AEROSPACE INDUSTRIES ASSOCIATION

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Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
14th and Pennsylvania Avenue , N.W.
Room 2099B
Washington, D.C. 20230

ATTN: Mr. Timothy Mooney

SUBJECT: RIN 0694-AF66 "Specially Designed" Definition

Aerospace Industries Association (AIA), on behalf of its' members, submits the following comments regarding the proposed rule referenced above. We applaud many of the changes the Department has made to clarify and simplify its previous definition of "specially designed." There are a few additional minor changes that could further clarify the definition to the benefit of all interested parties. We appreciate the Department's continued engagement with industry on export control reform, particularly as the proposals move forward to implementation, at which point it will be critical to reduce any unintended consequences.

Additionally, noting that the regulatory impact of this proposed definition is strongly related to proposed rules previously published in the Federal Register, AIA requests that BIS also consider relevant comments regarding the timing of adoption of this rule with respect to other elements of the Export Control Reform (ECR) Initiative.

AIA would also like to comment on the importance of U.S. government outreach to exporters and foreign customers to educate and train them on USML/CCL revisions. This outreach is especially important for smaller and medium size companies. One of the major benefits of CCL classification is the use of Strategic Trade Authorizations (STA). The U.S. government should publish a list of approved parties and integrate that list into the Automated Export System (AES) so that exports may take full advantage of the authorization.

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Industry has also expressed concern that some EAR 99 items could transition to .y classification – in effect a re-control. If the U.S. government saw fit to classify an item under EAR 99 pre-ECR, it should maintain that classification post-ECR.

AIA Proposed Rule Recommendations:

1) We recommend adding the following language to the definition of an *End Item* in Part 772.1:
   End item. This is an assembled commodity ready for its intended use. Only ammunition, fuel, catalyst or other energy source like electricity may be required to place it in a fully operating state. Examples of end items include ships, aircraft, firearms, and milling machines.

2) While the definitions of the terms "development" and "production" have been in the EAR for some time, it would be helpful to relate this language to DoD acquisition milestones (https://dap.dau.mil/aphome/das/Pages/Default.aspx) to improve clarity for defense exporters.

3) Comments related to definition of "Specially Designed."

   - Proposed paragraph (b)(2) may be unduly restrictive and fails to "release" many simple multi-use items that should not be construed as subject to Wassenaar controls. There are many simple components "of a type commonly used in multiple types of commodities." Limiting this release paragraph to single, unassembled parts may result in over-controlling items and driving additional licensing volumes that will burden the Department. We urge the Department to consider expanding (b)(2) to include components "of a type commonly used in multiple types of commodities." Without the addition of "components" to (b)(2), the proposed wording will place significant limitations on the numbers of components that will be eligible for "release" under (b)(2). This change is particularly important to small entities because it would eliminate an unnecessary analysis burden that they would continue to bear if the rule were adopted as written, and would implement BIS' stated intention to "release" simple, multi-use items. An alternate approach that could work would be to define the exclusion in terms of the functionality of the items, to include fastening, positioning/supporting, serving as a conduit for the transfer of fluids, electricity or signals.

   - AIA notes that the term "single unassembled" already appears in the definition for "part" proposed in RIN 0694–AF17. Repeating it in paragraph (b)(2) is redundant, self-referential, and results in uncertain interpretation. A nut plate, cited as an example in paragraph (b)(2), is normally a 2-element assembly. It is a

"part" because it would normally be destroyed by disassembly, but it would not be universally construed as a single unassembled "part." By including nut plates in the illustrative list, BIS has implied an intent is to "release" multi-use "parts" by paragraph (b)(2). Eliminating the self-referential language would be clearer.

- The brief illustrative list of examples currently provided in (b)(2) could lead to widely different subjective interpretations as to what (b)(2) was intended to "release." That is, does (b)(2) only release basic hardware and fasteners, or does it release all "parts"? AIA recommends using a Supplement or similar structure for enumerating a broader illustrative list of simple multi-use commodity types that are "released" under (b)(2). Many item descriptions from the Defense Logistics Agency Item Identification Guides would be suitable for this purpose.

