The University of Oklahoma®

VICE PRESIDENT FOR RESEARCH

July 8, 2013

Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
14th St. and Pennsylvania Ave. NW
Washington, D.C. 20230
Re: RIN 0694—AF87

To Whom It May Concern:

The University of Oklahoma (OU) is providing the following comments in response to the May 24, 2013 Federal Register Notice (78 FR 31431) proposing changes by the U.S. Department of Commerce's Bureau of Industry and Security (BIS) with regard to the proposed transfer of spacecraft systems and related items from the USML to the CCL (RIN 0694-AF87). OU appreciates BIS's request for comments. As a university, our mission is to provide the best possible educational experience for our students through excellence in teaching, research and creative activity, and service to the state and society. We hope the following comments are helpful.

OU would first like to commend the BIS for their efforts in working to transfer to the Commerce Control List (CCL) the types of satellites and space vehicles that are so critical to a robust space-related research and educational endeavor. It has been noted for many years that control of these types of items as munitions under the International Traffic in Arms Regulations (ITAR) has adversely impacted university research in the United States. Consequently, OU supports the proposed rule and feels it generally incorporates the recommendations of the Section 1248 Report. However, we remain concerned about the apparent re-definition of "use" technology, as well as the lack of reciprocal license exceptions in the EAR.

As BIS is aware, the definition of "use" technology in the EAR is uniquely defined in Part 772.1 to require operation, installation, maintenance, repair, overhaul ***and*** refurbishing [emphasis ours]. It is not apparent why software and technology controls proposed in the new 500 series are defined with a disjunctive "or". OU is concerned that this creates a discrepancy in the EAR will create confusion within the affected community. BIS has previously clarified that when evaluating "use" technology, all six elements contained in the definition must be present for "use" technology to be present, the substitution of the conjunctive "and" with the disjunctive "or" appears to be an expansion of regulatory burden.

It is OU's understanding that the Council on Governmental Relations (COGR), Association of American Universities (AAU), and Association of University Export Control Officers (AUECO) also are concerned with this change. We agree with these organizations that BIS should evaluate carefully the implications of the proposed change to "or". OU also respectfully asks that BIS provide clarification that mere access and/or mere operation of items in the conduct of fundamental research or teaching activities do not constitute controlled software or technology by virtue of 9D515 (software) or 9E515 (technology). Without such a clarification, the proposed changes will not create a "bright line rule" to the affected community.

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OU 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. OU notes that multiple provisions in the ITAR that are essential to university-based research have not been carried over to the EAR. These include 22 C.F.R. 123.16, 22 C.F.R. 125.4 (b)(7), and 22 C.F.R. 125.4 (b)(9). Without reciprocal provisions in the EAR for these exemptions, the transfer of items into 9X515 represents a significantly increased regulatory burden for universities, as these items and technologies that were exempted from licensing requirements under the ITAR would now require a license under the EAR. While a license exception for the release of software and technology in the United States by U.S. universities to their bona fide and full-time regular foreign national employees and other foreign nationals was created to correspond with the authorization in § 125.4(b)(10) of the ITAR, it is notably more restrictive than the ITAR provision. For example, it is not available for encryption related software controlled for ''EI'', not is it available for software and technology controlled for ''MT'' (Missile Technology) reasons.

On this point, OU is concerned that reciprocal provisions (should they eventually be incorporated into the EAR), would be hampered by other parts of the EAR, namely the limitation on use of License Exceptions in Part 740.2. In relevant part, Part 740.2(a) states that "You may not use ***any*** License Exception if. . . the item is controlled for missile technology [MT] reasons[1]" [emphasis in original]. As a result, even if license exemptions/exceptions are adjusted to prevent inequities (i.e., through creation of corresponding provisions to 123.16, 125.4(b)(7) and 125.4(b)(9) of the ITAR), the utility of license exceptions in the EAR will be significantly limited for any items or technologies that are subject to MT reasons. This possibility is even more concerning due to the acknowledgement that the 9X515 ECCNs may be subject to MT controls[2]. OU urges BIS to carefully consider ways that the EAR can be adjusted to prevent items that are transferred to the CCL from creating more of a licensing burden than they were under the ITAR.

In closing, OU appreciates the opportunity to provide the comments above. In particular, we are concerned about the expansion of the definition of "use" and the lack of reciprocal license exemptions in the EAR. Both of these issues present unprecedented burdens to university research. However, we are hopeful that with appropriate solutions can be found, and we appreciate BIS's attention to these matters.

Sincerely,

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[1] There are some limited exceptions to this prohibition.

[2] See https://federalregister.gov/a/2013-11986. "All items in the 9X515 ECCNs, as proposed in this rule, would be subject to national security (NS Column 1) and regional stability (RS Column 1) controls, as well as antiterrorism (AT Column 1) controls. Some of the items would be subject to missile technology (MT) controls in some cases.