AUECO
ASSOCIATION OF UNIVERSITY EXPORT CONTROL OFFICERS

2 July 2012

Directorate of Defense Trade Controls
Attn: Category XIII 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 XIII (77 CFR 29575, May 18, 2012, Public Notice 7883)

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 XIII (Materials and Miscellaneous Articles) of the U.S. Munitions List (USML) to describe more precisely the Category XIII items and 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 that each entry 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 whenever possible. It is equally important to ensure that the regulations do not have the unintended consequence of restricting early stage fundamental research in areas related to Category XIII. Such research provides critical information to Government decision-makers about those materials and technologies that may, with future research and development, benefit the US military. With these considerations in mind, AUECO carefully examined the proposed rule and is providing the following recommendations.

<u>Renaming and Reorganization of Category XIII</u>

AUECO would like to commend DDTC for making this Category more focused and specific by removing items more appropriately included in other USML Categories or Commerce Control List Export Control

Classification Numbers and for providing "bright line" performance thresholds for many of the articles. We also appreciate DDTC's decision to identify those articles common to the Missile Technology Control Regime (MTCR) Annex and the USML with the parenthetical "(MT)". That being said, there are a few areas in which the proposed rule falls short.

The first problematic issue is the lack of thresholds related to proposed section (b)(1-5). AUECO particularly recommends that DDTC clarify the meaning of "military cryptanalytic systems" in (b)(3) and add performance criteria if possible.

The next problematic issue is the definition of "ablative materials". To prevent ambiguity, "ablative materials" needs to be better defined or the materials defined in subsection (d)(2) carbon/carbon billets provided with more positive characteristics. Carbon/carbon billets with three or more dimensional weaves may be created for purposes other than ablative material performance characteristics, yet the proposed rule would capture these materials on the USML as ablative materials. Currently, the USML limits controls on ablative materials only in applications in Category IV launch vehicles and MTCR Annex Category I reentry vehicles. Without further clarification, the proposed rule appears to expand items listed on the USML, not remove them.

The E_m and NIJ Level III performance thresholds for proposed sections (e)(2), (e)(3), (e)(6) and (e)(7) establish a bright line identifying those armors which warrant the more stringent controls afforded by the ITAR. What remains unclear is whether or not there is an affirmative responsibility to test new armor materials to the stated performance thresholds. Under the current armor classification guidelines university researchers, and others, can continue to work with experimental materials in an unrestricted manner unless and until they have been tested and shown to exceed stated performance thresholds and there is no affirmative responsibility to perform such tests. In order to further establish a "bright line" for these materials and to permit university fundamental research in this important area to continue, AUECO recommends that DDTC adopt and articulate a similar position with respect to the armor and armor materials identified in Category XIII.

If DDTC determines that affirmative responsibility to test armor materials is necessary, there are ancillary issues that must be addressed. Material researchers may not have the expertise or equipment needed to test such materials against stated performance thresholds. Also, with many material samples, it may be difficult and expensive to produce the material in a form that can be tested by outside testing agencies. The matters of affirmative responsibility and testing are so problematic that some researchers have indicated they would abandon research into these materials rather than be left in a liability situation by unknowingly creating ITAR-restricted armor materials, or faced with an affirmative testing responsibility.

Proposed sections (e)(4) and (5) provide size criteria (greater than ¼ inch-thick and larger than 8 inches x 8 inches) rather than a performance criteria for transparent and non-transparent ceramic plate or blanks, respectively. AUECO recommends that performance thresholds be identified for these sections or, alternatively, that the sections be limited to plates and blanks used in specific military applications. In addition, AUECO recommends that DDTC use total surface area rather than linear dimensions to describe the size threshold for plates and blanks. As currently written, a reasonable interpretation is that a plate exceeding eight inches in either dimension would be captured by these sections whether or not the total surface area was less than the 64 square inches. Making this change would provide greater clarity and flexibility for exporters.

Applicability of §121.1 Category XIII to the Products of Fundamental Research

AUECO is concerned about the applicability of §121.1 Category XIII (e)(1) to the products of US DoD funded fundamental research and recommends that language be added to differentiate between armor and armor materials. Our concern is that without a clear distinction between these terms that inclusion of armor materials in (e), particularly when the term is not used in any of the subparagraphs, will lead to overly broad interpretations. This is particularly critical in (e)(1) which deals with developmental armor developed under a DoD contract. As written, (e)(1) would subject the products of contracted fundamental research (i.e. conducted by a university under a subcontact from a company on a DoD prime contract) to regulation as a defense article even in the absence of any contractual restrictions on the dissemination of the research results. While it may seem unlikely that developmental armor or armor materials would be produced under a US Government funded fundamental research contract, it is possible that this could occur.

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 armor materials and armors for use by US military. In order to support the discovery of these next generation materials, it is critical to protect the earliest stages of research from regulation. It is essential that any regulatory structure recognize that most new materials produced in fundamental research will be unlikely to have any military utility. Should new materials with military applications be 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.

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 current regulations and previously closed proposed regulations when the proposed definition affects the interpretation and/or implementation of the 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 for exporters.

AUECO strongly recommends that DDTC regulate new materials and articles 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 rather than by inclusion of "developmental" catchalls or the source of funding.

Additionally, as currently written, the proposed revisions fail to clearly differentiate between "armors" and "armor materials" which creates uncertainty regarding the regulatory scope. Absent clear definitions exporters may be forced to treat materials 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 XIII 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,

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