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July 3, 2013

Via electronic mail (publiccomments@bis.doc.gov)

Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
14th Street and Pennsylvania Avenue, NW
Washington, DC 20230

Re: Comments Concerning "Technology" in Connection with the Transfer of Spacecraft Systems and Related Items from the U.S. Munitions List to the Commerce Control List (RIN 0694-AF87)

Dear Sir or Madam:

The University of Minnesota's Office of Sponsored Projects Administration (the "University") respectfully submits these comments to the Bureau of Industry and Security ("BIS") in response to the proposed rule (the "Rule")[1] that would accommodate the transfer of certain spacecraft, satellites, and related items from the U.S. Munitions List ("USML") to the Commerce Control List ("CCL"). We applaud the U.S. Government's prodigious efforts in the ongoing Export Control Reform initiative, and are grateful for the opportunity to provide input that we hope is useful in developing an improved regime that focuses resources on transactions of real concern while reducing undue constraints on the global exchange of ideas, international commerce, and cooperation with our strategic allies.

As a general matter, the University supports the migration of certain spacecraft and related items from the USML to the CCL. The proposed changes should confer on many stakeholders greater freedom in communicating with collaborators abroad, in engaging the services of non-U.S. experts within the U.S., and in competing on the global commercial satellite market. Articles and activities of actual concern, such as military satellites and launch vehicle services, would remain properly subject to the stricter controls of the International Traffic in Arms Regulations ("ITAR").

[1] Export Administration Regulations (EAR): Control of Spacecraft Systems and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 78 Fed. Reg. 31,431 (May 24, 2013).

The University is concerned, however, that the Rule seems to be the most recent reflection of a move to expand the concept of "technology" subject to the Export Administration Regulations ("EAR"). Specifically, it appears that the scope of certain "technology," at least with regard to "500 series" and "600 series" Export Control Classification Numbers ("ECCNs"), is being stretched to cover mere operation, installation, maintenance, or repair data and assistance. This approach represents a significant change in the operation of the EAR, especially in the context of deemed exports. It also does not advance the cause of the Export Control Reform initiative, insofar as it would build "higher walls" around the same types of low-sensitivity technical assistance that the Directorate of Defense Trade Controls ("DDTC") is simultaneously proposing to exclude from the ITAR in connection with the items remaining on the USML. The University respectfully recommends that BIS reconsider the matter.

I. Background of "Use" "Technology"

The EAR define controlled "technology" to encompass only "technical data" and "technical assistance" that are "necessary for the 'development,' 'production,' or 'use' of a product."[2] The third category, "use" "technology," consists of technical data and assistance needed for the "operation, installation, (including on-site installation), maintenance (checking), repair, overhaul, *and* refurbishing" of an EAR-controlled item (emphasis added).[3] In 2006, BIS declined to change the "and" in this list to "or," explicitly affirming that "[a]ll six activities in the definition of 'use' must be present" for technical data or assistance to rise to the level of "use" "technology."[4] The agency reasoned that controlling any of the six activities alone would result in "a substantial licensing burden on the regulated community, without a corresponding benefit to national security," and that only when taken together could the elements "provide [a] foreign national with enough knowledge to replicate or improve the performance capabilities of [a] controlled item."[5] There were thus no compelling national security or counter-proliferation reasons to regulate any of the six activities individually. Accordingly, mere operation, installation, repair, *or* maintenance data and assistance about items on the CCL have not themselves constituted licensable "technology" controlled on the CCL,[6] at least until the recent release of the "500 series" and "600 series" rulemakings.

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[2] 15 C.F.R. § 772.1 (definition of "technology"); *accord*, BIS, Questions and Answers to Supplement Clarification of Deemed Export Related Regulatory Requirements, Q&A no. 1 under "Fundamental Research" ("The EAR license requirements apply to the transfer of controlled technology for 'development,' 'production,' or 'use' of certain equipment."), http://www.bis.doc.gov/deemedexports/deemedexportssupplementqa.html.

[3] 15 C.F.R. § 772.1 (definition of "use").

[4] Revisions and Clarification of Deemed Export Related Regulatory Requirements, 71 Fed. Reg. 30,840, 30,843 (May 31, 2006).

[5] *Id.*

[6] *See, e.g.*, BIS, Questions and Answers to Supplement Clarification of Deemed Export Related Regulatory Requirements, Q&A no. 2 under "Controlled 'use' technology" ("If the technology available to the foreign national does not meet all [six] of these attributes, then it is not 'use' technology for deemed export licensing purposes."), http://www.bis.doc.gov/deemedexports/deemedexportssupplementqa.html; *accord* BIS, "Deemed Export" FAQs, no. 3 ("Controlled technology is that which is listed" on the CCL.), http://www.bis.doc.gov/deemedexports/deemedexportsfaqs.html.

