all of which are slightly different — and a similarly minor change is made to the radiator to make it work on a military vehicle, the item becomes "specially designed." Particularly in an industry where many parts and components are vehicle or OEM-specific, minor changes that are of a type offered to civilian customers should not render a part or component "specially designed," requiring a license or exception for the product to be exported to any country except Canada or for technical information about the product to be disclosed to a foreign national/person of any country except Canada.

Items that lack military significance should not be subject to U.S. export control restrictions. Using the example provided in the Proposed Rule, Continental is not aware of any respect in which a radiator that is designed for a military use (without any prior mitigating civilian use) is less militarily significant than a radiator that has enjoyed a long life as a civilian product and is simply changed in its form or fit for use on a military vehicle — or even changed in its cooling performance capabilities, assuming those capabilities are still within the range of capabilities offered for civilian vehicles in production.

Based on the example in the preamble, it will be easy for a part or component that was originally designed for use on a military vehicle, without any civilian predecessor, to outgrow its status as "specially designed" simply by being used on a civilian vehicle that is in production. However, it will be impossible for a manufacturer to make any changes at all to a part or component that was originally designed for a civilian vehicle in order to make the item work on a military vehicle without the item becoming "specially designed." We would request that BIS clarify this by changing the word "same" in proposed paragraph (b)(3) to read "equivalent" shown above, in accordance with the existing ITAR language and other statements in the preamble to the Proposed Rule.

(3) No Identified Connection Between Changes, Assembly Level, and Control Status

Continental recognizes that some automotive parts and components could have military or intelligence applicability (for example, a weapons system, armor, command control and communications systems, threat detection systems, and systems for concealment). Nevertheless, Continental does not believe that the Proposed Rule states an adequate basis for applying "national security" and "regional stability" controls (as would apply under the ".x" paragraphs BIS has proposed for the various "600 Series" ECCNS) to civilian vehicle parts and components that are modified for military vehicles in the same types of ways in which they are modified for all vehicles. In fact, if these items have civil equivalents, predominant civil applications, and no significant military or intelligence applicability, the preamble to the Proposed Rule appears to recognize that they should not be treated as raising national security issues.

The Proposed Rule draws no specific connection between changes to the form or fit of an item — or even changes to performance characteristics that are within the range offered for civil use vehicles in production — and military or intelligence applicability. To the extent that BIS does in fact plan to treat items that are modified in such minor ways as requiring a license or exception for export to every country except Canada, we note that the Proposed Rule does not explain that decision or attempt to quantify or justify it. The Proposed Rule also does not address either (a) the rationale for imposing an increase in the export regulation of parts and components at this time, or (b) the burden on the U.S. military, taxpayers, and the U.S. economy involved in putting in place or continuing such a strict level of regulation.

Other proposed rules issued by BIS relating to a number of "600 series" ECCNs have included ".y" paragraphs for items that, even if they are "specially designed," will not be treated as national security threats. Thus, BIS has recognized that the form, fit, and even performance capabilities of some items can be changed without rendering them "specially designed." Similarly, the Proposed Rule indicates that single unassembled parts and components of a type used with items not enumerated or referenced in the EAR or ITAR, will be "released" under paragraph (b)(2), even if they are modified.

The Proposed Rules do not explain why the fact that a part is assembled or unassembled has any bearing on its military or intelligence applicability. There is no meaningful policy rationale provided for the distinction that unassembled parts qualify for an exception but once those parts are assembled they no longer qualify. The assembly of the parts does not necessarily make the new item militarily significant and instead may inadvertently capture a broad range of items with no corresponding benefit. A high-performance but unassembled radio antennae part may in fact be much more militarily significant than an air conditioner assembly with several hundred pieces. Continental requests that BIS not equate assembly, complexity, or electronic content with military or intelligence applicability and apply to all parts and components the same principles it is proposing to apply to unassembled parts and components — if they are of a type used in multiple vehicles that are not subject to U.S. export control restrictions, there is no need to restrict the export of these items to all countries except Canada.

