U.S. Department of State  
Bureau of Political-Military Affairs  
Department of Defense Trade Controls Policy  
2401 E Street, N.W.  
Washington, D.C.

ATTN: Ms. Candace Goforth  
Director, DTC Policy

SUBJECT: RIN1400-AD22 Amendment to the International Traffic in Arms Regulations  
Definition of “Specially Designed”

Dear Ms. Goforth:

The Aerospace Industries Association (AIA), on behalf of its members, commends the Department for development of a definition standard for “specially designed.” We also appreciate the proposed structure to determine if an article is “specially designed” on the United States Munitions List (USML) if it is not actually identified by description or technical parameters on the USML “positive list.” It is helpful that the proposed definition is similar to the definition proposed by the U.S. Department of Commerce, as harmonized definitions will help exporters interpret the ITAR and EAR consistently.

Additionally, we appreciate the overall approach in structuring the definition. In theory, the implementation of the definition to operational practice in the jurisdiction and classification procedure is facilitated through the “decision tree” approach for the “catch” (those items meeting the specially designed criteria) and “release” (those items meeting one or more of the three “specially designed” criteria, but excluded from being treated as specially designed under the ITAR). However, the use of the proposed definition on an individual part/component basis will create a significant implementation and compliance burden for exporters, without further clarification.

In particular, AIA members are concerned that the proposed definition will require an exporter (or original equipment manufacturer) to determine if the item has “properties that were
peculiarly responsible for achieving or exceeding” performance levels; was an accessory or attachment that “enhance the usefulness and effectiveness;” is a “single unassembled part” used in “multiple types of commodities;” “has the same form, fit, and performance capabilities” of an item that “is or was in production;” and “was or is being used with a reasonable expectation of use in or with defense articles.” This extensive analytical requirement has the potential to result in exporters classifying parts/components differently and/or a significant increase in the number of commodity jurisdiction requests, due to the unintended consequences of misclassification of items. The comments outlined below are intended to encourage consideration of clarifying language that will help to ensure that the proposed definition for “specially designed” does not inadvertently undermine the potential benefits of an enumerated listing of items on the USML and overburden the U.S. Government with requests for clarification to avoid compliance ambiguity.

Additional consideration is also warranted for how the proposed 22 CFR 120.41 definition fits with the existing structure of the ITAR. 22 CFR 120.3 “Policy on Designating and Determining Defense Articles and Services” criteria should be deleted or revised to reference Section 120.41 indicating that 120.41 codifies 120.3 through the “catch and release” concept applicable to determining USML jurisdiction and classification. A footnote in 120.3 could explain the purpose/function of 22 CFR 120.41, or the following could be included in 120.41 itself as a preamble:

“An article or service may be designated or determined in the future to be a defense article (see §120.6) or defense service (see §120.9) if it:

(a) Is identified on the United States Munitions List (see §121 United States Munitions List); or
(b) Meets the definition of “specially designed” for an article on the United States Munitions List, even though it may not be enumerated on the USML (see §120.41) and is controlled in a “catch all” paragraph on the USML; or
(c) Is determined by the Department to have significant military or intelligence applicability such that control under this subchapter is necessary.”

Since the “Policy on Designating and Determining Defense Articles and Services” is the beginning criteria for U.S. exporters to use in self determinations of jurisdiction, the language in §120.3 and §120.41 must be considered together to clearly diagram the decision process steps that implement the regulatory requirements for jurisdiction self determination in an operational business process. Without revision of §120.3 or its deletion, the full intent of a positive USML coupled with clarification of those items not enumerated on the USML but “specially designed” may result in reliance on the existing language in §120.3 and have the unintended consequence
of treatment of items as USML that the Department believes are more properly regulated on the Commerce Control List as “600” series items.

We further recommend that the language and definitions regarding “development” be correlated to the Dept. of Defense acquisition milestones in terms of technology development phase (https://dap.dau.mil/aphome/das/Pages/Default.aspx) to improve clarity using terminology commonly understood and accepted by defense contractors.

In addition, AIA submits the following more detailed comments on details of the proposed definition:

- The definition uses the term “commodity” to mean any article, material or supply, except technology/technical data or software. The Department of Commerce proposed definition uses the term “item” in its equivalent paragraph (a)(1). We believe the term should also apply to technology/technical data and software as well as hardware, in parallel to the Department of Commerce definition.
- Paragraph (b) should be rephrased to read “A part, component, accessory, or attachment that would be controlled by paragraph (a) of this paragraph is not specially designed if it;”
- Proposed 120.41(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 ITAR licensing volumes that will burden the Department. There are several changes that could improve this paragraph:
  - We urge the Department to consider expanding (b)(2) to including 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).
  - 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.
  - At a minimum, the Department should add other part types to the list of examples to make clear that a broader set of parts is intended to be released under this paragraph, for example, clamps, brackets, connectors, tubes, fuel lines and wire harnesses.
- Proposed 120.41(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 ITAR. 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) that do not enhance or upgrade the performance capability of the item.

- Proposed 120.41(b)(3) should also include a new sub-item (iii) to allow for commodities that have been formally determined by DDTC as Commerce-controlled items under the EAR in a commodity jurisdiction (CJ). This will prevent an unnecessary revision to the “specially designed” catch-all in the ITAR. The Department may want to consider the following proposed text for inclusion in 120.41(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).

- The Department of Commerce’s proposed specially designed definition includes a Note to paragraph (a)(1) (77 Fed. Reg. 36,419) which illustrates well the intended meaning of “peculiarly responsible” in (a)(1). AIA recommends expanding the proposed Note to paragraph 120.41(a)(1) to add analogous language.

- It remains unclear how tooling, test and support equipment are intended to be covered by the definition. The Department should clarify whether it intends tooling, test and support equipment to be caught in any of the “catch all” paragraphs.

- The Note to paragraph (b) defines the “catch all” paragraphs. AIA notes that the phrases that are called out as indicating a “catch all” were not utilized in all of the proposed USML categories, even where we interpret that to be the intent (for example, in proposed Category XIX). As the Department moves forward to finalizing the USML categories, any paragraphs intended to be “catch alls” should match the language in this definition. Note 1 to paragraph (b)(3) should be clarified by striking the reference to “serial production.” That term is no longer utilized expressly in (b)(3) and it could complicate interpretations of the term that is utilized, “production.”

- Note 1 and 2 to paragraph (b)(3): “Production” and “Development” are both used throughout the ITAR and are currently not defined. As these notes are currently written, the provided definitions in Note 1 and Note 2 apply only to the definition of “specially designed,” which implies that the Department has a separate definition for those terms as used on other areas of the ITAR (i.e., 120.9 Defense Services, 120.10 Technical Data, Part 125 and 126). AIA recommends the inclusion of these definitions in Part 120 to apply wherever used in the ITAR.
• Note 3 to Paragraph (b)(3): What is 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.

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,

Remy Nathan
Vice President, International Affairs
Aerospace Industries Association