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U.S. Department of Commerce, Bureau of Industry and Security
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U.S. Department of State, Directorate of Defense Trade Controls
DDTCResponseTeam@state.gov

ATTN: Specially Designed Definition

Dear U.S. Department of Commerce and Department of State:

The American Bar Association ("ABA") Section of International Law ("Section") appreciates this opportunity to comment on the proposed rules published in the Federal Register by the U.S. Department of Commerce, Bureau of Industry and Security ("BIS") and the U.S. Department of State, Directorate of Defense Trade Controls ("DDTC") on July 19, 2012 (77 Fed. Reg. 118, 36409-36419 and 36428-36433, respectively) regarding the proposed definition for "specially designed."

We present these views exclusively on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA itself.

The ABA is the largest voluntary professional association in the world. The Section, with over 20,000 members, is the ABA leader in the development of policy in the international arena, the promotion of the rule of law, and the education of international law practitioners. Many of its members are experienced in the export control laws of the United States and other countries.

We applaud the U.S. Government's efforts to amend the International Traffic in Arms Regulations ("ITAR") and the Export Administration Regulations ("EAR") as part of the President's ongoing Export Control Reform effort. The proposed definition of "specially designed" is a very good improvement over earlier versions. It is quite apparent from the draft, from comments of agency officials, and from the experience of our members that it was an enormous challenge to meet all nine of your goals with the definition. With clarifications via interpretation of the new elements, this will be an even better effort.

We believe it is important to publish the redrafted United States Munitions List ("USML") categories and Commerce Control List ("CCL") entries to reflect positive, objective criteria in the control lists and to avoid overlapping or conflicting claims of jurisdiction. Because the definition of the term "specially designed" is a precondition to the publication of the control lists in final form, we believe the proposal should be finalized with clarifying interpretations of the type suggested below.

Section Fall Meeting • Dublin, Ireland · October 11 – 15, 2011 ABA/Section Midyear Meeting • New Orleans · Louisiana · February 1 – 7, 2012
Section Spring Meeting • New York City · April 17 – 21, 2012 ABA/Section Annual Meeting • Chicago, Illinois · August 2 – 7, 2012

Our specific comments on key aspects of the proposed definition follow.

Software and Technology and Technical Data (BIS comment only)

We understand BIS intends that software and technology "peculiarly responsible" is captured by paragraph (a)(1) by its use of the term "item." Officials have indicated that paragraphs (a)(2) and (a)(3) do not capture software or technology, and we recommend that BIS confirm this to make the regulatory history clear.

Software and Technology and Technical Data (DDTC comment only)

Paragraphs (a)(1), (a)(2), and (a)(3) apply only to "commodities" and do not capture software or technology. We understand from officials that in the Export Control Reform effort, DDTC has not used and will not use the term "specially designed" to modify technical data or software in any subparagraph of the various categories of the USML to be rewritten. We urge DDTC to confirm this.

Section 120.3 of the ITAR (DDTC comment only)

DDTC indicates that the term "specially designed" will apply exclusively to a defense article "enumerated or referenced" in a control paragraph or subparagraph of a USML category. To achieve this important and laudable goal, we understand DDTC will modify Section 120.3 of the ITAR to eliminate terms such as "developed, configured, adapted, or modified for a military application." Changes to §120.3 of the ITAR are essential to achieve several of the stated goals of the new definition for "specially designed." These include clarity of the control lists and avoiding overlaps between the control lists.

"As a Result of 'Development'"

We understand the Administration intends this phrase—"as a result of 'development'"— to mean that, during the development period, the developer takes an affirmative step with a view to achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or USML paragraph. To the contrary, if the developer does not take such an affirmative step, the item being developed does not meet the "as a result of 'development'" standard. We urge the Administration to clarify this position in an interpretive note.

As proposed, the "specially designed" definition would make significant use of the existing term "development." However, BIS has indicated in the proposed note to paragraph (b)(3) that some changes to an item that is already in "production" would not constitute "development." In particular, BIS has specified that for items in production, "activities, *such as* those pertaining to quality improvements, cost reductions, or feature enhancements, remain in 'production'" as long as these activities do not change the "basic performance or capability of the commodity" (*emphasis added*). We suggest that the Administration clarify the use of the term "such as" certain design changes that are in the "production" time-frame and are therefore not within the scope of the phrase "as a result of 'development'". In other words, are certain minor changes that do not change the basic performance capability of a commodity, but change its form or fit, outside the scope of the term "as a result of 'development'"?