The relatively simple changes to the proposed definition shown above could address the issues raised in this section of our comments. As described above, if BIS were to delete the words "form and fit" from paragraph (b)(3) and replace the word "same" with "equivalent," this issue would be resolved without compromising any national security interests.

If BIS wanted an additional layer of protection against diversion to terrorist countries, it could clarify that parts and components that are <u>not</u> specially designed (but are for enumerated or referenced commodities and defense articles) would still be subject to control for Anti-Terrorism reasons. If BIS were to take this approach in combination with the other minor clarifications proposed above, it would have the added benefit of reducing the need to (i) create an analogue to the commodity jurisdiction process under which the control status of an item could be reduced,

and (ii) update the ".y" paragraphs of the "600 series" ECCNS on a constant basis to list items that lack military significance but still require control for Anti-Terrorism reasons.

Another approach that BIS could use would be to apply "release" paragraph (b)(2) to all parts and components.

(4) Necessity, Usefulness, and Effectiveness

In addition to the changes to the "specially designed" definition suggested above, subparagraph (a)(2) suggests another way BIS could refine the definition to make it more consistent with the stated goals of export reform, without releasing items that truly have significant military and intelligence applicability. Subparagraph (a)(2) "catches" an item only if, as a result of development, it "is a part or component necessary for an enumerated or referenced commodity or defense article to function as designed."

It is not currently clear in the Proposed Rule what it means for an item to be "necessary" for a military vehicle to function "as designed." For example, the current wording could cause doubt about whether an anti-lock brake system would be considered "specifically designed" because the original design for a military vehicle included some type of brakes, the anti-lock brakes are "designed in" at a later time, and brakes are necessary for any vehicle to function. A clarification to this language presents another way to refine the proposed definition of "specially designed."

If BIS chooses not to adopt the language suggested above to remove unnecessary controls from militarily insignificant parts and components, BIS could easily clarify this matter in a note to the paragraph (a)(2), as follows:

> "**Note to (a)(2)**: A part, component, accessory, or attachment will not be treated as 'necessary for an enumerated or referenced commodity or defense article to function as designed' simply because the item is included in the design for an enumerated or referenced commodity or defense article if the item performs a function of a type commonly performed by equivalent parts, components, accessories, or attachments in multiple types of commodities not enumerated on the CCL or the USML."

We note our understanding that the Commerce Department does not plan to treat any parts and components as attachments or accessories but we request that you please clarify that distinction in the final rule. If BIS is not able to confirm this point, we would request that BIS include a similar note to paragraph (a)(3) of the proposed definition.

(5) Information Needed to Modify Parts and Components for Military Vehicles

On December 6, 2011, BIS issued proposed rules stating that BIS is considering recommendations to "limit the controls on form, fit and function data needed to provide militarily insignificant items for military vehicles to the anti-terrorism reason." 76 Fed. Reg. 76,088. Because this issue is critical to export reform and the "specially designed" definition may be the most appropriate context in which BIS could address this issue, we raise it here and request that BIS consider the technical note proposed above. That technical note would clarify that BIS will not control the specifications and other information needed to supply commercial parts and components to the U.S. military at a level above the parts and components themselves, as long as the information is of the same type commonly used to provide parts and components for items not enumerated or referenced in the USML or CCL.

This issue is critical to meaningful export reform because, without basic information on what is needed for a particular military vehicle or other application, manufacturers cannot provide parts and components to meet that need. If this issue is not resolved, many small and large businesses will be unable to offer their commercially available technologies to the U.S. military at commercial prices — or may not be able to offer them at all — because of the cost, complexity, risk, and delay inherent in dealing with export-controlled "technology."

Modifying parts and components almost always requires a supplier to obtain, make available to its workforce, and sometimes pass down to its supply chain, some minimal information about the vehicle for which the part or component is being modified, such as the size of the slot into which it will fit. Without such information, the part cannot be fitted and integrated into the vehicle mechanically or electrically, cannot be rendered ergonomic and safe for users, and often cannot be covered by the manufacturer's warranty. For example, a speedometer or engine sensor must be made to the proper size and this requires the manufacturer to know the size of the slot in the dashboard or instrument panel into which it will fit. Similarly, an antilock brake system cannot readily be made to function properly without information about how heavy the vehicle is, whether there is enough space under the hood for the unit's control module, and the amount of electrical voltage, electrical current, and brake fluid flow available for running the system. Even for products listed in the various ".y" paragraphs BIS has proposed, the issue remains, because some information about the application will often be needed to supply a modified product.

