



June 13, 2011

PM/DDTC, SA-1, 12th Floor
Directorate of Defense Trade Controls
Office of Defense Trade Controls Policy
Bureau of Political Military Affairs
U.S Department of State
Washington, DC 20522-0112

EMAIL: DDTCResponseTeam@state.gov

Re: Regulatory Changes—Defense Services

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 eighteen accredited institutions of higher learning in the United States. AUECO members monitor proposed changes in laws and regulations affecting academic activities, and advocate policies and procedures that advance effective university compliance with applicable U.S. export/import and trade sanctions regulations. AUECO is specifically interested in contributing to the export control reform effort in order to ensure that the resulting regulations do not undermine the scientific and economic contributions made by our nation's universities. As a result, AUECO is providing the following comments in response to the U.S. Department of State (DoS) proposed rule on potential changes to the International Traffic in Arms Regulations (ITAR) policy regarding defense services.

AUECO would first like to express its support for President's Export Control Reform effort and the U.S. Department of State and the Defense Trade Advisory Group (DTAG) for assuming leading roles in the reform. We fully support the mission of protecting the nation's sensitive technologies while also working to ensure that the United States remains at the forefront of technological innovation.

General Comments

AUECO believes that revision to the current ITAR definition of defense services is warranted because the current definition is overly broad and often problematic, particularly for universities. AUECO respectfully submits the following comments on the proposed regulatory change to 22 C.F.R. §120.9 defense services from the perspective such changes may have on academic institutions. This is of particular importance for universities since the vast majority of university-based activity does not involve defense services. However, certain activities, including research, have indeed constituted a defense service as defined under the current ITAR.

Another general observation we would make is that the proposed rule often does not provide definitions of key terms that would be helpful in interpreting the rule. In some cases, additional information about the terms appears in the Supplementary Information section of the Notice of Proposed Rule but not within the regulatory language itself. In other cases, there is no additional guidance to define key terms. For example, "integration," as used in the proposed section 120.9(a)(3) is not defined in the regulations, but is defined in the Supplementary Information. (76 Fed. Reg. 20591 (Apr. 13, 2011)) Key terms such as "employment" and "irregular forces/units" are not addressed at all. Our comments are necessarily limited by the missing definitions.

With these considerations in mind, AUECO carefully examined the proposed rule as is providing the following suggestions.

Part 120 Comments

§120.9(a)(1)

Definition of Defense Service

AUECO supports the DoS decision to revise the definition of 120.9(a)(1) to remove from "defense service" the act of furnishing of assistance where such assistance is provided only with information that is in the "public domain." Much of what U.S. universities do is to create new knowledge that will be placed in the public domain and which builds on prior scientific findings in the public domain. Because of the licensing requirements of 124.1, on occasion such work, though basic, scientific research, may constitute a defense service under the current definition and require licensing. We appreciate the clarity provided by removing "public domain" information as a trigger for providing a defense service.

We note, in passing, that clarifying the definition of defense service in this way also harmonizes the relationship between the definition of "technical data" in 120.10 and the licensing requirements of 124.1. As currently written, 120.10(a)(5) removes from the definition of "technical data" information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges, or universities. However, such catalog-listed courses might well be viewed to include assistance to the foreign students attending those classes in the design, development, operation, or use of defense articles, which could require a license under 124.1 as a defense service with public domain information. While DoS has not, to our knowledge, taken that position to date, the proposed change to 120.9(a)(1) would resolve this anomaly in the existing regulations.

AUECO also supports the removal of the terms "operation" and "use" from 120.9(a)(1). We believe that this is consistent with the President's Export Control reform goal of protecting the truly sensitive technologies while not inhibiting the ability of American industry and universities to compete and innovate in the global context. We note that this definition change is also consistent with the approach the proposed rule takes with respect to basic level maintenance in 120.38(a).