We believe there may be "low hanging fruit" regarding the types of minor changes to form or fit that could help to define the Administration's regulatory intent and identify items that have no military or intelligence capability and do not meet the criteria of paragraph (a) regarding the "as a result of 'development'" standard. In particular, if BIS and DDTC retain the language in (b)(3) that does not appear to release an item if there have been any changes to its form or fit, we would suggest that the note to (b)(3) be revised to clarify that other activities that do not change the basic performance capabilities of an item would not constitute "development" in the context of the "specially designed" definition. Alternatively, the Administration should clarify whether any of the following types of changes to form or fit do fall within the standard for "as a result of 'development."

We believe the following changes in the form or fit of parts, components, attachments, and accessories do not meet the standard for "as a result of 'development'". These are examples of common types of modifications that have presented jurisdiction issues in the current undefined definition of "specifically designed" and the term "modified" under Section 120.3 of the ITAR and with the undefined term "specially designed" in the CCL. The types of modifications described below are not likely to qualify for release under paragraphs (b)(2) and (b)(3) of the proposed definition of "specially designed." In many instances, these common types of modifications may also not qualify for the exclusions of (b)(4) or (b)(5) because the changes often must be made for each use of a part, component, attachment or accessory.

If the Administration believes the following types of modifications are captured by (a), then we urge the Administration to interpret (b)(3) or modify the text of (b)(3) to exclude defined or published minor modifications of the following types. We also believe several of the following examples may be excluded from "specially designed" with an interpretation that parts, components, accessories, and attachments are within the range of form and fit already in production by the manufacturer even though the modification is a change in the form or fit.

We urge the Administration to address the application of the final rule to these examples regarding changes in form or fit while the "performance capabilities" of the unenumerated items and the modified item remain the same:

1. Changes from British Imperial/SAE sizes to metric sizes;
2. Moving an input or output from one location on an item to another location;
3. Increasing or decreasing the size of an item within the range of sizes already in "production" for items not listed or enumerated;
4. Changes to the mounting brackets, fastener locations, and other mounting characteristics of an item;
5. Changes to the number of sub-component units used within the range of numbers already in "production" for items not listed or enumerated (for example, changing a rear windshield defroster to have eleven defroster wires instead of ten or twelve, or changing the number of vents in an air conditioning system);
6. Changes to data values used by electronic parts within the range of the values already used in items in "production" (for example, entering tire size into a speedometer assembly so that it can calculate speed, or entering cabin square footage into a climate control system so that it can maintain temperature);
7. Selections from among existing options already in "production" for items not listed or enumerated (for example, choosing a particular combination of windshield washer sprayer

pumps, fluid tube sizing, and nozzles that has never before been used, where all of the individual options are already in "production").

Without such clarification, paragraphs (a) and its "as a result of 'development'" standard and subparagraph (b)(3) of the proposed definition, when taken together, appear to mean that only commercial off the shelf ("COTS") items with no changes whatsoever in form or fit are released from the definition of "specially designed." In connection with the above examples, the result is that a single modification in form or fit of any type to an unenumerated item for a single use in an enumerated item will be captured by the broad scope of paragraph (a) of the definition of "specially designed" and will not be released from the definition by paragraph (b) of "specially designed." Also, the result is that only interchangeable parts, components, accessories, and attachments for use in both enumerated and unenumerated items will be released by (b)(3).

This standard, while clear, does not appear to be consistent with the statement in the preamble to the rule that the new 600 series ECCNs "should not control items that (a) have predominant civil applications and performance equivalents to those used for civil applications and (b) do not have significant military or intelligence applicability…" This standard may also be inconsistent with the objective of not moving items under a lower control status, such as EAR and ECCN 9A991, to a higher status, such as 600 series in an "x" subparagraph. (77 Fed. Reg. 36,410.)

Market-based Agency Jurisdiction, Accident of First Sale, Predominant Use, and General Purpose Design Intent

The phrase "as a result of 'development'" as applied with the definition of the development period will resolve three related historic concerns. Those historic concerns with the current text of Section 120.3 regard (a) the shifting of jurisdiction based upon unpredictable market conditions over time after release of the product, (b) the accident of first sale after release of a product with general purpose design intent or civil-only design intent, and (c) predominant use criteria.

