Lauren Airey
Director, Trade Facilitation Policy

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Timothy Mooney
Regulatory Policy Division
Bureau of Industry and Security
Department of Commerce
Washington, DC 20230

Re: "Specially Designed" Definition (RIN 0694-AF66)

Via email: publiccomments@bis.doc.gov

Dear Mr. Mooney:

The National Association of Manufacturers (NAM) welcomes the opportunity to comment on revisions to Export Administration Regulations (EAR) that would provide a new definition for the widely used term "specially designed."

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Our members play a critical role in protecting the security of the United States. The NAM has long been a staunch advocate of rational export control policies that address evolving national security concerns and modern business practices. Manufacturers' ability to remain ahead of global competition is significantly undermined by the outdated and ineffective U.S. export control system. In a recent study, the Milken Institute estimated that U.S. high tech exports could increase by $60 billion, resulting in 350,000 new jobs, if the export control system is comprehensively modernized.

We applaud many of the changes in this proposal that would clarify and simplify its previously published proposed definition of "specially designed." We encourage the Department, though, to consider a few additional changes that would further clarify the definition. We very much appreciate the Department's continued engagement with industry stakeholders on export control reform, particularly as the proposals move forward to implementation.

Broadly, the NAM believes components that provide essential performance capabilities should have their control status determined by the end item into which they are incorporated. An integrated circuit, for example, is only useful in conjunction with an end item. No component that is not "specially designed" for a controlled, enumerated end item should be subject to EAR controls. In paragraph (b)(5) of the proposal, the Department has stipulated that non-application-specific components are not "specially designed." Furthering the above example, application-specific integrated circuits (ASICs) would therefore have a different control level than general purpose integrated circuits. We appreciate this distinction.

More specifically, we would like to provide the following comments and recommendations.

- Proposed paragraph (b)(2) may be unduly restrictive. In practice, it fails to release many simple multi-use items that should not be construed as subject to multilateral Wassenaar controls. In addition to parts, there are many simple components "of a type commonly used in multiple types of commodities." Limiting this release mechanism to single, unassembled parts may result in over-controlling items and driving additional licensing volumes to the Department. We urge the Department to consider expanding paragraph (b)(2) to include components "of a type commonly used in multiple types of commodities." This expansion would particularly impact small and medium manufacturers, who would be relieved of an unnecessary analytical and liability burden.

- The term "single unassembled" already appears in the definition for "part" proposed in RIN 0694–AF17. Repeating this in paragraph (b)(2) is redundant and results in uncertain interpretation. A nut plate, cited as an example in paragraph (b)(2), is normally a two-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 provide useful clarity.

- We recommend using a Supplement or similar structure for enumerating a broader illustrative list of simple multi-use commodity types that are "released" under paragraph (b)(2).

- Proposed paragraph (b)(3) may also be unduly restrictive, since requiring identical form and fit will result in capturing items that are insignificant and have performance characteristics that are equivalent to items not controlled on the CCL. Performance capability, or function, should be the salient criteria for control. The Department should consider language that would allow a part or component to fall within the (b)(3) release if differences are limited to dimensional variations (e.g. an adjustment to internal diameters for a bearings assembly to account for different measurement systems).

- Proposed paragraph (b)(3) should also include a new sub-item (iii) to allow for commodities that have been determined by DDTC as Commerce Control List (CCL) items in a commodity jurisdiction (CJ) determination, so those items do not accidentally revert back to the USML. Additionally, paragraph (b)(3)(iii) could also require CJ documentation recordkeeping as proposed in (b)(4)-(5).

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

- The term "reasonable expectation" in paragraph (b)(5) of the proposed definition would benefit from clarification. We suggest using the same definition of "knowledge," including the high probability standard, as defined in EAR Part 772. If another "reasonable expectation" standard is adopted, we encourage the Administration to provide a clarifying Note to indicate which bodies of law have interpreted the "reasonable expectation" standard.

- We recommend providing 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. We encourage the Department to clarify and provide a definition or examples.

- The terms "part," "component," and "system" are used throughout the proposed definition of "specially designed." Unfortunately, no definition is provided for those terms within EAR Part 772 or within the definition of "specially designed." We strongly encourage the Department to include definitions of those terms, which are currently defined in the ITAR Section 121.8.

- The definition of "end item" should be modified. End items should be able to operate by themselves and perform functions independent of other items. As currently drafted, the definition of "end item" could capture items that are more accurately "components."

- The NAM also recommends the Department harmonize the terms "development" and "production" to Defense Department acquisition milestones (https://dap.dau.mil/aphome/das/Pages/Default.aspx) to improve clarity for defense exporters.

Additionally, we are concerned about how the definition of "specially designed" will be applied to parts and components that have previously been subject to a CJ determination 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 parts reverting back to the ITAR. This would cause confusion and could disrupt existing commercial programs. We urge the Department to clarify how the definitions and transition rules apply in these situations. Manufacturers have also expressed concern that some EAR 99 items could transition to .y classification. We recommend the Department maintain existing EAR 99 classifications under the new system.

We encourage the Department, along with its partner agencies in the U.S. government, to actively reach out to exporters and foreign customers to educate and train them on U.S. Munitions List (USML) and CCL revisions. This outreach will be particularly important for small and medium manufacturers. We recommend the Administration publish or post publically, on an ongoing basis, additional examples regarding end items, parts, and components that meet or do not meet the various standards within the definition for "specially designed." We also urge the Administration to publish a list of approved parties for Strategic Trade Authorizations (STA) and integrate that list into the Automated Export System (AES) so that exporters may take full advantage of that license exception.

In addition to the work that the Administration is doing within the U.S. export control system, the NAM strongly encourages the United States and its multilateral regime partners to continue to work to reduce the use of "specially designed" in the multilateral regimes.

The NAM appreciates this opportunity to provide comments on the proposed rule regarding the definition for “specially designed.” Please feel free to contact us if you have any questions about these comments.

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Thank you,

Lauren Airey