August 3, 2012

Mr. Timothy Mooney
Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
14th Street and Pennsylvania Avenue, NW
Washington, DC 20230

VIA ELECTRONIC SUBMISSION ON WWW.REGULATIONS.GOV

RE: Specially Designed Definition – RIN 0694-AF66

Dear Mr. Mooney:

These comments are submitted on behalf of the Forging Industry Association (FIA) to both the Department of State and the Department of Commerce on the proposed definition of "specially designed" for use in the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR). FIA is the primary trade association representing the bulk of forging capacity in North America. The North American forging industry is comprised of approximately 500 forging operations in 38 states, Canada and Mexico.

Forging is one of the oldest known metalworking processes, where metal is pressed, pounded or squeezed under great pressure into high-strength parts known as forgings. The process is usually performed by preheating the metal to a desired temperature before it is worked. Forged parts are strong and reliable, and therefore vital in safety-critical applications. Rarely seen by consumers, forgings are normally component parts inside assemblies on aircraft, ships, and vehicles—anything that flies, floats or rolls.

On December 22, 2011, FIA provided comments to both the Departments of State and Commerce on proposed revisions to Category VIII related to aircraft and related items. In those comments, FIA applauded the Administration's overall efforts to amend the EAR in conjunction with amendments to the ITAR to describe more precisely which articles warrant continued control under ITAR and which are subject to the EAR.

In particular, FIA noted that, if our understanding of the proposed revisions was accurate, we would expect that upon finalization **ONLY** those forgings "specially designed" for a specific list of U.S.-origin aircraft that have low observable features or characteristics would be subject to continued control under ITAR. Further, we stated our belief that all other forgings "specially designed" for military aircraft would be subject to the jurisdiction of the EAR, as appropriate and consistent with multilateral export control regimes, including the Wassenaar Arrangement Munitions List (WAML). Because the proposed definition of "specially designed" under consideration would apply to all military end items, this reference to the WAML creates the need for additional clarity with regard to certain forgings that are shipped "unfinished" or "raw" and whether they are subject to export controls under the ITAR or the EAR. Many other forgings are shipped as finished parts, and we believe the decision as to whether they are "specially designed" will be made based on the part, not the fact that it is a forging.

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The WAML's category 16 (which would be implemented in the newly proposed EAR ECCN 9A610.x) provides a control regime for forgings, castings and other unfinished products "specially designed" for specified end items such as weapons, ammunition, bombs, aircraft, etc. That control regime applies to unfinished products only "*when they are identifiable by material composition, geometry or function."*

> *Note 1: Forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by material composition, geometry, or function as commodities controlled by ECCN 9A610.x are controlled by ECCN 9A610.x.*

Many aerospace forgings and some other forgings are shipped to the customer in "raw" form, and require substantial additional machining and manufacturing processes before being installed in an assembly or end item. In fact, the industry commonly refers to the "90/10 ratio" of what is shipped versus what ends up in the final product.

Such forgings are not "*identifiable by material composition, geometry or function"* when they are shipped to a customer. While such forgings may have a part number on them, FIA believes that a part number should not be enough to meet the definition of "*identifiable by material composition, geometry or function."* We suggest that an affirmative statement be made clarifying that the determination of whether a forging is "*identifiable by material composition, geometry or function"* cannot be made solely based on the existence of a part number.

Both the Department of State and the Department of Commerce have now proposed a final definition of "specially designed" (**Federal Register** / Vol. 77, No. 118 / Tuesday, June 19, 2012), and generally FIA believes that both proposed definitions would result in the same outcome as anticipated in our December 2011 comments, and would apply to forged parts contained in all categories of end items potentially subject to either ITAR or EAR. We believe this is the right approach, as it retains the ability to control forged parts that meet the definition of "specially designed" while creating a streamlined "decision tree" process for determining which forged parts no longer warrant controls under ITAR or EAR.

It is our understanding that if these definitions are adopted, the United States Munitions List (USML) will become a "positive list"—that is, any items to be controlled under ITAR will be specifically listed on the USML. All other items will be subject to EAR controls, but only if they meet the definition of "specially designed" included in the Commerce proposal, including the exclusion paragraphs.

We further understand that Commerce is attempting to create a "yes/no" decision tree process for determining whether an item, part or component is "specially designed" by posing a series of questions, beginning with a general definition and proceeding, if necessary, through several specific exceptions or exclusions. Under the proposal, if the answer is "no" at any point in the questioning, the item is not "specially designed" and no further analysis would be required.

However, we believe additional clarity is necessary in several areas in order to insure that the final definitions accomplish that goal without inadvertently "controlling" parts or components that do not warrant control. Our remaining comments will address those areas.

One of the exclusions (Exclusion paragraph (b) (2)) specifically excludes "any single unassembled "part" that is of a type commonly used in multiple types of commodities not enumerated on the USML or the CCL". Examples of "parts" listed in this exclusion are threaded fasteners (screws, bolts, nuts, nut plates, studs, inserts), other fasteners (clips, rivets, pins), and basic hardware (washers, spacers, insulators, grommets, bushings, springs). We would make two points with regard to this exclusion:

1. While we understand that this list is not intended to be all-inclusive, we believe it should be made clear in the final definition that for "parts" not specifically mentioned as examples, it is the "part" that controls

the determination, not the process by which the part is made. In the case of forgings, this will help forgers determine whether the forging (part) they produce is subject to this paragraph.

2. It is our understanding that Commerce intends to view "parts" broadly when determining whether they are "of a type commonly used in multiple types of commodities not enumerated on the USML or the CCL". Specifically, we understand that to mean that variations in such things as dimension, material, coatings or lubricants are not sufficient to cause a "part" to be "specially designed", unless one or more of those variations contribute to low observable features of an aircraft or some other unique characteristic of an end item warranting control. We suggest that be made clear in the final definition by stating affirmatively that such variations as dimension, material, coatings or lubricants do not cause a "part" to be "specially designed".

Another of the exclusions (Exclusion paragraph (b) (3)) would exclude a part, component, accessory or attachment that: "Has 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." We believe further discussion and clarity is required regarding the terms "form" and "fit" as stated below:

1. As currently written, it appears that only identical parts used in both civilian and military applications would be considered within the definition, which does not adequately reflect the nature of the forging process. For example, a crankshaft used in a compressor onboard a submarine would have the same form and performance characteristics as a crankshaft used in an engine powering an armored vehicle, but not the same "fit", as it would have different dimensions. Numerous other "parts" that are forged would fall into that same category, thus we suggest that additional clarity is needed.

With those caveats, FIA supports the overall Administration approach, which would retain ITAR control of critical forged parts that contribute to the properties of key U.S.-origin aircraft having low observable features or characteristics. All other forgings would be subject to control under EAR, but only if they are "specially designed" for military end items, consistent with multilateral export control regimes.

FIA appreciates the opportunity to comment on this proposed definition. We would be happy to answer any questions regarding these comments or export controls and their effect on forgers. Please contact our Washington Representatives: Laurin Baker at 202-393-8525 or Jennifer Baker Reid at 202-393-8524 if you have any questions.

Sincerely,

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