We understand that the proposed definition for "specially designed" will eliminate the manufacturer's obligation, if one ever existed, to monitor spikes in purchases for military use after release of the product to the market. In other words, the proposed definition removes any requirement for a manufacturer or reseller to predict future market uses or document historic percentages to measure predominant use. To its credit, for quite some time, DDTC has considered the first sale as just one factor among many other. However, suggestions within the last year or so imply an obligation to monitor end use.

The historic concerns of the private sector regarding the measurement and prediction of future sales by use are driven by three overlapping factors that make it impossible in many supply chains to measure, let alone predict the percentages of commercial versus military end uses. First, several manufacturers of parts and components sell through independent distributors who do not report the end uses to the manufacturer. Second, distributors may know the end use break-down for their own sales to some degree, but they have no means to see that information for other distributors. Third, both manufacturers and resellers of parts and components do not know whether a given integrator will use its parts for military application or civil application. Integrators are not always willing to share that information with parts and component vendors. The day has long passed since a given buyer of parts and components in the aircraft, vehicle, or electronics market deals exclusively in military end use or exclusively civil end use.

The accident of first sale to a military user has been most problematic with the release of a product for general purpose. Yet the release of products or components with intent to sell as many parts and components as possible is a common market strategy in the aircraft, vehicle, and electronics markets. It simply makes business sense from the perspective of the manufacturer. From the perspective of the military, its procurement of COTS or general purpose products helps keep down tax payer costs. For some years now, DDTC has not considered a first sale to a military buyer as dispositive of jurisdiction under Section 120.3.

We commend the Administration for resolving the long-standing problems of market-based agency jurisdiction, the accident of first sale, and jurisdiction based upon predominant use rather than defined functionality. But for careful drafting, these problems could have reappeared in the 600 series of the CCL. The lessons of the past should apply to both the USML and the CCL. We ask the Administration to confirm our understanding of its intentions to remove any perceived obligation to monitor post-release sales, and to ensure a first sale to or predominant use by military end users will not confer "specially designed" status and suggest that clarifying language to this effect would be a welcome addition to Section 120.3.

Example under the Phrase "As a Result of 'Development'"

The application of the "as a result of 'development'" standard in the proposed definition is limited by the principle that it will only apply to enumerated items. For this reason, it is essential for Government and the private sector to understand how the "as a result of development" standard works when applied to the 600 series in subparagraph "y." As suggested by BIS and DDTC, we give an example and seek confirmation from the Administration on whether the "specially designed" standard would apply.

For example, assume a developer is developing an aircraft tire for a new commercial aircraft platform that is properly classified under ECCN 9A991.b. The affirmative steps of this developer with a view to making an "aircraft tire" for a commercial aircraft would not fall within proposed ECCN 9A610.y.a.1. This is so because in the view of the developer the aircraft tire is not:

> [F]or a commodity subject to control in this ECCN or a defense article in USML Category VIII and not elsewhere specified in the USML or the CCL, and other aircraft commodities "specially designed" for a military use.

However, we are concerned that regulators or enforcement personnel in the future would interpret the penultimate paragraph of ECCN 9A610.y to mean that an aircraft tire made with a view during development to use the tire "for" a specific civil aircraft classified under ECCN 9A991.b of the CCL is a "specially designed" component and is therefore captured by ECCN 9A610.y.1. Such an interpretation would cause a roll back of the type that would cover virtually all aircraft tires, and we do not believe the Administration intends such an interpretation or consequence. The aircraft tire is currently excluded from tight controls under the footnote to Category VIII(h) and would likely be classified under ECCN 9A991.b under the current rules without the burdens of the proposed 600y series. The language of concern is "elsewhere specified in the . . .CCL. . ." Our concern in this paragraph is not with regard to end items specified in proposed ECCN 9A610 but rather ECCN 9A991.a. To be explicit, we do not believe that the tire referenced above is "as a result of 'development'" specially designed for a commercial aircraft under ECCN 9A991 even though the

developer has a specific aircraft in mind and knows the aircraft is classified under ECCN 9A991.b. We urge the Administration to clarify the rule-making record when it finalizes the rules.