II. New Scope of "500 Series" and "600 Series" "Technology"

The new heading for the "500 series" "technology" ECCN proposed in the Rule reads:

> 9E515 "Technology" "required" for the "development," "production," *operation, installation, maintenance, repair, overhaul, or refurbishing* of "spacecraft" and related commodities, as follows (see List of Items Controlled).[7]

(Emphasis added.) We have also reviewed several proposed "600 series" rulemakings issued over the past year, and found the same approach taken in their "technology" ECCNs. The various new "500 series" and "600 series" "technology" headings omit the defined term "use," incorporate the six individual "use" elements, and replace "and" with "or"—with the apparent design of now controlling certain operation, installation, maintenance, or repair data and assistance individually under the EAR.[8]

It is the University's understanding that this expansion is likely intended to exert CCL controls over information and assistance that have previously been subject to the ITAR. Under current law, all technical data and defense services directly related to defense articles on the USML are themselves on the USML.[9] Technical data and defense services on the USML include not only the kinds of things that fall into the EAR categories of "development" and "production" "technology," but also operation, installation, maintenance, or repair information and assistance alone.[10] As BIS confirmed in 2006, these elements in isolation do not rise to the level of controlled "use" "technology."

Thus, as items migrate from the USML to the CCL, directly related operation, installation, maintenance, and repair information and assistance go from being stringently ITAR-controlled technical data and defense services to discrete information and activities that are not contained in any of the EAR's three defined "technology" categories, including "use." It is the University's sense that BIS is therefore proposing to expand "technology" beyond the standard "use" concept for "500 series" and "600 series" items likely in an effort to maintain some level of control over formerly ITAR-controlled operation, installation, maintenance, or repair information and assistance.

III. Difficulties With this Approach

Extending "technology" beyond "development," "production," and the established scope of "use" raises three significant issues. It would be inconsistent with the goals of the Export Control Reform initiative, create a substantial regulatory discrepancy, and complicate compliance efforts by upsetting expectations concerning the operation of the EAR held for several years now within the regulated community.

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[7] *Supra* note 1, at 31,443.

[8] The University's concerns do not include overhaul or refurbishing data and assistance, which we believe (a) are far less frequently encountered in the academic deemed export context than operation, installation, maintenance, and repair activities; and (b) overlap significantly with the established definitions of controlled "development" and "production" "technology."

[9] 22 C.F.R. Part 121 (the USML).

[10] 22 C.F.R. §§ 120.9, 120.10 (definitions of ITAR-controlled defense services and technical data).

Export Control Reform Initiative

Subjecting operation, installation, maintenance, or repair activities individually to control under the EAR dilutes one of the key benefits of moving less-sensitive articles from the USML to the CCL. It is true that the EAR generally surpass the ITAR in offering greater flexibility to export and reexport in many ways, such as the various common-sense exceptions now contained in 15 C.F.R. Part 740. But the liberty to export mere operation, installation, maintenance, or repair data and assistance free from CCL controls is one of the main reasons U.S. exporters and non-U.S. end-users have consistently preferred items to be EAR-controlled rather than ITAR-controlled. Curbing this liberty for certain ECCNs is inconsistent with the Export Control Reform initiative's goals of reducing controls on items of lesser national security concern.

Moreover, the expansion of "technology" to cover operation, installation, maintenance, or repair activities in connection with "500 series" and "600 series" items is in contradiction to the approach DDTC appears to be taking in revising the ITAR definitions of defense services and, eventually, technical data. With its most recent proposed rule, DDTC would define defense services in subsection 120.9(a) of the ITAR to include

> (1) The furnishing of assistance (including training) using other than public domain information . . . in the design, development, engineering, manufacture, production, assembly, testing, intermediate- or depot-level maintenance, . . . modification, demilitarization, destruction, or processing of defense articles . . . .[11]

Conspicuously absent are three key words from the version of subsection 120.9(a)(1) currently in force—operation, repair, and use. Also excluded from the new definition of defense services is organizational-level maintenance and, at proposed subsection 120.9(a)(2), assistance with installation (as opposed to integration). So, to sum up, as part of the Export Control Reform initiative, DDTC is now proposing to eliminate ITAR coverage of technical assistance furnished to foreign persons in the operation/use, installation, organizational-level maintenance, and repair of defense articles remaining on the USML. Yet at the same time, it appears BIS is endeavoring to extend "technology" controls over these same activities in connection with "500 series" and "600 series" items that no longer warrant the ostensibly tougher restrictions of the ITAR.

If this peculiar inversion of control scopes continues, it may lead to the very sort of counterintuitive licensing oddities the Export Control Reform initiative is meant to remedy. For instance, given the scope of "technology" controlled by proposed ECCN 9E515, a university would need a BIS license to lawfully furnish non-public technical assistance required for the mere operation, installation, maintenance, or repair of an orbital scientific telescope system on the CCL to a visiting

[11] Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV and Definition of "Defense Service," 78 Fed. Reg. 31,444, 31,448 (May 24, 2013). This formulation is materially the same as DDTC's first proposed revision of subsection 120.9(a)(1) from two years ago. International Traffic in Arms Regulations: Defense Services, 76 Fed. Reg. 20,590, 20,592 (Apr. 13, 2011). DDTC has indicated it will issue corresponding changes to the definition of ITAR-controlled technical data at some point.

