DATE: April 4, 2016

TO: Dennis Krepp, Division Director, Sensors and Aviation Division, Office of National Security and Technology Transfer Controls, Bureau of Industry and Security, Department of Commerce, and Mr. C. Edward Peartree, Director, Office of Defense Trade Controls Policy, Department of State

FROM: The Optical Society (OSA)

RE: Department of Commerce Regulation Identifier Number (RIN) 0694-AF75 / Department of State RIN 1400-AD32

We are submitting this response to the United States Munitions List (USML) Category XII Proposed Rule Change – an amendment to the International Traffic in Arms Regulations (ITAR) – that was published in the Federal Register on February 19, 2016, on behalf of The Optical Society, a global professional organization for scientists, engineers, students and entrepreneurs who fuel discoveries, shape real-life applications and accelerate achievements in the science of light, and our more than 250 U.S. corporate members. These include global organizations like IBM Corp. as well as manufacturers like Optimax in Rochester, New York, and Beckman Coulter Inc. in Miami, Florida. The US-based optics and photonics market comprises 900 companies that employ more than 125,000 people. We estimate that 90 percent of these are small and mid-size businesses.

The United States Munitions List (USML) Category XII encompasses fire control, range finder, optical and guidance and control equipment that the United States considers critical to national security. The goal of the Category XII proposed rule change was to move dual-use items with both military and commercial applications from the State Department USML list to the less restrictive Commerce Control List (CCL) list, thereby reducing or eliminating confusion regarding the regulations and jurisdictional classifications between the USML and CCL. In July of 2015, we submitted comments to the initial proposed rule published in the Federal Register on May 5, 2015. We are pleased that many of the concerns we originally raised on behalf of our membership have been addressed in this new proposal.

However, there are four primary areas of concern with these export control revisions for the optics and photonics community as proposed:(1) Impact on time to market for regulated products and components, (2) Specifically designed for military use, (3) Cost of compliance, and (4) Enhanced access to government export assistance resources, particularly for small businesses.

(1) Globally, optics and photonics annual revenues amount to more than $400 billion according to an analysis by OSA Industry Development Associates. The United States maintains a tenuous

leadership role in this marketplace facing significant competition from China, Taiwan, South Korea, Japan and Europe. Anecdotally, the lead time for the Category XII export licenses averages between 30 – 60 days for both Commerce Department Bureau of Industry and Security licensing for dual use technology exports and the Department of State Directorate of Defense Trade Controls on military technology export licensing. This seemingly brief window of time is an opportunity for a competitor to undercut a sale – regardless of product quality and in some instances price. Therefore, this proposed rule has the potential to deter foreign buyers from purchasing US-made components and systems.

(2) One of the issues which has received the greatest input from our constituents is the language that defines broad areas that fall under the protection of the USML simply because they have the Department of Defense as the source of their funding (for example, see ¶ (b) (7) laser systems, (c)(9) Night vision, (d)(6) guidance systems and (e)(23) developmental sensors "funded by the Department of Defense"). This phrase "funded by the Department of Defense" could more effectively be replaced by "specifically designed, modified or configured for military use". This would more appropriately define the specific defense scope. Since it is taken directly from the current USML, this could remedy a language that is far too broad in its reach and would limit commercial sales of technology.

(3) Compliance is a necessary cost of doing business. However, it shouldn't be burdensome for small businesses. They face a substantial cost disadvantage when having to deal with export compliance regulations and fees when compared to their larger counterparts, who often have in-house legal counsel and other resources that would be prohibitively expensive for small and mid-size businesses. The industrial sector of The Optical Society membership base is particularly concerned about the loss of potential revenue due to limitations to freely sell technologies that are sold as dual-use or are available from companies based in other countries.

These regulations also impact the academic community, which makes up nearly 60 percent of OSA's membership. Export Control has been put into place to protect not only the technology, but national security, which should enhance the safety and position of the United States globally. However, these restrictions as such are inconsistent with many mission statements for universities to facilitate international collaboration. The university experience is fundamental to provide a learning environment for all students, staff and faculty members where they are afforded the opportunity to pursue open inquiries, examine critically, and carry out research and teaching in an unrestricted environment. In the optics and photonics fields, that can be a challenge if a professor feels restricted by export control regulations that force them to limit interactions with non-U.S. citizen scientists and graduate students, or potentially face the threat of personal liability for possible violations.

(4) Finally, we recommend that the U.S. government enhance export assistance resources, particularly for small businesses. Once the rules are finalized, we strongly encourage that the U.S. government conduct extensive educational outreach across the country for businesses and universities on export control compliance and licensing requirements. Small companies, especially those without in-house, in-depth export compliance expertise are often challenged to

sell export-controlled products outside of the United States. The new rules have the potential to create confusion and questions in both the academic and industrial facilities. They may also drive up the cost of compliance by forcing these small and medium-sized businesses to contract with subject matter experts to gain an understanding regulations and their impact while mitigating risk. Extensive educational outreach on the new rules will help reduce uncertainty.

It is important for the government to address all of the concerns shared in this public comment period in an expeditious manner. Time is limited to implement a finalized rule change for Category XII before the end of the year. The Optical Society is ready to partner with the federal government to work in a timely manner to ensure the finalization of an acceptable rule change to Category XII before the end of the year.

Sincerely,

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