



February 6, 2012

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–AC99

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 five 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 VI (surface vessels of war and special naval equipment) of the U.S. Munitions List (USML) to describe more precisely the vessels 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 December 22, , 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 “Mission Systems”

While paragraph §121.15(a)(6) defines the term “mission systems” for all of Category VI, there is a lack of consistency between the definitions of “mission systems” used in in this paragraph and that used in paragraphs §121.3(a)(6) (Category VIII) and §121.4(a)(3) (Category VII) that could create confusion. Specifically, “mission systems” as defined in paragraphs §121.3(a)(6) and §121.4(a)(3), specify that “mission systems”... are defined as... “defense articles that perform specific military functions”. AUECO suggests that Paragraph §121.15(a)(6) be revised to make it consistent with the Category VII and VIII definitions of “mission systems” and proposes the following change:

(6) incorporate any “mission systems” controlled under this subchapter. “Mission systems” are defined as “systems” (see § 121.8(g) of this subchapter) **that are defense articles** that perform specific military functions such as by providing military communication, electronic warfare, target designation, surveillance, target detection, or sensor capabilities.

Without this clarification, language such as that found in §121.15(a)(6) (“mission systems”) will confuse exporters.

Consistent Applicability of Criteria Defining “Developmental” Defense Articles

“Developmental” items (e.g., vessels, aircraft) are dealt with in an inconsistent manner in the subject categories. In Categories VII and XX, “developmental” items are controlled as defense articles only when the developmental item has the characteristics specified in paragraphs §121.4(a) and §121.14(a), respectively. In Category XX, “developmental vessels” are further designated Significant Military Equipment when two criteria are met: (1) the “developmental vessel” meets the criteria of paragraph paragraphs §121.14(a), and (2) the “developmental vessel” is developed under a Department of Defense contract. On the other hand, as proposed in Categories VI and VIII, “developmental vessels” and “developmental aircraft” are defined as defense articles without regard to the criteria specified in paragraphs §121.15(a) and §121.3(a) respectively. In these instances, mere funding under a Department of Defense (DoD) contract appears to be the criteria that defines the developmental vessel or aircraft as a defense article. AUECO believes that the definition of developmental vessels in Category VI is overly broad. AUECO recommends that §121.1 Category VI(c) be amended to add the following: “(see § 121.15 of this subchapter)”.

Applicability of Category VI §121.1(c) to the Products of DoD-Funded Fundamental Research

If the mere funding by DoD will make a developmental surface vessel a defense article, then AUECO is concerned that surface vessels developed for fundamental research or educational purposes under DoD funding might now be considered defense articles.

Unless further clarified, as noted previously in comments relating to Category VIII developmental aircraft, there will be a chilling effect on DoD-funded research into developmental surface vessels at institutions of higher learning. Researchers will be unwilling to bring their products of fundamental research (including experimental and research vessels, parts, components, etc.) into a DoD-funded developmental vessel project, knowing that the resulting vessels, parts, etc., will be automatically designated as defense articles, regardless of whether or not these items meet the criteria of §121.15(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 clarify that §121.1 Category VI (c) would not, in fact, capture developmental vessels (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 VI, VII, VIII, and XX.

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 VI appear to create confusion and uncertainty as to the applicability of the term "mission system". Without consistent structure and language in each of the paragraphs under Category VI, 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 VI concerning. For example, the lack of harmonized definitions for key terms such as “development” and “fundamental research” that is absolutely necessary to analyzing the proposed rewrite. AUECO is also concerned about the applicability of Category VI §121.1(c) to DoD fundamental research and educational outreach.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gretta N. Rowold', written in a cursive style.

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