Israeli graduate student researcher.[12] But given the proposed definition of defense services, that university would need no analogous DDTC authorization to provide the same kind of low-sensitivity technical assistance directly related to a fully armed and operational Death Star on the USML to the same student.[13]

Such results do not comport with the oft-repeated metaphor for the Export Control Reform initiative—the creation of "higher walls around fewer items." With the proposed "technology" ECCNs for "500 series" and "600 series" items, it appears BIS is building "higher walls" around the kinds of low-sensitivity activities that it has for years specifically refrained from controlling, and that even DDTC appears to have determined warrant essentially no walls with regard to the militarily critical articles remaining on the USML.

Regulatory Discrepancy

As currently written, the proposed "500 series" and "600 series" "technology" headings conflict with the EAR's lodestar definition of "technology." On their face, these new ECCNs explicitly apply only to certain kinds of "technology," a term defined in Part 772 of the EAR. As discussed above, that definition is limited to technical data and assistance rising to the level of "development," "production," or "use" "technology." In other words, any data or assistance not falling into one of these three categories is perforce outside the scope of "technology" as defined and controlled by the EAR.

BIS confirmed in 2006 that even "use" "technology" does not encompass operation, installation, maintenance, *or* repair alone (and it goes without saying that these are not covered by the "development" and "production" categories). Therefore, data and assistance required for any one of these four activities cannot fit within the Part 772 definition of "technology" as a threshold matter. Yet the new "500 series" and "600 series" "technology" ECCNs purport to sweep up exactly such activities individually as "technology." This creates a regulatory ambiguity—or rather, contradiction—that would have both exporters and U.S. Government authorities going in semantic circles.

Complicating Compliance

The clarification from BIS in 2006 regarding "use" "technology" on the CCL was welcomed by the regulated community generally, and by academic institutions in particular. Universities may

[12] License Exception Technology and Software Unrestricted (TSU), 15 C.F.R. § 740.13, offers little relief in such circumstances. Subsection 740.13(a) does not apply to deemed exports in the U.S. because it authorizes certain operation "technology" exports only in connection with equipment that has been legally exported from the U.S. And newly-promulgated subsection 740.13(f) authorizes deemed exports solely to full-time university employees, and not to students who work on a part-time basis or not at all for their host institutions. Revisions to the Export Administration Regulations: Initial Implementation of Export Control Reform, 78 Fed. Reg. 22,660, 22,718 (Apr. 16, 2013).

[13] We are aware that the Administration has, for the time being, declined to pursue development of a Death Star as a federal program. White House Office of Mgmt. and Budget, This Isn't the Petition Response You're Looking For (Jan. 11, 2013), https://petitions.whitehouse.gov/response/isnt-petition-response-youre-looking. The University takes no position on the prudence of this determination, but stands ready to compete for future battle station fundamental research grants if things change.

possess any number of EAR-controlled commodities, and often host many non-U.S. students and researchers potentially engaged in the operation, installation, maintenance, or repair of these items and equipment. Enterprise-wide EAR technology control policies and protocols have been developed in the understanding that mere operation, installation, maintenance, or repair data and assistance alone are not on the CCL. Having for years relied on that "coherent, bright line rule,"[14] the university community might now be required to deal with effectively two EAR-controlled "use" "technology" triggers—one requiring all six "use" elements, the other requiring only one of the six—adding yet another layer of intricacy and uncertainty to what even U.S. Government regulators agree is a "confusing, time-consuming" system in dire need of streamlining.[15] The proliferation of control requirements would increase compliance and licensing burdens, and unnecessarily divert university and Government resources and focus from those activities that pose genuine national security risks. BIS declined to go down a similar road in 2006, and should do so again today.

IV. Conclusion

The University respectfully urges BIS to reconsider the apparent effort to extend its jursidiction over the types of low-sensitivity technical data and assistance that it has chosen not to control before, and that even DDTC is now proposing to deregulate. Reaffirming and sticking to the all-or-nothing six-element definition of "use" "technology" articulated in 2006 will avoid confusion, engender compliance, and complement the Administration's ongoing and laudable efforts to rationalize U.S. export controls.

Please don't hesitate to contact me at bris0022@umn.edu or 612-625-3860 with any questions regarding these comments. Thank you for your hard work, and for continuing to invite the public to participate in the conversation on Export Control Reform.

Respectfully submitted,
/s/
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[14] *Supra* note 4, at 30,844.

[15] Export Control Reform: The Agenda Ahead: Hearing on Export Control Reform Before the H. Foreign Affairs Comm., 113th Cong. (2013) (statement of Acting Assistant Sec'y Tom Kelly, Bureau of Political-Military Affairs), http://www.state.gov/t/pm/rls/rm/2013/207883.htm.