NORTHROP GRUMMAN

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

ATTN: Mr. Timothy Mooney

SUBJECT: RIN0694-AF66 Proposed "Specially Designed" Definition

Dear Mr. Mooney:

Northrop Grumman agrees with the objective of the proposed rule referenced above, to clarify the term "specially designed" and to develop a consistent standard for application of term for articles covered by the United States Munitions List (USML) or the Commerce Control List (CCL).

We appreciate the overall structural approach (decision tree methodology) in terms of our ability to implement the definition in practice. In a few test analyses conducted at our businesses, using proposed USML Category VIII "catch all" category for parts and components and the definition of "specially designed," those individuals involved in self determination of jurisdiction and export classification were able to understand and apply the methodology to result in items moving to the "600 series" within the Commerce Control List. We were unable to conduct this exercise over multiple categories, however, as many of our product/technology sets are in Categories XI and XII, and the proposed rules have not been issued. However, we urge both Departments to develop training materials that clearly define the "decision tree" analysis to implement consideration of items "specially designed" in the self jurisdiction and classification process, and publish those in the same manner as other "decision trees" for license determination or other processes within the Export Administration Regulations (EAR).

We recommend the following regarding specific EAR sections:

1) Update 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) Proposed paragraph §772.1 Specially Designed sub-paragraph (b)(2) may be unduly restrictive. 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 including components "of a type commonly used in multiple types of commodities." We recommend that additional language be added to encompass "small assemblies and components of a type commonly used in multiple types of commodities" in §120.41(b)(2). We believe the requirement as it currently exists will place significant limitations on the numbers of components that will be eligible for "release" under (b)(2). The Defense Logistics Agency Item Identification Guides may be the reference for an illustrative list of simple components that would be released from consideration as specially designed in (b) (2).

4) 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.

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. We also request revision to 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 …"

6) 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." 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."

We also request the Department confirm applicability of the "specially designed" criteria on existing Commodity Jurisdictions (CJ). 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 parts reverting back to ITAR control or a higher level control on the CCL. This would cause confusion and could have a very disruptive impact on existing commercial programs. Therefore, we recommend that, in the final rule, the Department specify that items

subject to a prior Commodity Jurisdiction determination of CCL are expressly excluded from any retroactive re-review of jurisdiction and classification, based on the "specially designed" criteria.

If you have any questions or desire further discussion, please contact me at 703-280-4056 or beth.mersch@ngc.com to engage the appropriate individuals.

Sincerely,

Mary Elizabeth (Beth) Mersch

Mary Elizabeth (Beth) Mersch
Director, Export Operations