ECCN 9A991.b for civil aircraft is subject to AT controls only. In this example, we understand BIS may respond that (b)(3) under the release portion of the definition of "specially designed" will apply. Such a response by BIS would imply that the "as a result of 'development'" standard has no meaning or limitation on the application of "specially designed"; and, as a result, the aircraft tire is caught under the catch provisions of (a)(2) but released under (b)(3). Therefore the tire is classified as ECCN 9A991 as a part for civil aircraft. If that is the intention of BIS, we urge clarification of the rule-making record when the rule is finalized.

Aircraft Tires and Other Conflicts between Proposed Category VIII(h)(1) and Proposed ECCN 9A610.y. Partially Resolved by Interpretation of "As a Result of 'Development'"

Aircraft tires are not enumerated in DDTC's proposed Category VIII in a separate, unique subparagraph. 76 Fed. Reg. 68694, 68697 (November 7, 2011) (hereafter Category VIII). All "specially designed" parts and components are "enumerated" in a fairly broad catch-all for selected aircraft platforms identified at Category VIII(h)(1):

(h) Aircraft components, parts, accessories, attachments, and associated equipment as follows:

> 1. Components, parts, accessories, attachments, and equipment "specially designed" for the following U.S.-origin aircraft: B–1B, B–2, F–15SE, F/A18E/F/ G, F–22, F–35 (and variants thereof), F–117, or United States Government technology demonstrators.

This is a broad catch-all that is limited solely by the specified military platforms. For the enumerated platforms, "specially designed" tires may be captured under Category VIII(h)(1); however, as noted below, aircraft tires are also enumerated in the proposed BIS rule at ECCN 9A610.y.1.

Tires are not enumerated under Category VIII subparagraphs (h)(2) through (19). For this reason, "specially designed" tires may be captured by proposed Category VIII(h)(1) but in no other subparagraph of Category VIII(h).

The BIS counterpart to Category VIII is proposed at 76 Fed. Reg. 68675, 68688 (November 7, 2011) (BIS Proposal). At ECCN 9A610.y.1. of the BIS Proposal, "aircraft tires" are captured if the aircraft tires are "specially designed."

> [F]or a commodity subject to control in this ECCN or a defense article in USML Category VIII and not elsewhere specified in the USML or the CCL, and other aircraft commodities "specially designed" for a military use, as follows:
>
> 1. Aircraft tires.

The BIS Proposal seems to capture aircraft tires "specially designed" for the aircraft platforms enumerated at Category VIII(h)(1). The BIS Proposal also seems to capture aircraft tires and other items enumerated in "y" when for "aircraft commodities" "specially designed" for a military use.

We note that under the current ITAR, Category VIII(h) apparently excludes tires from parts and components controls, and for that reason it is not clear why aircraft tires should be subject either to the 600 series or proposed Category VIII(h). The current ITAR text provides:

(h) Components, parts, accessories, attachments, and associated equipment (including ground support equipment) specifically designed or modified for the articles in paragraphs (a) through (d) of this category, *excluding aircraft tires* and propellers used with reciprocating engines. (*emphasis added*).

For this reason, it is not clear to us that aircraft tires should be subject either to proposed Category VIII(h)(1) or the 600 series of the proposed CCL. We urge the Administration not to expand controls over aircraft tires not now controlled.

There appears to be a conflict between Category VIII(h)(1) and ECCN 9A610.y.1. Moreover, the conflict also seems to apply to every other subparagraph of ECCN 9A610.y and Category VIII(h)(1). We urge the Administration to clarify the proper classification of "specially designed" parts and components enumerated in ECCN 9A610.y for aircraft designated at Category VIII(h)(1).

Definition of the "Development" Period

As defined in the proposal, the period of development ends with the start of "production." While the "as a result of" standard reintroduces a type of design intent, it is limited in that it comes to an end with the beginning of production and, most importantly, it is not a general criterion to be used under Section 120.3 of the ITAR or under the EAR to reach beyond expressly enumerated items under entries or commodities under ITAR category subparagraphs that call out "specially designed" items. Under the "as a result of 'development'" standard, a manufacturer will not be required to monitor market-based developments after the start of production. As noted above, agency jurisdiction and classification under the 600 series will not shift from time-to-time as purchasing patterns change between commercial and military buyers. We recommend that the Administration confirm this for the rule-making record when it issues the final rule.

