



August 3, 2012

Office of Defense Trade Controls Policy  
U.S. Department of State

RE: Amendment to the International Traffic in Arms Regulations: Definition for "Specially Designed"  
(RIN 1400-AD22)

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 for policies and procedures that advance effective university compliance with applicable U.S. export controls and trade sanction regulations.

AUECO is specifically interested in contributing to the export reform effort in order to ensure that the resulting regulations do not have an adverse impact on academic pursuits. As a result, AUECO is providing the following comments with respect to the U.S. Department of State's request for public comments on its proposed definition for "specially designed".

The development of positive lists with objective parameters to describe controlled items is important for the export community. The development of control criteria based on the specific characteristics which make them defense articles rather than on design intent removes ambiguity and promotes compliance for the export community. Nonetheless, AUECO recognizes that the complete elimination of catch-all control criteria may not be possible.

To the extent that "specially designed" must remain as a catch-all in the description of defense articles subject to the ITAR, AUECO supports the goal of providing a clear definition of "specially designed" that meets the nine objectives outlined in the July 15, 2011, proposed rule. AUECO also supports the effort to have the definition of "specially designed" in the International Traffic in Arms Regulations (ITAR) be as close as possible to that in the Export Administration Regulations (EAR). We concur that a clear, common, and objective definition of "specially designed" is important to the export reform initiative, particularly as items are moved from the USML to the CCL.

#### Recommendations for the definition of "specially designed"

The proposed definition of "specially designed" first catches items that may be subject to control in paragraph (a) and then releases items which are not subject in paragraph (b). We suggest that the language in the introduction to paragraph (b) be changed from "a part, component, accessory, or attachment is not controlled by a U.S. Munitions List "catch-all" paragraph if it" to "a part, component, accessory, or attachment is not "specially designed" if it". This change in language eliminates the need

to define a “catch-all paragraph” (i.e. allows for the removal of the Note to paragraph (b)) and more closely aligns with the proposed EAR definition.

Paragraph (b)(5) is designed to address potential overreach of the “specially designed” designation to parts, components, accessories or attachments originally developed for a general purpose not specific to the related USML item. The proposed language is “Was or is being developed with no reasonable expectation of use in a particular application”. This language could also describe many basic research activities, but in the university environment, such activities typically fall under the definition of fundamental research, and would thus be outside the scope of the ITAR. We find the proposed language confusing with respect to applied research, as it is hard to imagine an item being developed without consideration of potential applications. We suggest that the wording of (b)(5) be changed to “Was or is being developed with no reasonable expectation that its predominant use would be in an application which would cause it to be “specially designed” in (a)”. This change would serve to clarify that the consideration is limited to the particular USML reference causing the evaluation of the part, component, accessory or attachment.

The note to paragraphs (b)(4) and (b)(5) requires that contemporaneous documentation used to establish that the that the part, component or accessory is not “specially designed” be maintained. Additional guidance on suggested practices for record-keeping as well as a clear statement of any record-keeping requirements associated with exclusion of items as “specially designed” based on design intent would be useful to the export community. In particular, we are concerned that absent such guidance, the definition may fail to meet the objective of being easily understood and applied by exporters, prosecutors, juries and the U.S. Government.

#### Additional Comments

AUECO has previously expressed concern that the proposed revisions to the ITAR will adversely impact fundamental research at U.S. universities. We are particularly concerned that in addition to items becoming controlled simply due to an inability to divine design intent, that the funding based catch-all in many of the proposed USML categories will sweep items into the USML based simply on Department of Defense (DoD) funding. This catch-all is in some ways more inclusive and troublesome than the design intent criteria, which has been targeted for removal by the export reform initiative, because it does not require that the item have any uniquely “military” application, characteristic or use.

The proposed definitions of “specially designed”, “development”, “defense services” and their inclusion in USML item descriptions, taken together with the DoD funding catch-all creates a control regime so broad as to preclude experimentation in fundamental research under DoD contract, prime awards or subcontracts, if that experimentation requires use of any hardware.

As an example, consider Category VIII “(f) Developmental aircraft and “specially designed” parts, components, accessories, and attachments therefor developed under a contract with the U.S. Department of Defense” (emphasis added). Suppose that a DoD component contracts with an U.S. university to conduct fundamental aerospace research (no restrictions on publication or participation and no national security controls). The university research team intends to validate certain novel aerodynamic principles through experimentation using a model airplane modified specifically for the research effort.

Under the proposed “specially designed” definition, the “specially designed” parts of the model plane may be no longer subject to the ITAR (they become subject to control in the 600 series of the Commerce Control List (CCL)). However, the model airplane in the example would become a defense article because it has “properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions described in the relevant USML Paragraph”; in this case, simply by virtue of the fact it was “developed” under a DoD contract. Because the proposed definition of “development” includes all stages prior to serial production, such as design research, design concepts, etc., the term is apparently intended to include all basic and applied research activities. Further, in accordance with the proposed “defense services” definition relating to “integration” of ITAR or EAR components into a defense article, integrating anything into that model plane will constitute a defense service and thus an export license or Technical Assistance Agreement would be required for any foreign person to participate in the research, regardless of whether or not all the information relating to that component and the model airplane is in the public domain (see ITAR §124.1(a)).

AUECO believes that taken in total, the proposed rules will have unintended consequences, creating a chilling effect on the university research community and interfering with basic and applied research. If scientists cannot experiment to reduce scientific principles to practice, or apply the results of fundamental research to specific problems without export licenses being required to facilitate that experimentation, they will be reluctant to participate. Many U.S. universities are bound by institutional or state non-discrimination policies which prohibit exclusion of foreign national participation in educational and research activities based on that foreign nationality. Such universities, which include some of the premier research universities in the U.S., may not be able to participate at all in DoD funded research contracts if the simple presence of DoD funding causes the research to become controlled.

#### Closing

AUECO supports the goals of the export reform initiative, particularly the effort to create positive lists and “bright lines” for controlled items. We believe that such positive lists promote export compliance, and that every effort should be made to limit the use of catch-all descriptions of items controlled on the USML and CCL. We understand that complete elimination of the “specially designed” catch-all is not possible at this time and appreciate the adoption of a clear definition of the term.

It is important that the proposed definitions and USML categories work in concert to protect U.S. national security without unnecessarily impeding fundamental research activities critical to maintaining the U.S. defense industrial base. For this reason we strongly encourage the Department to revisit the proposed rules amending the ITAR taken as a whole and assess their cumulative impact before implementing any changes. This is particularly critical for the academic research community and those DoD agencies and programs that currently rely on and fund fundamental research at U.S. universities. We thank the Department of State for the opportunity to comment on the proposed definition.

Sincerely,



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