



September 13, 2011

Regulatory Policy Division
Bureau of Industry and Security, Room 2099B
U.S. Department of Commerce
14th St. and Pennsylvania Ave. NW
Washington, DC 20230

EMAIL: publiccomments@bis.doc.gov

RE: Proposed Revisions to the Export Administration Regulations (EAR); Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (RIN 0694-AF17)

To Whom It May Concern:

I am writing on behalf of the Association of University Export Control Officers (AUECO), a group of senior export practitioners at twenty-three accredited institutions of higher learning in the United States. AUECO members monitor proposed changes in laws and regulations affecting academic activities and advocate reforms that will improve the efficiency and effectiveness of the United States export control system. AUECO is specifically interested in contributing to the export control reform effort in order to ensure that the resulting regulations do not have an adverse impact on academic pursuits. As a result, AUECO is providing the following comments in response to the Department of Commerce request for comments on the proposed revisions to the EAR to allow for items to be moved from the USML to the CCL.

AUECO supports the President's Export Control Reform initiative. We fully support the mission of protecting the nation's most sensitive technologies while also making sure that the U.S. remains at the forefront of technological innovation. AUECO also supports efforts to limit regulatory burden and views the movement of items from the USML to the CCL with its more flexible licensing requirements as an important step in this effort. We look forward to the clarification of definitions of terms used throughout the EAR and harmonization with those definitions in the ITAR, as we believe the single definitions will promote more consistent interpretation of the regulations. However, AUECO feels that as currently drafted, the proposed revisions could represent unprecedented regulatory burdens, some of which may be more restrictive than the ITAR itself.

Comments on the proposed addition of ECCN 0Y521 to the CCL

AUECO understands that the purpose of the addition of this new miscellaneous ECCN to the CCL would be to allow for the control of an item warranting control, but not yet controlled. The example provided in the notice is "emerging technologies". It is not clear from the proposed language how items potentially subject to 0Y521 would be brought to the attention of The Departments of Commerce, State and Defense. It is also unclear whether a person developing an emerging technology needs to somehow seek a formal determination of the applicability of 0Y521 to the item. AUECO is concerned that the creation of

0Y521 and its application to “emerging technologies” represents an unprecedented regulatory burden that would have a disproportionate adverse impact on university research.

The proposed 0Y521 ECCN is designed to be similar to Category XXI of the USML. Category XXI (Miscellaneous Articles) of the USML is limited to articles not otherwise specifically enumerated with substantial military applicability specifically designed, developed, configured, adapted or modified for military purposes as well as technical data and defense services directly related to such articles (22 CFR §121.1). Category XXI is vague and worrisome for US exporters. It does not capture specific items nor does it describe what is meant by “substantial military applicability.” For example, could health-care technology that was developed specifically for a DoD component for use in the battlefield or at VA hospitals fall under category XXI? The enumeration and definitions of Category XXI do not provide a clear answer.

The concern is similar with 0Y521. Will the items listed in the Supplement positively identify certain goods and technology or will categories of goods and technologies be listed for the exporter to determine its applicability? Vague “catch all” controls have historically been a stumbling block for exporters, and within an academic environment they can have a significant chilling effect on academic activity.

This chilling effect is even more concerning when considering the breadth of the EAR. In contrast to the limited scope (military and space) of the ITAR, the EAR is broadly applicable. Therefore, the impact of any new EAR regulatory requirement has the potential to impact a much broader segment of industry and academia than would a similar change to the ITAR.

Even though the applicability of the EAR is broad, the positive list approach to enumeration of items on the CCL has historically provided clear criteria by which to judge the applicability of a specific ECCN to an article or technology. Under the current regulations, once a determination is made that an item of “emerging technology” is subject to the EAR but does not fit the criteria of any applicable CCL entry, the exporter may confidently conclude that the item is EAR99. Without clear guidance regarding when such “emerging technologies” will be considered 0Y521 rather than EAR99, AUECO’s concern is that 0Y521 will become an unprecedented burden to exporters who previously were able to rely on their knowledge and expertise in self-classification. This concern is exacerbated in the academic environment where “emerging technologies” are regularly being developed in nearly every field of science and engineering, from Category 0 to Category 9 of the CCL. Furthermore, we fear that this will lead to a significant increase in the need to file Commodity Classification and Commodity Jurisdiction requests. Placing these regulatory burdens on a critical stage of research will have a devastating effect on innovation.

