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January 31, 2011

By Electronic Mail

Assistant Secretary Kevin Wolf
Bureau of Industry and Security
U.S. Department of Commerce
1401 Constitution Avenue, NW
Room 2705
Washington, D.C. 20230
Email: *publiccomments@bis.doc.gov*

Re: Comments to Bureau of Industry and Security's December 9, 2010 Advance Notice Proposed Rulemaking on Commerce Control List: Revising Descriptions of Items and Foreign Availability

Dear Assistant Secretary Wolf:

On behalf of Advanced Energy Industries, Inc. ("AEI"), I am pleased to submit comments in response to the Bureau of Industry and Security's ("BIS") Advance Notice Proposed Rulemaking on Commerce Control List: Revising Descriptions of Items and Foreign Availability (75 Fed. Reg. 76664, December 9, 2010).

AEI, a publicly held and traded company headquartered in Fort Collins, Colorado, is a global leader in innovative power and flow solutions for emerging, renewable-energy and IT markets. AEI focuses on high-growth applications, including solar cell, passive-solar architectural glass, solar grid-tie inverter, semiconductor, flat panel display, data storage, and other advanced processes. AEI's Thin Films Business Unit product portfolio includes the following: (i) direct current, high power, low- and mid-frequency and other power systems; (ii) thermal measurement instrumentation; and (iii) plasma and ion beam source technology. Certain items in these product lines are used by original equipment manufacturers and other end-users in the manufacture of semiconductors, flat panel displays, data storage products, solar cells, architectural glass, industrial vacuum and other advanced thin-film applications.

In particular, AEI manufactures power systems and other products that are used as components or accessories by original equipment manufacturers to produce semiconductor manufacturing equipment. Based on a formal BIS classification determination, several of AEI's power products

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have been determined to be "specially designed" for certain anisotropic plasma dry etching equipment classified under Export Control Classification Number ("ECCN") 3B001.c, and therefore also are controlled under ECCN 3B001.c. ECCN 3B001 and its subparts cover "[e]quipment for the manufacturing of semiconductor devices or materials, as follows (see List of Controlled Items) and specially designed components and accessories therefore." This ECCN is based on Category 3.B.1.c in the Wassanaar Arrangement's List of Dual-Use Goods and Technologies, which includes identical language regarding "specially designed components and accessories therefore."

AEI respectfully submits that the current interpretation by BIS of the term "specially designed" for purposes of ECCN 3B001 is overbroad and is inconsistent with the Administration's efforts to make the Commerce Control List ("CCL") more "positive", clear, and precise. In fact, BIS's current application of this term has resulted in certain AEI products becoming subject to a high level of control despite AEI making only minor changes to such products to accommodate its OEM customers. Accordingly, we suggest that BIS consider the following options as it revises the CCL as part of its export control reform efforts.

1. BIS Should List Specific Components or Accessories That are "Specially Designed" for Items in ECCN 3B001

BIS has in the past applied a broad definition of the term "specially designed," which can result in standard components with minor modifications becoming subject to more stringent export controls even though the components themselves are not specifically enumerated on the CCL. BIS has interpreted "specially designed" to mean that any modification to an existing component or accessory for use with a 3B001 device, regardless of its significance, renders that component or accessory as "specially designed" for the 3B001 device. This approach is overly broad and results in a wide variety of items being classified under a more stringent ECCN, regardless of the nature of the adjustments to such items and regardless of whether there is a national security or other policy basis for controlling the item with the minor adjustments. In particular, AEI's power systems, which are used with a variety of customer tools, including tools not classified under ECCN 3B001.c, in various applications, have been determined to be "specially designed" even in cases where only minor changes have been made to the device so that it is capable of use with a customer's ECCN 3B001.c dry etching equipment tool. Practically speaking, this results in a situation in which one component is classified as EAR99 while a component with an identical purpose and function is classified under ECCN 3B001 because a customer decides to use it with certain controlled manufacturing tools.

Rather than taking the approach above, BIS should consider adding a "positive" list of specific items in 3B001 that are considered to be "specially designed" for the controlled items currently set forth in

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that ECCN. Obviously, under our Wassanaar Arrangement obligations, BIS cannot remove the term "specially designed" from 3B001 at this time. However, it should precisely and narrowly define which specific components and accessories are considered to be "specially designed" for purposes of ECCN 3B001.

