December 30, 2016

Office of Deputy Chief Management Officer
Directorate for Oversight and Compliance
Department of Defense
4800 Mark Center Drive, Mailbox #23
Alexandria, VA, 22350-1700


Dear Sirs/Madams,

I am writing on behalf of the Association of University Export Control Officers (AUECO), an association of over 170 senior export practitioners with export compliance responsibilities at more than 100 accredited institutions of higher education in the United States. As expressed in its founding charter, AUECO is committed to monitoring changes in the administration of export laws and regulations that could impact transactions and collaborations in academia.

AUECO appreciates the opportunity to comment on this DOD proposed rule. In the preamble, DOD outlines that the purpose of this proposed rule is “to establish policy, assign responsibilities and prescribe procedures for the dissemination and withholding of technical data and technology” subject to the ITAR and EAR (81 Fed. Reg. 75352). Although the proposed rule states that it “[d]oes not modify or supplant” the ITAR or EAR, certain parts of the proposed changes raise concerns for institutions that request access to and/or receive unclassified, export-controlled information from DOD.

Proposed sec. 250.3 imposes an access restriction on export controlled technical data and technology that goes beyond the scope of current U.S. export control laws.

In paragraph 4 under the definition of “Qualified U.S. Contractor”, there is a requirement for contractors to obtain DOD permission to disseminate export controlled information to certain foreign nationals even in situations when no license is needed to share the information under the ITAR or EAR. For example, certain foreign national university employees do not require export licenses to access certain export-controlled information under the “bona fide” employee exemption at 22 C.F.R. 125.4(b)(10). However, under the proposed rule, a university may be required to obtain DOD permission before the same foreign national university employee would be able to access the same export-controlled information. Under the EAR, a license determination is based on the details of the transaction, which starts with the classification of the item. Other factors such as the country of destination and catch-all controls would then be considered for deemed and physical exports. In some cases, no license will be required for transfer of the information to certain foreign nationals. However, under the proposed rule, DoD permission would be required regardless of whether a Department of Commerce license is required. As a result, the proposed rule imposes additional, and stricter, access controls on export controlled-information than do the ITAR or the EAR.
AUECO recommends the following:

i. Delete the requirement for contractors to obtain DOD permission to disseminate export controlled information to foreign nationals.

Proposed Section 250.3 includes an overly broad contractor certification requirement for “Qualified U.S. Contractors”.

Under Paragraph 5 of the definition of “Qualified U.S. Contractor”, a U.S. contractor must certify that “[t]o the best of its knowledge, ... no person employed by it or acting on its behalf who will have access to such data and technology... has violated U.S. export control laws...” As written, this provision is overly broad and creates an extremely high bar for any U.S. contractor to meet. For example, a university that previously submitted a voluntary disclosure at any time in the past may be disqualified from receiving DOD unclassified export controlled data, despite having put in place a robust export compliance program as a result of a past violation. Moreover, this broad language penalizes organizations equally for unintentional mistakes and criminal conduct. For these reasons, AUECO recommends that the DOD revise the certification requirement to include a time limit, such as “the last three years” and be limited to cases where a U.S. Contractor “willfully or knowingly violated U.S. export control laws.”.

The proposed rule does not adequately explain the process by which determinations will be made under proposed sec. 250.6(b).

Proposed sec. 250.6(b)(1)(ii) states that the controlling DOD office will determine whether to disseminate technical information depending, in part, on whether the information would require a “license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations.” However, the proposed rule is silent on how DOD personnel will make this determination in the absence of information about country of destination (or nationality), end use, or end user. Nor is it clear if the DOD plans to collect such information and, if so, when and how it plans to do so. Further, although proposed sec. 250.6(b)(2) states that the controlling office may consult with other DOD units, the State or Commerce Departments in making these determinations, it is unclear under what circumstances DOD would consult with the State and Commerce Departments, which have regulatory authority over the ITAR and EAR respectively.

For the reasons above, AUECO recommends that DOD revise the proposed rule as follows:

i. Clarify the process to be used by DOD when making the determination described in 250.6(b)(1)(ii);
ii. Allow U.S. contractors to make determinations on licensing requirements based on export classification provided to contractor by DOD, and
iii. Clarify when the controlling DOD office must consult with the State and Commerce Departments when making determinations under 250.6(b).
The proposed rule allows the DOD to sanction contractors without due process.

Proposed sec. 250.6(e) states that upon “receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law”, the DOD “will temporarily revoke the U.S. contractor’s qualification.” Unless the contractor can present evidence that the basis for the revocation was in error within 20 working days of revocation, the contractor will be disqualified.

This provision raises several issues of concern for universities, including whether a voluntary disclosure or a report of a cyber-breach is “substantial and credible information that a qualified U.S. contractor has violated U.S. export control laws.” If so, this provision may discourage universities from voluntarily disclosing export violations, which is contrary to State and Commerce’s policy (and DOJ’s recent guidance) to encourage companies to come forward with violations. Furthermore, although the proposed rule allows contractors to respond in writing to the information upon which the temporary revocation is based, a contractor’s qualification will be temporarily revoked before it has had a chance to respond to this information – a situation which raises due process concerns. Finally, the proposed timeframe of “20 working days” may not give the university a reasonable opportunity to investigate and rebut DOD’s adverse information. For example, under the ITAR, an exporter has 60 days to submit a full disclosure after its initial notification.

For this reason, AUECO recommends that the DOD revise the proposed rule as follows:

i. Clarify what it considers to be “substantial and credible information” of a U.S. export control violation;

ii. Allow U.S. contractors the opportunity to respond to the DOD’s “receipt of substantial and credible information” of U.S. export control violations before the contractor’s qualifications are temporarily revoked; and

iii. Allow contractors more time to conduct thorough internal investigations in order to rebut such information and avoid being disqualified.

The proposed rule contains confusing and overlapping terminology.

The proposed rule uses unnecessary, conflicting and overlapping definitions to describe what is subject to the rule, e.g. “public disclosure”, “technology”, “technical data”, “technical information”. The EAR and the ITAR already contain unique definitions. For example, under the EAR, “publicly available” is defined in 15 C.F.R. 734.3 and under the ITAR “public domain” is defined slightly differently in 22 C.F.R. 120.11. It is concerning then, that this proposed rule sets another standard by defining “public disclosure” differently from both. Even slight differences in definitions can contribute to regulatory burden and confusion.

For this reason, AUECO recommends that the DOD revise the proposed rule as follows:

i. Streamline the definitions, refer to definitions in the ITAR and the EAR, and/or eliminate specific definitions completely.
Conclusions

As currently written, the proposed rule appears to complicate the already complex arena of export compliance. It will require universities to seek DOD permission to disseminate export-controlled information, even in the absence of a State or Commerce Department licensing requirement; it will empower another agency (DOD), which does not have regulatory authority over the relevant export controls, to sanction contractors— even before a full investigation of a potential violation can be completed; and it will create another set of definitions, outside of the EAR and the ITAR. AUECO appreciates the opportunity to comment on this proposed rule and urges DOD to consider these recommendations.

Sincerely,

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Chair
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