Ad Hoc Coalition for Effective Export Control Reform
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VIA E-MAIL (publiccomments@bis.doc.gov AND DDTCPublicComments@state.gov)

Mr. Steven Emme
Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce – Room 2099B
14th Street and Pennsylvania Avenue, N.W.
Washington, DC 20230

Mr. C. Edward Peartree
Director, Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
U.S. Department of State
PM/DDTC, SA-1, 12th Floor
Washington, DC 20522

REF: RIN 0694–AF75 (BIS) AND RIN 1400-AD32 (DDTC)

RE: Comments on Second Round of Proposed Rules Relating to USML Category XII

Dear Mr. Emme and Mr. Peartree:

The Ad Hoc Coalition for Effective Export Control Reform ("CEECR") appreciates the opportunity to comment on the second round of proposed rules published by the U.S. Department of Commerce, Bureau of Industry and Security ("BIS") and the U.S. Department of State, Directorate of Defense Controls ("DDTC") on February 19, 2016 (81 Fed. Reg. 8421 and 81 Fed. Reg. 8438, respectively) concerning proposed revisions to certain aspects of the Export Administration Regulations ("EAR") and the International Traffic in Arms Regulations ("ITAR") relating to certain fire control, laser, imaging, and guidance and control equipment controlled under Category XII of the U.S. Munitions List ("USML") and various Categories of the Commerce Control List ("CCL), as applicable (individually, the "BIS Proposed Rule" and the "DDTC Proposed Rule," and collectively, the "February 19 Proposed Rules").

The CEECR applauds the U.S. Government's efforts to amend the EAR and the ITAR as part of the Obama Administration's ongoing Export Control Reform ("ECR") initiative. It is quite apparent from the text of the February 19 Proposed Rules, from comments that agency officials have made regarding on the February 19 Proposed Rules, and from the experience of our members in analyzing the February 19 Proposed Rules that much thought went into the proposed definitions that are referenced in the February 19 Proposed Rules.

In our view, many aspects of the February 19 Proposed Rules represent significant improvements over the previous round of proposed rules issued by BIS and DDTC relating to fire control, laser, imaging, and guidance and control equipment. However, it is the CEECR's view that the proposed definitions for certain terms under the EAR and ITAR could be further improved by making the changes or clarifications that are recommended below.

I. General Comment Regarding USML Category XII

In the DDTC Proposed Rule, it was stated with respect to comments received relating to the first round of proposed rules relating to USML Category XII issued by DDTC and BIS that:

> A commenting party expressed concern that policy objectives may override the revised control criteria and specially designed definition. The commenting party noted that Category XII's focus on not moving items from the USML could result in the government questioning whether an article is nevertheless controlled even if it does not meet the new regulatory requirements. The commenter requested confirmation that the regulations will control whether an article is still on the USML. It also requested that the Department establish an expedited procedure to handle disputes when a government official believes an item is still on the USML.

A key concern relating to the DDTC Proposed Rule is its reliance on the "specially designed" definition to determine whether an item is on the USML. As the preamble notes, this reliance is based on design intent. This will almost certainly lead to situations where the government may disagree with a self-determination by a private entity that an item is not "specially designed." This is particularly the case if the (a)(1) catch of "specially designed" will essentially incorporate the (b) releases, as is proposed by the harmonization rule. It is already documented that this has proven to be an issue with other revised USML categories. In particular, the Defense Trade Advisory Group ("DTAG") addressed this issues in its most recent meeting.[1] This has created a great deal of uncertainty as to the reliability of the revised categories for self-determinations.

The concerns that were expressed at DTAG are the same that we have experienced as well. Moreover, we note a number of occurrences where a Department of Commerce license request was returned without action because an official from the Department of Defense objected by stating that the item is still (or should be) controlled on the USML. At public forums, DDTC has approved this practice by advising exporters and manufacturers in this position to submit a commodity jurisdiction (CJ) request to settle the dispute. But this is not very practical – since submitting a CJ request at least temporarily re-controls it on the USML until it is revolved. It is also the government in this case who has doubt, and not the private party. This practice is also contrary to the purpose of Export Control Reform, which is to establish a positive list with clearly defined definitions that the public (including foreign parties) can rely on.