While we support the proposed definition of "defense service", it heightens the need to update the definition of "public domain" in 120.11. As many commentators have noted, the ITAR's current definition of "public domain" does not expressly include the Internet, increasingly the most commonly used source of public information. We recognize that 120.11(a)(4) includes libraries open to the public or from which the public can obtain documents. And it is true, of course, that libraries today, even in the smallest communities, contain publicly accessible computers from which patrons may search and

obtain information from the Internet. However, now that we are well into the 21st century, there appears to be little reason not to acknowledge the Internet as a method of releasing information in the public domain. This would also be consistent with the way publishers of scientific information increasingly use the Internet, such as the Public Library of Science, a publisher of online scientific and medical research.

To further the goal of unifying the regulatory regimes of the ITAR and Export Administration Regulations (EAR), we would urge DoS to revise “public domain” to include the kinds of information excluded from EAR jurisdiction (see EAR Part 734) by virtue of being “publicly available”, “published”, and/or “information resulting from fundamental research”. 15 C.F.R. 734.3 appears to use “publicly available” as a top-level category of information, into which the latter two types of information fall, similar to the use of “public domain” as a section heading for 120.11 in the ITAR. 15 C.F.R. 734.7(a)(1) defines “published” information as that which has become “generally accessible to the interested public in any form, including” publication in periodicals, books, print, electronic, or any other media available for general distribution to any member of the public or to a community of persons interested in the subject matter, such as those in a scientific or engineering discipline, either free or at a price that does not exceed the cost of reproduction and distribution.”

As for the results of fundamental research (as excluded from EAR jurisdiction by 15 C.F.R. 734.8), AUECO would advocate that such information be clearly and similarly excluded from ITAR restriction in order to preserve the ability of our universities to lead the world in producing fundamental research that forms a key part of our nation’s defense. The principle of protecting the free exchange of fundamental research results is of greater import to us than the location within the ITAR of such regulatory protections, whether as part of the definition of “public domain”, or as a free-standing provision, as currently found in the EAR.

§120.9(a)(2)

“Integration”

AUECO makes two comments with respect to 120.9(a)(2). First, as noted above, the term “integration” is not defined in the regulations even though its definition in the Supplementary Information of the proposed rule appears to have binding legal effect when applied to the regulated community. The Supplementary Information states that “integration” has plain meaning in the context of the proposed rule. However, it is clear that DoS means to distinguish “integration” from “installation” and includes the introduction of software into a device.

Second, 120.9(a)(2) makes clear that integration (as defined in the Supplementary Information) covers the act of integrating a defense article on the U.S. Munitions List (USML) or an item on the Commerce Control List into an existing end item or component that qualifies as a defense article. What is less clear is what the regulatory status would be under the proposed rule of an activity that integrates an item on the CCL into another item on the CCL to create a new item. Where the resulting new item is not specifically designed or modified for military purposes, but would meet or exceed performance parameters of an item controlled on the USML, the proposed rule should clarify that it is not subject to ITAR jurisdiction in the absence of the U.S. Government placing such an item on the USML.

§120.9(a)(3)

Employment of a Defense Article

The intent of 120.9(a)(3) looks to control as a defense service the training or providing of assistance to foreign units and forces, regular and irregular in any manner as it relates to the employment of a defense article when other than public domain information is used. AUECO has concerns that the language in Section 120.9(a)(3) is ambiguous as it is currently proposed and may not clearly articulate the intent of the revised language:

Training or providing advice to foreign units and forces, regular and irregular, regardless of whether technical data is transferred to a foreign person, including formal or informal instruction of foreign persons in the United States or abroad by any means including classroom or correspondence instruction, conduct or evaluation of training and training exercises, in the employment of defense articles; or [emphasis added]

Distinction between Foreign Person, Foreign Units and Forces, Regular and Irregular

Section 120.9(a)(3) references that the recipient of the training or assistance needs to be a foreign unit or force, regular or irregular, but does not define such terms. A definition of the terms unit, force and irregular would clarify the intent of this section. Additionally, including the phrase “formal or informal instruction of foreign persons” as proposed implies that training or assistance to all foreign persons whether or not they are part of a foreign Unit or Force be it regular or irregular in the employment of a defense article would constitute a defense service. The removal of the term foreign persons or its replacement with “foreign units and forces” in 120.9(a)(3) would be beneficial as it would further clarify what we believe to be the intent of the language.