If BIS adopts this approach, we respectfully submit that standard power systems, such as impedance match networks and power delivery systems, manufactured for and used with a variety of applications and tools and subsequently modified to be compatible with controlled equipment (but still capable of use with other non-controlled equipment) should not be considered to be "specially designed" for purposes of ECCN 3B001.c.

2. BIS Also Should Adopt the Missile Technology Control Regime (MTCR) Definition of "Specially Designed" for Purposes of ECCN 3B001

Rather than using its current broad definition of "specially designed", BIS should consider applying the existing definition of "specially designed" in the Export Administration Regulations ("EAR") for the MTCR context to ECCN 3B001 (and other ECCN's as BIS deems appropriate). The definition of "specially designed" as set forth in Part 772 of the EAR is as follows:

> "Specially designed". (MTCR context)-- Equipment, parts, components or "software" that, as a result of "development", have unique properties that distinguish them for certain predetermined purposes. For example, a piece of equipment that is "specially designed" for use in a "missile" will only be considered so if it has no other function or use. Similarly, a piece of manufacturing equipment that is "specially designed" to produce a certain type of component will only be considered such if it is not capable of producing other types of components.

We recommend that the words "(MTCR context)" be removed from the definition above. In addition, to the extent BIS wishes to use a broader definition of "specially designed", it should include an explanatory note in the relevant ECCNs. Also, ECCN 3B001 should reference the definition of "specially designed" set forth above.

3. Conclusion

AEI respectfully submits that the comments set forth above are consistent with both the national security goals of the EAR and with the specific objectives of the export control reform initiative

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announced by President Obama and senior Commerce Department officials. For example, as described in remarks delivered on August 31, 2010 by President Obama, Assistant Secretary of Commerce for Export Administration Wolf and Undersecretary of Commerce for Industry and Security Hirschorn, a basic tenet of the Administration's export control reform initiative is to create a "positive list" of controlled items. This "positive list" was defined as a "list that describes controlled items using objective criteria (e.g., technical parameters such as horsepower or microns) rather than broad, open-ended, subjective, catch-all or design intent-based criteria." 1/ Implementation of the comments set forth above specifically would achieve this goal – both by moving toward the recommended "positive list" and by eliminating the "open-ended, subjective, catch-all or design intent-based criteria" that result from the Commerce Department's current interpretation of "specially designed" in ECCN 3B001.

Similarly, AEI's comments would result in more "transparent and predictable rules" while "harmonizing definitions across all the export control regulations." 2/ By requesting that the Commerce Department precisely and narrowly define which components and accessories are considered "specially designed" and by requesting that the Commerce Department consistently apply the existing definition of "specially designed" in the EAR for the MTCR context to ECCN 3B001, AEI's comments further these additional foundational goals of the Administration's export control reform initiative.

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1/ White House Fact Sheet dated August 30, 2010: *President Obama Lays the Foundation for a New Export Control System To Strengthen National Security and the Competitiveness of Key U.S. Manufacturing and Technology Sectors*, available at http://www.bis.doc.gov/news/2010/white_house_fact_sheet.htm.

2/ *See* Remarks by Under Secretary of Commerce for Industry and Security Hirschorn at BIS Annual Update Conference (August 31, 2010), available at http://www.bis.doc.gov/news/2010/hirschhorn_bis_update_remarks.htm. *See also* Remarks by Secretary of Commerce Locke at BIS Annual Update Conference (August 31, 2010), available at http://www.bis.doc.gov/news/2010/seclocke_bis_update_remarks.htm and Remarks by Assistant Secretary of Commerce for Export Administration Wolf at BIS Annual Update Conference (August 31, 2010), available at http://www.bis.doc.gov/news/2010/wolf_bis_update_remarks.htm.

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We appreciate the opportunity to provide comments on BIS's December 9, 2010 Advance Notice Proposed Rulemaking on the Commerce Control List. Please do not hesitate to contact us with any questions concerning our comments above,

Sincerely,

Cindy Pitrat
Worldwide Trade Compliance Manager