



18 June 2012

Directorate of Defense Trade Controls
Attn: Category V Revision
Bureau of Political Military Affairs, U.S Department of State
Office of Defense Trade Controls Policy
PM/DDTC, SA-1, 12th Floor
Washington, D.C. 20522-0112

RE: Revision of U.S. Munitions List Category V (77 CFR 25944, May 2, 2012, Public Notice 7861)

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-six 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 US 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 amending the International Traffic in Arms Regulations (ITAR) to revise Category V (Explosives and Energetic Materials, Propellants, Incendiary Agents and their Constituents) of the U.S. Munitions List (USML) to describe more precisely the Category V materials warranting control on the USML.

In the Federal Register notice, the DoS acknowledged that difficulties in interpreting the existing USML arise because the categories “are general and include design intent as an element of causing an item to be controlled.” AUECO would like to emphasize that in order to create a “positive list” with a “bright line” between what is controlled on the USML and what is controlled on the Commerce Control List (CCL), 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 to 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 recommendations.

Removal of Catchall Categories

For the most part, Category V of the USML, as currently written, is a positive list that specifies the materials covered by common chemical name and in many cases the specific CAS number. AUECO would like to commend DDTC for making this Category even more specific by removing the catchall phrases, including but not limited to (a)(35), (b)(6), (b)(7), (c)(12), (e)(19) and (f)(21), found in

the current regulations. We also appreciate DDTC's decision to modify interpretation (i)(3) now located under section k (2) which specifies that the inclusion and/or transformation of a material subject to USML Category V is not in of itself ITAR controlled. Only in cases where the resulting material meets or exceeds the performance parameters of a USML Category V material or in instances when the Category V material can be recovered is it still controlled by the ITAR. That being said there are a few areas in which the proposed rule falls short.

The first problematic issue is the addition and/or retention of several limited 'catchall' categories including, but not limited to, the following proposed sections: (a)(37), (a)(38), (b)(1), (b)(2), (b)(3), (c)(3), (c)(4), (c)(8), (c)(11), and (f)(4)(xv). In keeping with the bright line determination AUECO recommends removing these limited catchall categories and replacing them with specific materials. When new materials are identified in the future, they should be designated as an emerging technology (0Y521) or directly added to the CCL or USML by publication of a new or revised ECCN or USML Category description in the Federal Register.

AUECO's second concern is the modification to USML Category V(a)(38) which previously specified a detonation velocity exceeding 8,700m/s, but has been revised under the proposed rule to read 8,000m/s. This reduction in the threshold value could result in a previously developed material that was determined either through a CJ or a self determination to be subject to the EAR becoming a Category V defense article. As one of the limited catch all subcategories mentioned in the previous paragraph, the preferred method for dealing with USML Category (a)(38) would be its deletion.

If DDTC, elects not to delete these limited catchall categories, AUECO recommends that the regulations be revised to ensure that such materials maintain their EAR control status after implementation of the proposed rule. If DDTC cannot provide for either of these options, then at minimum, it is requested that a phase in period be provided so that the affected community can review their existing inventory of materials to ensure that appropriate controls are implemented for materials that will become defense articles.

Applicability of Category V §121.1(i) to the Products of Fundamental Research

AUECO is concerned about the applicability of §121.1 Category V (i) to the products of US Government funded fundamental research. While it may seem unlikely that developmental explosives, propellants, pyrotechnics, fuels, oxidizers, binders, additives, or precursors would be produced under a US Government funded fundamental research contract, it is possible that this could occur.

There will be a pronounced chilling effect on university fundamental research into all kinds of developmental materials if the mere presence of US Government funding means that the products of such research will be defense articles. Researchers will be unwilling to work on or bring their products of fundamental research (including experimental and research materials) into a US Government-funded project. If resulting materials will be automatically designated as defense articles, regardless of whether or not these items meet any performance criteria of Category V of the USML, the proposed revisions to Category V will act as a significant deterrent to the conduct of such research.

It is important to understand that fundamental research exploring the early stages of new materials is critical for the development of the next generation of explosives, propellants, pyrotechnics, fuels, oxidizers, binders, additives, or precursors for use by US Government and industry. In order to support

the discovery of these next generation materials, it is critical to protect the earliest stages of research from regulation.

AUECO notes that the revised Category VII wisely avoids such a funding-related restriction on developmental ground vehicles. AUECO strongly recommends that DDTC delete USML Category V §121.1 (i) in its entirety or at minimum clarify that it would not, in fact, capture developmental explosives, propellants, pyrotechnics, fuels, oxidizers, binders, additives, or precursors solely based on the fact that the effort was funded under a US Government contract.

The Need for Harmonized Definitions

AUECO would like to once again recommend that the proposed harmonized definitions be released prior to the next Federal Register notice requesting comments on export reform. Use of the pertinent definitions is critical to the interpretation of the regulations, assessment of the likely impact of the proposed changes, and would greatly enhance the quality and relevance of public comments.

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.

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 (e.g. 22 CFR §§ 125.4(b)9, 125.4(b)(10) and 125.4(b)(7)) exist that can provide relief from licensing requirements; such exemptions are not currently available under the EAR.

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.

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 also supports the elimination of catchall controls, but as noted above has concerns about the proposed revisions. We strongly recommend that DDTC regulate new materials through designation as an emerging technology (0Y521) or by directly adding the material to the CCL or USML by publication of a new or revised ECCN or USML Category in the Federal Register. The retention of catchall controls is antithetical to the stated goals of the export control reform effort.

Additionally, as currently written, the proposed revisions to Category V appear to create confusion and uncertainty in regards to the limited catchall phrases and the inclusion of US Government funding as a determinant of ITAR status. Absent the names and/or CAS numbers of the specific explosives, propellants, pyrotechnics, fuels, oxidizers, binders, additives, or precursors and the deletion of the subsection (i) of USML Category V, 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.

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, a lack of harmonized definitions makes assessing the impact of the proposed revisions to Category V problematic. Harmonized definitions for key terms such as “fundamental research”, “technology”, “public domain”, etc., are absolutely necessary to analyzing the proposed rewrite.

AUECO remains committed to contributing to the export control reform effort, and welcomes any request for further clarification of the comments above. Again, thank you for the opportunity to provide input on this very important topic.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gretta N. Rowold', with a large, stylized flourish at the end.

Gretta N. Rowold
Chair

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