"Necessary" in (a)(2)

In (a)(2), we recommend a note to explain the meaning of "necessary." It is not a term historically used in the EAR or ITAR in this context. We recommend that BIS and DDTC interpret or explicitly modify "necessary" to mean "peculiarly responsible" for achieving defined control criteria or functionality of the end product in which the part or component is used, as established in (a)(1). This would better meet the stated objectives. However, we understand from the Administration that it does not believe the "peculiarly responsible" or "required" standards currently used in the Wassenaar Arrangement for other purposes are sufficiently broad to capture appropriate parts and components. If the Administration intends that the term "necessary" capture a broader scope of parts and components, we recommend a note of clarification to make the rule-making history clear.

Enumerated in an Entry of the CCL or in a Category on the USML modified by "Specially Designed"

Under (a)(2), can you please confirm "an enumerated or referenced" commodity or defense article means solely a commodity or defense article included in a control paragraph modified by "specially designed" in the text of the USML category or CCL paragraph? Such an interpretation is consistent

with the fourth objective described in the preamble and the clear statements in the preamble to the proposed definition.

"Function as Designed" in (a)(2)

Under (a)(2), does "function as designed" mean the function as advertised or held out to the public by the direct and indirect buyers of a manufacturer's part or component? Such an interpretation is consistent with objective two, to use "objective, knowable" criteria for the definition of specially designed. A fact is not "objective or knowable" if one manufacturer must ask another manufacturer about its product "as designed." Does the phrase "function as designed" provide any other limit on what the manufacturer must determine its part or component is "for" or is "necessary for" in its customer base or in the market place? As noted elsewhere in these comments, we trust the Administration will interpret the definition of "specially designed" to limit decisions by the developer to the development period without market-based jurisdiction and classification and the shifting conditions of the marketplace.

"Necessary" to "Function as Designed" in (a)(2)

We urge the agencies to give advice under (a)(2) on the application of the standard for items "necessary" for enumerated or referenced parts and components to "function as designed." Officials of the agencies had indicated that (a)(2) is broad. The proposed rule also indicates that "specially designed" does not include items merely because they could be used in an enumerated or referenced item. This leaves some uncertainty as to where the line may be redrawn.

We urge the agencies to consider the following examples. Assume the following parts are not enumerated in the proposed rule issued by DDTC at Category VII(g). Assume further that each of the parts or components were developed with a view to use in a vehicle enumerated in Category VII(a), (b), and (c) of the proposed rewrite of the UMSL. Also assume these components are not interchangeable with any component used in an unenumerated end item on the USML or CCL and that these components are not classified components. Under these assumptions, which of the following are captured by proposed ECCN 606.x, 606.y, or EAR99?

1. Air conditioner.
2. Internal door handle assembly.
3. Windshield wiper assemblies.
4. Airbag systems that utilize a different supply voltage than a commercial equivalent.
5. Radiator with slightly larger or smaller intake or outflow holes to fit the coolant system hoses on a military vehicle when compared with an unenumerated vehicle.
6. Axle bearing.
7. Gear for the drive chain.

Could the agencies please also clarify whether an air conditioning system for an enumerated vessel in proposed Category VI is "necessary to function as designed" under (a)(2) of the proposed definition of specially designed?

Specially Designed for an Enumerated End Item AND Enumerated in 6XXy

It will be necessary to resolve overlaps for parts and components specially designed for

enumerated end items on both the USML and the CCL versus parts and components also enumerated in a 600 series ECCN at subparagraph "y." We understand that in such a case because subparagraph "y" is more specific and more objective, it prevails and the item is not also within the scope of subparagraph "x." We hope the Administration will confirm and clarify this position.

Request for Guidance Regarding the Scope of (a)(3)

The "catch" portion of the proposed definition of specially designed would capture an accessory or attachment "used with an enumerated or referenced commodity or defense article to enhance its usefulness or effectiveness." Assume each of the following is advertised for use with an enumerated or referenced commodity or defense article after the USML and the CCL are rewritten. Do any of the following meet the standard regarding enhancement of "usefulness or effectiveness"?

1. A sling for an M16.
2. A cleaning kit for an M16.
3. An airtight and waterproof case for use with night vision goggles.

We urge the agencies to clarify the "enhancement of usefulness or effectiveness" standard by indicating whether these examples and others meet the standard and do so with the final implementation of the rules. After promulgation of the rules, we urge the agencies to regularly post advisories that include additional examples of accessories and attachments that meet and do not meet the standard of (a)(3).

