



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–AD01)

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 XX (submersible vessels and related articles) of the U.S. Munitions List (USML) to describe more precisely the submersible 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 §121.14(a)(5) defines the term “mission systems” for all of Category XX, 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. AUECO suggests that paragraph §121.14(a)(5) should be amended to be consistent with the Category VII and VIII definitions of “mission systems” and proposes the following change:

(5) 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 §121.14(a)(5) (“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 and §121.14, 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, 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” in and “developmental aircraft” are defined as defense articles without regard to the criteria specified in paragraphs §121.15 and §121.3 respectively. In these instances mere funding under a DoD contract appears to be the criteria that defines the developmental vessel or aircraft as a defense article. AUECO believes that Category VII and XX correctly restrict the definitions of developmental items to only those items with specific positive criteria in paragraphs §121.4 and §121.14, while the definitions of developmental vessels and aircraft in Categories VI and VIII, which do not have such restrictions, are overly broad.

Lack of Definition of “Military Payloads”

AUECO is concerned that paragraph §121.14(a)(2) includes in its definition of defense articles submersibles “specially designed” to be used as a platform to deploy “military payloads” a term which is not defined. Without precise definitions, even innocuous payloads carried by any experimental, research, or developmental vessels, such as the SeaPerch Remotely Operated Vehicles, might be considered to be carrying “military payloads”. AUECO recommends that paragraph §121.14(a)(2) be revised to include additional qualifications or descriptive terms for “military payload”, such that only payloads that are defense articles meeting specified criteria are controlled, or that the entry be removed, consistent with entries in Categories VI, VII, and VIII.

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 XX 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 XX, 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 XX concerning. For example, a lack of definition for the term “military payload” is problematic, as is the lack of harmonized definitions for key terms such as “development” and “fundamental research” that are absolutely necessary to analyzing the proposed rewrite. AUECO is also concerned about the applicability of Category XX §121.1(a)(7) to DoD fundamental research and educational outreach.

Sincerely,

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

Gretta Rowold
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