Continental recognizes that some information about military vehicles is militarily significant, namely, certain information about offensive weaponry, armor, threat detection, military command control and communications equipment, and concealment of a vehicle's presence or location. However, basic information that is simply needed to design, modify, or test a militarily insignificant vehicle part or component should not be controlled in the same way as information about weaponry, armor, threat detection, command control and communication equipment, and vehicle concealment.

There would be little or no benefit at all in having commercial automotive parts and components be "released" from the specially designed definition (or included in the ".y" controls of various

"600 series" ECCNs) if U.S. law regulates the basic specifications and other information needed to manufacture and provide such items under far stricter rules than the parts and components themselves. If controls are not substantially relaxed on such information, supplying the U.S. military will remain a complex, risky, and therefore expensive proposition for many manufacturers, particularly when relatively small production runs for military vehicles are considered. This is because, to supply the U.S. military, U.S. suppliers would have to obtain and BIS process perhaps hundreds of thousands of employee licenses (unless an exception applies to every foreign person and every lower level supplier who will have access to the information).[1] Expensive information technology systems would also be required to allow suppliers to restrict access to harmless information needed to supply commercial products, at a time when our nation faces other information technology-related threats that are real and significant. For small businesses with a few foreign employees right up to large international companies manufacturing and doing business in the U.S., the expense and complexity of supplying the U.S. military will not be justified unless the export regulations are reformed to address this issue.

Technology for the development, production, and use of "specially designed" items could continue to be regulated without regulating the information needed to supply parts and components with no significant military or intelligence applicability. Relaxing controls on the specifications and other information needed to supply militarily insignificant parts and components would enable the U.S. military to get better, faster, and less expensive access to the technologies it needs to update its fleet, protect and provide basic comfort to the warfighter, and conserve U.S. taxpayer dollars, while focusing information and technology controls on the particular instances where militarily significant information and technology is present.

The technical note proposed above regarding "technology" would address the significant issues raised here without the need for any changes to the text of the definition itself.

Conclusion:

We greatly appreciate the work that BIS is doing to reform the U.S. export control rules and appreciate the opportunity to participate in that process. The above issues are not minor in nature, because virtually every military vehicle (or other military platform) that the U.S. government purchases contains thousands parts and components, many of which are items that have to be modified in small ways for use on any specific vehicle. The amount of additional money that U.S. taxpayers have to pay (directly or through OEMs) for parts and components that are subject to export controls is no doubt phenomenal. The associated regulatory burden of

[1] For many large vehicle part and component manufacturers, the EAR's Strategic Trade Authorization ("**STA**") license exception would do little to mitigate the heavy cost of providing adapted parts and components for the U.S. military market. This is because these companies operate in, have employees who are nationals of, and have suppliers in countries that are outside of the thirty six (36) eligible for favorable treatment under license exception STA. While the Commerce Department has decided to limit the use of license exception STA to thirty six (36) nations with respect to items that are truly militarily significant, as the Commerce Department has recognized by proposing to regulate 0A606.y items only for anti-terrorism ("AT") reasons, parts and components that have little or no military significance need not be treated in the same manner.

obtaining hundreds or thousands of licenses for foreign employees, putting in place complex compliance structures and special IT systems not only drives up costs — these factors also keep large and small businesses in the U.S. from competing on U.S. military opportunities or offering their leading edge technologies to the U.S. military. The U.S. military deserves to be equipped with the best, most efficient, and most cost-effective equipment in the world. Under the Proposed Rule, as under current regulations, restrictions that unnecessarily apply to military insignificant items would continue to be a major hindrance to the U.S. military and a major expense to taxpayers. These issues also make U.S. businesses less competitive in the world without any corresponding national security benefit.

Thank you for your consideration of the above and for your on-going work in the ECR Initiative.

Respectfully Submitted,

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