Form, Fit, "and" Function and Release under (b)(3)

Under (b)(3), an item under the EAR and a commodity under the ITAR modified by "specially designed" text is released from the scope of "specially designed" if it has the same "form, fit, and function" as a commodity unenumerated on the USML and an item not enumerated on the CCL. In addition, an item controlled under the EAR solely for AT reasons is outside the scope of "specially designed." Historically, minor dimensional changes in shifting from imperial to metric dimensions for precision parts and components have presented jurisdictional issues. In recent years, DDTC has not taken jurisdiction over some parts and components with such minor modifications to "fit" or "form" when the functionality remained the same and variations were all consistent with civil or commercial standards, including but not limited to FAA standards. Many of these decisions were made in the context of a Commodity Jurisdiction determination by DDTC. Moreover, the footnote to Category VIII(h) excludes a part or component that can be used in both a military aircraft and in an aircraft with an FAA type certificate. We understand the Administration interprets (b)(3) to: (a) require precisely the same "form, fit, and performance" with no minor changes, such as imperial versus metric dimensions, and (b) the scope of the exception under the current Category VIII(h) footnote will not be lost or narrowed given the scope of the (b)(3) release. We urge the Administration confirm these interpretations when it issues the final rule to make the regulatory intent clear.

Developed with Reasonable Expectation of Use in or with both Enumerated and Unenumerated Items or Commodities

Release pursuant to (b)(4) is determined by a developer's reasonable expectation of use as documented during development. The qualifying expectation is of a use in an unenumerated item on either the CCL or USML or such a use in addition to a reasonable expectation of a use in or with an enumerated item or commodity. Administration officials have indicated that a manufacturer need not revisit those expectations after release of the item or commodity to the market. We urge the Administration to confirm this interpretation with inclusion of clarifying language in the final rule.

Further, provision (b)(4)(i) of the BIS proposed definition "releases" from control under "specially designed" a part or component that is developed with a reasonable expectation of "use in or with commodities *described* on the CCL" (emphasis added). We suggest "described" should be changed to "enumerated" to make the definition parallel in construction to the DDTC proposed definition covering items with a reasonable expectation of use in or with defense articles enumerated and not on the USML.

"Particular Application" and Release under (b)(5)

In (b)(5), the release is based upon the "reasonable expectation" of the manufacturer or developer that the unit is not for use for a "particular application." Every development is for one or more "particular" applications even if the item is developed for a general purpose. It is commonplace for manufacturers of parts and components to do market research in aerospace, vehicles, and electronics to determine whether use in a given function or performance level may have a market. However, that research often will not disclose whether the buyers will use that function for military or civil applications or both. We do not anticipate the Administration intends (b)(5) to be an empty box and release no items or commodities. We urge the Administration to interpret (b)(5) and explain whether market research precludes a release under (b)(5) if the research or other knowledge indicates a potential market for an unenumerated mechanical function or electronic function but does not indicate whether the future buyers will use the function for a civil application, a military application, or both.

"Reasonable Expectation" and Release under (b)(5)

Does "reasonable expectation" have the same definition of "knowledge," including "high probability," as defined in Part 772 of the EAR? We believe the "high probability" standard is appropriate and achieves the Administration's national security goals. If this is the standard, we trust the Administration will confirm that. However, Administration officials have indicated the "reasonable expectation" standard is established and interpreted in federal law in other areas outside of export controls and sanctions. If so, it would be useful for the Administration to provide a clarifying note and, especially for the export control bar, to indicate which body or bodies of law have interpreted the standard.

Ongoing Publication or Posting on Guidance

Throughout this letter, we have asked the agencies to give examples that clarify the application of the criteria under the various provisions of the proposed definition of specially designed. After promulgation of the proposed rule in final form, we also urge the agencies to continue to post advisories that include additional examples regarding end items, parts, components, accessories, and attachments that meet and do not meet the various standards within the definition of "specially

designed." We urge the agencies to publish new examples periodically until the published interpretations provide a full and robust interpretation of each standard sufficient to permit the private sector to self-classify specially designed items on the CCL and commodities on the USML. The addition of examples should be more than a one-time exercise. Rather, it should be an ongoing process of publishing interpretations.