0Y521 lists reasons for control as Significant Military or Intelligence Advantage to the United States or for Foreign Policy reasons (RS1 controls) with no license exception availability other than GOV. AUECO is concerned that this is extremely restrictive for a category that may include a wide array of different “emerging technologies”. In some situations, it appears that 0Y521 could result in technologies being regulated in a more restrictive manner than if they were controlled under the ITAR. Under the ITAR, important general exemptions exist that can provide relief from licensing requirements to U.S. persons developing the new technologies. These general exemptions do not appear in the proposed rule.

For example, 22 CFR §125.4(b)(9) allows for the export of technical data (including classified data) sent or taken by a U.S. person who is the employee of a U.S. corporation or government agency to a U.S. person employed by that U.S. corporation or government agency outside the United States for some purposes. 22 CFR §125.4(b)(10) permits disclosures of unclassified technical data in the U.S. by U.S. institutions of higher learning to foreign persons who are their bona fide and full time regular employees if those employees have a permanent abode in the U.S. throughout their employment period in the U.S., are not nationals of proscribed countries, and the institution informs the employees in writing of the obligation not to transfer the technical data to other foreign nationals. A similarly important ITAR exemption for academia is 22 CFR §125.4(b)(7) which allows for technical data to be exported to the original source of import.

Consequently, should an “emerging technology” be placed under 0Y521, it appears that a license would be required for its export whereas it may not be required if the technology were subject to the ITAR. AUECO believes that the licensing requirements for 0Y521 should be consistent with the controls for similar items placed under Category XXI of the USML and requests that similar exemptions or other provisions be included in the proposed rule so that overregulation does not occur. For example, creation of a more balanced version of the exemption found in 22 CFR §125.4(b)(9) that allows for relief from licensing requirements for academia and industry alike is absolutely necessary to prevent a disproportionate adverse impact on university-based research. Similarly, incorporation into the new rule of provisions such as those found in §§123.16(b)(10), 124.4(b)(7), and 125.4(b)(10) will be essential to prevent the application of 0Y521 from becoming more restrictive than the ITAR itself.

Another way to ensure that licensing requirements for 0Y521 do not unduly burden exporters is to consider whether additional license exceptions such as TMP would be appropriate at the time the item is placed under the ECCN. The proposed Supplement No. 5 to Part 774 will consist of a table enumerating items subject to 0Y521, the date the items were classified under the ECCN, and the date the items would be moved to EAR99 or another ECCN. The availability of license exceptions for particular 0Y521 items could also be enumerated in the table along with appropriate record keeping and notification requirements. We believe that this will lead to a reduction of license reviews required for items which may be eligible for license exceptions. The adoption of such a strategy allows for appropriate control of 0Y521 items without unduly restricting legitimate export activity during the time between classification as 0Y521 and the ultimate assignment of those items to a permanent ECCN or EAR99.

Closing

AUECO supports the movement of items from the USML to the CCL and the creation of the 600 series. We believe the harmonization of the numbering scheme for ECCNs with items on the Wassenaar Agreement Munitions List will indeed simplify export compliance where multinational considerations are required.

AUECO appreciates the time taken in defining several terms used in the EAR in 15 CFR§ 772.1 including “accessories and attachments”, “component”, “end item”, “equipment”, “facilities”, “material”, “military commodity”, “part”, “serial production”, and “specially designed”. However, some key definitions still retain incredible complexity. For example, “specially designed” contains eight bullet points, three notes to the definition and then three additional notes to the exclusion paragraphs. We understand the necessity of retaining the term “specially designed” because of its use in multilateral regimes in which the U.S. participates such as the MCTR. However, many exporters feel that the new definitions are not an improvement.

AUECO recognizes the usefulness of the addition of a miscellaneous category to the CCL, and appreciates the careful consideration of how items should move out of the 0Y521 classification and into positive existing ECCNS or EAR99 in a consistent and timely fashion. However, AUECO is particularly concerned with the inclusion of “emerging technologies” in 0Y521 given its potential to capture technologies that are the product of university fundamental research activity. AUECO strongly suggests that the criteria for inclusion of items and technologies in the new 0Y521 ECCNs be clarified and opened for public comment prior to publication of the final rule. Any obligations of persons developing “emerging technologies” that are not otherwise controlled should be clearly stated, and care should be taken not to overly restrict legitimate export activities for “emerging technologies” including products developed as a result of fundamental research.

AUECO believes it is essential that general license exceptions similar to those found in the ITAR be made available for 0Y521 items and that the applicability of additional license exceptions should be evaluated at the time the 0Y521 determination is made. Failure to make these accommodations will result in more stringent licensing controls than are currently imposed under the ITAR.

AUECO would like to express appreciation for the opportunity to provide comments on these proposed changes.

Sincerely,

A handwritten signature in black ink, appearing to read "Gretta Rowold". The signature is fluid and cursive, with a large loop at the end.

Gretta N. Rowold

Chair

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