December 22, 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
Submitted via http://www.regulations.gov/

Re: RIN (1400–AC96)

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 two 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 have a disproportionate impact on academic pursuits. As a result, AUECO is providing the following comments in response to the Department of State (DoS) proposal to amend the International Traffic in Arms Regulations (ITAR) to revise Category VIII (aircraft and related articles) of the U.S. Munitions List (USML) to describe more precisely the military aircraft and related defense articles warranting control on the USML.

The Need for Reciprocal Licensing Exemptions/Exceptions

As previously expressed in our comments submitted to the Bureau of Industry and Security on September 13, 2011, AUECO is concerned that in some instances transferring items to the Commerce Control List (CCL) 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.

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.

AUECO strongly recommends that DDTC and BIS ensure that reciprocal exemptions or similar relief to licensing requirements be provided under the EAR. In the absence of reciprocal provisions under the EAR, moving items and technologies from the USML to the CCL will increase the licensing burden at academic institutions.

Consistent Applicability of Definition of "Aircraft" Found in §121.3

While §121.3 defines the term "aircraft" for all of Category VIII, there is a lack of consistency amongst the paragraphs that could create confusion as to which paragraphs are, in fact, limited in scope by the definition in §121.3. For example, paragraph (a) begins with "Aircraft (see §121.3 of this subchapter)", whereas the following paragraphs containing the term "aircraft" do not refer the reader to §121.3. AUECO recommends that each paragraph be consistently worded such that each paragraph references the definition of "aircraft" in §121.3. Without this clarification, language such as that found in §121.1(h)16 ("specially designed" for aircraft) will confuse exporters.

Concerns with the Potential Reach of Proposed Revisions

AUECO has concerns that the move from design intent to a determination based on function and/or performance parameters will adversely affect both existing and future efforts that under the current regulations would be determined not ITAR controlled due to the absence of design intent and/or DoD funding. Under the proposed regulations there is an argument that some of these projects would now be considered ITAR controlled under the new proposed rewrite.

For example,§121.1(h) includes components such as UAV flight control systems with swarming capability, aircraft folding wing systems, and UAV launchers. As described above, a lack of consistency in the language and organization of the proposed rewrite to Category VIII leaves it unclear as to whether the definition of the term "aircraft" is applicable to all items in Category VIII. In the absence of clarification, some exporters may interpret all components listed in §121.1(h) 2-18 as being controlled under the ITAR irrespective of funding source, design intent or the aircraft on which the Component would be applied. Additionally, the UAV or other aircraft incorporating said components could also potentially be controlled under ITAR. Theoretically this would apply to an UAV incorporating one of these components whether created under a DoD contract or an NSF Grant. As only three USML Category rewrites have been released to date, it will be difficult to determine the overall scoped and breadth of this impact.

AUECO is concerned that this will have a significant chilling effect on University based research as it could lead to confusion regarding the applicability of ITAR as it pertains to University based research and development efforts. AUECO recommends that DDTC grandfather in projects that under the proposed changes could become controlled under the ITAR and provide guidance on interpretation and implementation of these and other proposed rules as they apply to University based fundamental research as well as to other R&D efforts conducted at US academic institutions.

Concerns with Lack of Relevant Definitions

AUECO is concerned that the proposed revisions to Category VIII are lacking several relevant definitions that are necessary to establish a "positive list" with a "bright line" between what is controlled on the USML, and what is controlled on the CCL. As we have stated in previous comments, it is critical for each entry to contain precise and specific terms as well as all relevant definitions for those terms. Steps should be taken to avoid ambiguous entries and should instead provide qualifying and clear descriptive terms as much as possible. With these considerations in mind, AUECO carefully examined the proposed rule and is providing the following recommendation.

A clear definition is needed for the word "armed". This is particularly true since this term is relied upon to describe which items are "aircraft" within Category VIII. While the language contained in §121.3(a)3 seems to imply that "armed" means "used as a platform to deliver munitions or otherwise destroy targets (e.g. firing lasers, launching rockets, firing missiles, dropping bombs or strafing), without a clear definition for that term, some ambiguity will remain.

AUECO is concerned that without a definition, the word "armed" in §121.3(a)3 could potentially be misunderstood to apply to aircraft "armed" with water cannons or paintball guns. AUECO recommends that §121.3(a)3 be re-written as follows:

> (3) Are armed with lasers, rockets, missiles, or bombs or are "specially designed" to be used as a platform to deliver munitions or otherwise destroy targets (e.g., firing lasers, launching rockets, firing missiles, dropping bombs or strafing);

Applicability of Category VIII §121.1(f) to the Products of DoD-Funded Fundamental Research

AUECO is concerned about the applicability of Category VIII §121.1(f) to the products of Department of Defense (DoD)-funded fundamental research. While it may be unlikely that developmental aircraft or a "specially designed" part, component, accessory or attachment would be produced under a DoD-funded fundamental research award, it is possible that this could occur.

If the mere funding by DoD of research into developmental aircraft makes the products of fundamental research defense articles, there will be a chilling effect on DoD-funded research into developmental aircraft at institutions of higher learning. Researchers will be unwilling to bring their products of fundamental research (including experimental and research aircraft, parts, components, etc.) into a DoD-funded developmental aircraft project, knowing that the resulting aircraft, parts, etc., will be automatically designated as defense articles, regardless of whether or not these items meet the criteria of §121.3(a). DoD will thereby lose the benefit of leveraging others' research products into DoD-funded fundamental research.

AUECO notes that the revised Category VII wisely avoids such a funding-related restriction on developmental ground vehicles. AUECO strongly recommends that DDTC clarifies that §121.1(f) would not, in fact, capture developmental aircraft (or "specially designed" parts, components, etc.) funded under a DoD award that qualifies as fundamental research.

The Need for Harmonized Definitions

The forthcoming harmonized definitions under the export control reform initiative are vital to the interpretation of the proposed regulation and will substantially impact AUECO's responses to this and other requests for comments. AUECO is concerned that without the final definitions of terms such as

public domain/publicly available, fundamental research, technology/technical data, and development we cannot appropriately analyze the proposed rules under consideration. For example, the definition of "development" and the redefinition of "fundamental research" are critical to the interpretation and implementation of the proposed rewrites of Category VII and VIII.

AUECO recommends that the proposed harmonized definitions be released prior to the next Federal Register notice requesting comments on export reform. We would further ask that the export community be offered the opportunity to comment not only on the proposed definitions once released, but also be afforded the opportunity to provide comments on previously closed proposed regulations when the proposed definition affects the interpretation and/or implementation of the proposed or final rule.

Closing

In closing, AUECO would like to express its appreciation for the opportunity to provide comments on these proposed changes. AUECO supports converting the USML into a "positive list", and hopes that this step will reduce jurisdictional disputes and uncertainty.

AUECO is concerned that without a lack of reciprocal licensing exemptions under the EAR, moving items and technologies from the USML to the CCL may create an increased licensing burden for universities. Additionally, as currently written, the proposed revisions to Category VIII appear to create confusion and uncertainty as to the applicability of the term "aircraft". Without consistent structure and language in each of the paragraphs under Category VIII, exporters may be forced to treat items and technologies that do not appear to provide a critical, substantial or significant military advantage as being ITAR controlled. A lack of relevant definitions also makes the proposed revisions to Category VIII concerning. For example, a lack of definition for the term "armed" is problematic, as is the lack of harmonized definitions for key terms such as "fundamental research" that are absolutely necessary to analyzing the proposed rewrite. AUECO is also concerned about the applicability of Category VIII §121.1(f) to DoD fundamental research.

Sincerely,

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