Distinction between Military and Non Military

Section 120.9(a)(3) makes no distinction between military and non-military training, but relies on “employment of a defense article” as the primary indicator of a defense service. AUECO concurs with DTAG and strongly recommends distinguishing military from non-military training in 120.9(a)(3), in addition to defining what constitutes “employment” as it pertains to defense articles.

While it is not possible to articulate all training events that constitute a defense service, the definition as written is too vague to alert an exporter whether specific training or advice constitutes a defense service by mere employment of a defense article. Would a defense article, such as an infrared camera, operated by a foreign person in a non-military research project at a U.S. entity constitute a defense service?

Inclusion of Other than Public Domain Information

Additionally, the language in 120.9(a)(3) would be more consistent with 120.9(a)(1) and the overall intent of the proposed revision if the language referenced as does 120.9(a)(1) that the training or assistance in the employment of a defense article would require involvement of other than public domain information in order to constitute a defense service.

AUECO recommends that the proposed revision to 120.9(a)(3) be modified to clarify the definition defense services. This would be accomplished by providing definitions to key terms, eliminating the term “foreign persons” throughout 120.9(a)(3), and distinguishing between military and non-military. Additionally, modifying 120.9(a)(3) to read as follows will also the section helps to focus the definition on the “employment” of defense articles, as such:

Training or providing advice in the employment of defense articles to foreign units and forces, regular and irregular, where said training or advice involves other than public

domain information, formal or informal instruction in the United States or abroad by any means including classroom or correspondence instruction, conduct or evaluation of training and training exercises,; or

Inconsistent with USML Category IX - Military Training Systems and Training

The proposed revisions to 120.9(a)(3) do little to resolve the ambiguous military training described in USML Category IX – Military Training Equipment and Training, paragraph (f)(3), which reads:

In any instance when the military training transferred to a foreign person does not use articles controlled by the U.S. Munitions List, the training may nevertheless be a defense service that requires authorization in accordance with this subchapter. See e.g., § 120.9 and § 124.1 of this subchapter for additional information on military training.

AUECO recommends USML Category IX paragraph (f)(3) be harmonized with the final version of §120.9, which could be as follows:

In any instance when the training transferred to a foreign person employs articles controlled by the U.S. Munitions List, the training may be a defense service that requires authorization in accordance with this subchapter. See e.g., § 120.9 and § 124.1 of this subchapter for additional information on military training.

§120.9(b)(1)

Clarification of What Is Not a Defense Service

The proposed revision excludes training in the basic operation (functional level) or basic maintenance (see § 120.38) of a defense article from the definition of a defense service. However, while Section 120.38 defines (a) Organizational-level maintenance, (b) Intermediate-level maintenance, and (c) Depot-level maintenance there is no such reciprocal definition of “basic operation” or “functional level”. AUECO believes that a definition of “basic operation” and “functional level” is vital and suggests that such definitions be added to reduce ambiguity.

120.9(b)(4)

Law Enforcement, Physical Security or Personal Protective Training

This proposed clarification should be amended to remove any unintended expansion of regulatory authority. Provided that no assistance is provided regarding the employment of defense articles, the provision of law enforcement, physical security or personal protective training, advice, or services to or for a foreign person should not constitute a defense service, regardless of whether or not public domain data is used.

§120.38(a)

Definition of Maintenance Levels

AUECO recommends further clarification of 120.38(a) Organizational-Level Maintenance (or Basic Level Maintenance) as it applies to work performed by a foreign national employee. The proposed definition indicates it is not a defense service to train foreign nationals in the basic maintenance of a defense article if the maintenance is performed by the end user unit or organization on equipment assigned to the inventory of the end user unit or organization. Based on the proposed language it is less clear

whether maintenance performed by a foreign national employee of a US Person entity on equipment assigned to the inventory of the US person entity, constitute a defense service in the United States.

Closing

AUECO would like to express its appreciation for the opportunity to provide comments to the proposed changes to §120.9 defense services. Compliance with the ITAR in the performance of defense services is a sensitive and inherently complex topic, and AUECO would like to thank the U.S. Department of State for taking the time necessary to consider the impact of the proposed changes as they affect university activities and research. With the revisions noted above, AUECO supports the proposed regulation.

Sincerely,

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

Gretta N. Rowold
Chair

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