- Proposed paragraph (b)(3) may also be unduly restrictive. While we understand and appreciate that the Department does not want this paragraph to focus solely on function, as opposed to form/fit, requiring identical form/fit will result in capturing items that are insignificant and have performance characteristics that are equivalent to items that are not controlled on the CCL. The Department should consider language that would allow a part/component to fall within the (b)(3) release if differences are limited to dimensional variations (i.e. fit).

- Proposed paragraph (b)(3) should also include a new sub-item (iii) to allow for commodities that have been determined by DDTC as Commerce-controlled items in a commodity jurisdiction in order to not revert back to ITAR controls and be subject to the "specially designed" catch-all. The Department may want to consider the following proposed text for inclusion in (b)(3)(iii): "Is determined as subject to the Export Administration Regulations pursuant to a Commodity Jurisdiction issued by DDTC." In addition, (b)(3)(iii) could also require CJ documentation recordkeeping as is proposed in (b)(4) –(5).

- **Note 1** - The note was confusing in correlating to paragraph (b)(3) (ii)(release from being considered specially designed) which seemed straightforward. The Department should revise this note to introduce additional clarity. In addition, AIA suggests revising the first part of the note to make clear that "enumerated" should be used as a modifier, for example change the first part of the Note to read: "'Enumerated' refers to an item (i) that is described on either the USML or CCL and is not controlled in a 'catch all' paragraph …"

- **Note to paragraph (a)(1).** This note is very helpful in illustrating how the concept of "peculiarly responsible" applies in the "specially designed" definition.

- **Note to Paragraph (b)(3)** – The language and criteria is generally clear, and we agree with the simplification of removing the term "serial production," which was utilized in the previous proposed rule, but we recommend the following change: Commodities in ``production'' that are subsequently subject to ``development'' activities, such as those pertaining to quality improvements, cost reductions, or feature enhancements, remain in ``production.'' Part obsolescence/Diminishing Manufacturing Sources is also included. 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 ``development'' until and unless they enter into ``production.''
    - AIA member companies request further explanation on the difference between "feature enhancements," allowing a commodity to remain in production, versus a "change [to] the basic performance or capability," placing a commodity back into development. U.S. exporters would benefit from additional clarification, including consideration of either defining "feature enhancements" or adding some examples of what constitutes an enhancement.

- The first column on page 36415 contains the following sentence: "These exclusion paragraphs (b)(4) and (b)(5) would not create a burden to know the original design intent, but they would allow those who know the original design intent to exclude those "parts," "components," "accessories," or "attachments" from being controlled as "specially designed." Not knowing or possessing the records that illustrate the original design intent of a commodity that is decades old creates a burden on industry to treat those commodities as "specially designed." This would result in obsolete technology that is decades old and cannot qualify under the paragraph (b) exclusions being treated as "specially designed," while newer, more capable commodities are excluded.

- **Part, component, system** – All three terms are used throughout the definition of "specially designed" and on occasion in quotation marks; however, no definition is provided for those terms within Part 772 or within the definition of "specially designed." AIA recommends inclusion of definitions of those terms, all three of which are currently defined in the ITAR Section 121.8.

Finally, AIA is concerned about how the definition of "specially designed" will be applied to parts and components that have previously been subject to a Commodity Jurisdiction, as part of an end item. If a part or component was covered in a CJ that resulted in a Commerce jurisdiction determination, the "specially designed" definition should not be applied in a way that could result in control parts reverting back to the ITAR. This would cause confusion and could have a

very disruptive impact on existing commercial programs. The Department needs to clarify how the definitions and transition rules apply in these situations.

Thank you once again for the opportunity to comment on this important proposed rule. Please feel free to contact us if you have any questions about these comments.

Best regards,

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