Thus, the concern is that policy objectives may control what items are on the USML rather than the control criteria itself. One way that this could materialize is based on the underlying policy that the revised Category XII is intended to not move most items from the USML. For items already in existence, it could then be relevant how the item was controlled under the still current "specifically designed or modified for military applications" standard. Stated differently, if an item is USML today, then it appears

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[1] *See* "Export Control Reform: White Paper," Oct. 29, 2015, *available at*: https://www.pmddtc.state.gov/DTAG/documents/Plenary_whitepaperSC_Comments.pdf.

there is a heavy presumption it will be USML tomorrow. But, as noted before, this concept may not prove correct in all situations when the new control criteria is applied.

Can DDTC confirm that application of the new control criteria will determine whether an item is on the USML? Also, what procedures can DDTC establish to resolve disputes that some in the government may have over a self-determination? The submission of a CJ request is a lengthy process and is inconsistent with the objectives of Export Control Reform. If the regulations are the controlling factor and an applicant does not have doubt as to jurisdiction, then the CJ process is also not appropriate. By providing control criteria and the "specially designed" definition through the revised Category XII, the controlling facts relevant to design intent are readily identifiable and the manufacturer is in the best position to establish this point. The issue then is purely factual rather than a policy or technical issue.

As such, to the extent that DDTC continues to allow other government agencies to question self-determinations, and thereby hold up exports, an expedited process should be established that reviews the self-determination for adherence to the regulatory criteria.

II. Comment on USML Category XII(e)(1) – Application of "Specially Designed" (b)(3) Release

In the DDTC Proposed Rule, it also was stated with respect to comments received relating to the first round of proposed rules relating to USML Category XII issued by DDTC and BIS that:

> One commenting party requested clarification on the application of the "specially designed" (b)(3) release for parts and components of the two enumerated entries. The commenting party noted that many types of components for the enumerated items are commercially available. As such, the commenting party requested clarification as to the scope of the "performance capabilities" standard within the (b)(3) release given that proposed Category XII(e)(1) does not provide any identified performance capabilities.

Proposed Category XII(e)(1) identifies "parts and components specially designed for articles described in paragraph (a)(1) or (a)(8) of this section." It is our understanding that – in at least as it relates to paragraph (a)(8) – there are a number of components that could be used in or with such electro-optical systems that do not have the functionality to "automatically detect and locate weapons launch or fire."

As there are no performance capabilities identified within paragraph (a)(8), it is requested that DDTC clarify how the (b)(3) release operates to ensure a component would have the same functionality and performance capabilities. In other words, if a component for a civilian article (not on the USML) has the same functionality but different performance capabilities, then would the component for the defense article be "specially designed" even though paragraph (a)(8) does not list any performance capabilities?

We note that this situation tends to arise where the performance capabilities exist in other civilian articles but it is difficult or not possible to identify one civilian article with the same function and performance capabilities. The differing performance capabilities also tend to be immaterial, *e.g.*, the use of different commercially available environmental coatings that are otherwise widely used in other civilian articles. It is requested that DDTC clarify the extent of the performance capabilities requirement.

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Your consideration of our comments is greatly appreciated. If you have any questions regarding this submission, please contact Christopher Stagg by telephone at (212) 518-4854 or by e-mail at chris@staggpc.com or Geoffrey Goodale by telephone at (703) 618-6640 or by e-mail at ggoodale@tradelawadvisors.com.

Respectfully submitted,

Geoffrey M. Goodale

The Ad Hoc Coalition for Effective Export Control Reform

cc: Christopher Stagg, Esq.