



August 6, 2012

Regulatory Policy Division
Office of Exporter Services
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
Washington, DC 20230

RE: RIN 0694-AF65 (Revisions to License Exceptions After Retrospective Regulatory Review)

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 Commerce's proposed revisions to license exceptions in the Export Administration Regulations¹ (EAR).

AUECO appreciates the proposed revisions to the license exception found in 15 C.F.R. 740.13 (Technology and Software Unrestricted (TSU)) which would broaden this license exception and make it consistent with an exemption found in the International Traffic in Arms Regulations² (ITAR). As AUECO has noted in previous comment letters, transferring items and technologies from the United States Munitions List (USML) to the Commerce Control List (CCL) without ensuring that consistent license exceptions/exemptions are in place would inadvertently result in more restrictive regulation under the EAR than it currently is under the ITAR. We applaud BIS for recognizing the importance of this issue, and for taking steps to address this concern before transferring items from the USML to the CCL. In order to create greater clarity and uniform interpretation and application of this proposed revision, AUECO is providing comments and recommendations below.

Additionally, while the proposed revisions to license exception TSU are appreciated, there are other license exemptions in the ITAR that will also need to be carried over to the EAR. AUECO appreciates the fact that BIS is welcoming comments on the differences between license exceptions under the EAR and ITAR, and is including comments on other important license exemptions for universities.

¹ 15 C.F.R. 730-774.

² 22 C.F.R. 120-130.

22 C.F.R. 125.4(b) 10 and Proposed Revisions to 740.13 (TSU)

It is encouraging to see the proposed revisions to 740.13 that would allow for transfers of technology that is subject to the EAR by U.S. universities to their employees. It appears that the proposed changes are intended to mirror the provisions of 125.4(b)(10) of the ITAR.

For years the text of 22 C.F.R. 125.4(b)(10) has created some concern for university because certain key terms are undefined. Clarification from DDTC has been obtained in some instances, and AUECO respectfully suggests that instead of mirroring the specific text of 125.4(b)(10), BIS instead should instead use language consistent with the interpretive guidance from DDTC. AUECO also recommends that BIS remove extraneous language so that the new rule is as clear and concise as possible. With these points in mind, AUECO is providing the following redlines and comments on the proposed revision:

(f) Release of technology and source code in the U.S. by U.S. universities to their full time employees.

Recommendation: Since the terms “bona fide” and “regular” are not defined and do not appear to provide any additional clarity to the rule, AUECO advises striking this language. This change would be consistent with informal guidance that DDTC has provided in the past.

(1) Scope. This paragraph authorizes the release in the United States of “technology” and source code that is subject to the EAR by U.S. universities to foreign persons who are their full time employees.

(2) Eligible “technology” and source code. Any “technology” or source code that is subject to the EAR may be released, except for “technology” or source code that is subject to a missile technology or EI reason for control or otherwise restricted from the use of license exceptions under §740.2 of the EAR.

(3) Eligible foreign nationals (i.e., full time employees of U.S. universities)

(i) The employee’s residence throughout the period of employment is in the U.S.;

Recommendation: The phrase “permanent abode throughout the period of employment” is confusing and contradictory to visa requirements. Previous guidance from DDTC has stated that the term “residence” should be used in place of “permanent abode” when evaluating the eligibility of a given employee³. AUECO requests that BIS adopt language that is consistent with visa eligibility requirements to avoid confusion within the regulated community, in this case U.S. universities.

(ii) The employee is not a national of a country subject to a U.S. arms embargo (see § 740.2(a)(12)); and

(iii) The university informs the individual in writing that the “technology” or source code may not be transferred to other foreign persons without prior U.S. Government authorization.

Recommendation: AUECO understands that there is some concern regarding the use of technology provided under this proposed revision once the individual’s employment at the

³ For additional information on this guidance please contact Gretta Rowold at the University of Oklahoma’s Office of Export Controls at (405) 325-5052.

university ends. AUECO suggests that (iii) be amended to add “and that this obligation survives the individual’s employment at the university” at the end of the paragraph to address this concern.

(4) Exclusions. (i) No “technology” or source code may be released to a foreign national for purposes of establishing or producing items subject to the EAR;

Recommendation: The phrase “establishing or producing items” is not uniquely defined in the EAR, nor is it apparent what this language is intended to exclude. AUECO recommends striking subparagraph (i) in its entirety, or in the alternative clarifying that the invention or creation of a dual use item in a university setting for research purposes is not intended to be captured by this provision.

(ii) No “technology” or source code may be released to a foreign person subject to a part 744 end-use or end-user control or where the release would otherwise be inconsistent with part 744; and

(iii) No “technology” or source code controlled for “EI” (encryption) or “MT” (Missile Technology) reasons may be released under this paragraph (f).

Comment: AUECO recognizes that there may be statutory provisions that limit BIS’s ability to change the scope of license exceptions. However, AUECO would note that exclusion of EI and MT technology and source code from this license exception represents a more restrictive licensing burden for universities than the current requirements under the ITAR. AUECO strongly encourages BIS to consider striking this provision in its entirety in order to prevent the increased licensing burden on universities that will result from this considerable limitation. Alternatively, AUECO encourages BIS to consider incorporating an expedited review process for individual validated licenses for EI and MT technologies and source code released to university employees.

Additional License Exemptions for Universities

AUECO appreciates BIS’s continued assertion that the transfer of items and technologies from the USML to the CCL should not create a more restrictive regulatory burden for exporters. As noted in previous comment letters there are multiple provisions in the ITAR that are essential to university-based research. These include 22 C.F.R. 123.16, 22 C.F.R. 124.4 (b)(7), and 22 C.F.R. 125.4 (b)(9). However, we understand that transition of those license exceptions will not be appropriate unless Congress enacts legislation repealing or amending the Strom Thurmond National Defense Act which currently mandates that all satellite technology be controlled as defense articles under the ITAR.

AUECO recognizes that BIS may be planning to address these exemptions in future proposed changes. However, we would like to emphasize that without having similar provisions in the EAR, any transfer of USML items to the CCL will create more onerous regulations than those that currently exist in the ITAR.

Closing

In conclusion, AUECO fully supports the export reform initiative, and particularly the effort to create positive lists and “bright lines” for controlled items. We applaud BIS’s recognition that “[r]egulatory changes that have the unintended result of being more onerous than current requirements are not beneficial for U.S. national security or economic interests, and will not further the stated objectives of

comprehensive Export Control Reform.” To that end, AUECO appreciates consideration of the comments above.

We thank the Department of Commerce for the opportunity to comment on these proposed revisions to license exceptions in the EAR. AUECO looks forward to continuing to work with BIS on future proposed changes that involve university interests.

Sincerely,

A handwritten signature in blue ink that reads "Kelly Hochstetler". The signature is fluid and cursive, with the first name "Kelly" and last name "Hochstetler" clearly legible.

Kelly Hochstetler
Chair

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