Classification Disputes and Agency Jurisdiction

The goals of the Export Control Reform Initiative as it relates to the creation of positive control lists are to create lists that complement each other, avoid overlaps, and avoid control gaps between the USML and the CCL. We recognize the rewriting of the lists is a major improvement in national security and that with the rewriting of the lists, the number of conflicting claims of authority between DDTC and BIS will be dramatically reduced. We recommend processes that will reinforce and institutionalize these goals over the long term.

First, for the fewer remaining jurisdictional conflicts, we recommend that the Administration establish a single decision-maker to resolve such disputes. For example, the National Security Advisor would be a good candidate for this role.

Second, BIS should consider repealing Section 734.3(b)(1)(i) of the EAR. Each control list should be considered on an equal footing without any regulatory presumptions. Rather, objective classification processes and standards should apply.

Third, DDTC should consider modifying Section 120.3 of the ITAR to eliminate terms such as "developed, configured, adapted, or modified for a military application." It is essential to eliminate these terms in order to avoid overlapping agency jurisdiction. Similarly, the UMSL should be considered on an equal footing with the single-decision maker without a regulatory preference. Without these procedural changes, a major flaw of the current system will remain. A well-managed corporate export control program may seek a classification or CCATs request from BIS and be left with the potential that a prosecutor or future managers of DDTC will disregard the BIS decision. It is the senior officials in the Administration who should assure internal coordination of classification decisions of the two agencies. This is not a burden that should remain on well-intended and compliance-minded exporters. This is so, no matter how few disputes there may be in the future. More importantly, the procedures we recommend will avoid the temptations of future classification officials and managers in the agencies to forget the current lessons well-recognized by Defense, State, and Commerce in the Export Control Reform Initiative. These procedures will avoid the temptation to return to a long-forgotten time when the rules were intentionally opaque decisions were based on a rule providing unlimited discretion without changes in the list to reflect decisions, and jurisdiction decisions were enforced retroactively.

Reference to *Lachman* and Other Circuit Court Decisions

The preamble to the BIS proposed definition refers to the *Lachman* decision. We see no particular value in this reference and it provides some potential for confusion. The decision in *Lachman* does not address the clearer and more objective standard in the proposed rule to define "specially designed." We underscore that Commerce and State may by regulation define the scope of license requirements and violations by regulation to be a narrower scope of required licensing and prescribed conduct than the much broader potential scope of the International Economic

Emergencies Powers Act or the Arms Export Control Act. The *Lachman* interpretation of the undefined term "specially designed" does not limit the authority of Commerce and State now to define the term because their organic statutes authorize such. Of course, all statutes and regulations must meet constitutional standards. Moreover, we believe *Lachman* relies too heavily on subjective intent to serve the goals of Export Control Reform. We note that the *Lachman* decision of the First Circuit is in conflict with the Seventh Circuit's decision in *Pulungan*. If the preamble in the pending proposed rule refers to case law, perhaps it should also refer to the Seventh Circuit's decision in its *Pulungan* decision, because it raises limits under the Constitution on rules not sufficiently clear that a person knows how to avoid conduct that is in violation of the agency's rules. That seems more relevant to the pending rule- making exercise than *Lachman*. The other option for BIS would be to make no references to case law. It is clear the intent of the agencies in this rule-making exercise is to improve and clarify the term "specially designed." The agencies clearly do not intend to leave the term undefined. The reference to the *Lachman* decision either adds nothing or at worst creates unintended confusion.

Seeking Reduction in the Multilateral Regimes for the Use of "Specially Designed"

We recommend that the Administration move to implement the rewritten control lists as soon as possible. The tremendous challenge of defining "specially designed" illustrates that the United States and its regime partners should work to reduce the use of the term "specially designed" and replace it with objective control criteria with defined functionality. While the multilateral efforts will require commitment of many years, the gains to the national security will be well-worth the effort, and we urge Defense, State, and Commerce to commit to that effort.

Conclusion

We commend Defense, State, Commerce, and the NSC staff for their tremendous effort in defining "specially designed" in regulations that will determine agency jurisdiction, classifications, and license requirements. With the additional interpretations we suggest, we urge the agencies to finalize the "specially designed" rules and move on to the tasks of reporting to the relevant oversight committees and publishing the rewritten control lists.

Sincerely,

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Chair, Section of International Law