September 9, 2013

Mr. Brian Baker
Director, Electronics and Materials Division
Office of National Security and Technology Transfer controls
Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
14th Street and Pennsylvania Avenue, NW
Room 2099B
Washington, D.C. 20230

Re: RIN 0694—AF64

Dear Mr. Baker:

We write on behalf of the Council on Governmental Relations (COGR) and the Association of American Universities (AAU) in response to the proposed rule (78FR45026) to transfer military electronic equipment from the United States Munitions List (USML) to the Commerce Control List (CCL). COGR is an association of 189 U.S. research universities and their affiliated academic medical centers and research institutes that concerns itself with the impact of federal regulations, policies, and practices on the performance of research and other sponsored activities conducted at its member institutions. AAU is an association of 60 U.S. and two Canadian preeminent research universities organized to develop and implement effective national and institutional policies supporting research and scholarship, graduate and undergraduate education, and public service in research universities.

COGR and AAU generally have supported the transfer of items from the USML to the CCL pursuant to the President's Export Control Reform Initiative. The goal is to provide that International Traffic in Arms Regulations (ITAR) and USML controls apply only to items that provide the United States with a critical military or intelligence advantage. We commented in July on the rules proposed by Commerce/BIS (78FR31431; RIN 0694-AF87) for the transfer of spacecraft systems and related items to the Commerce Control List. While we expressed overall support, we pointed out that certain new proposed 500 series Export Control Classification Numbers (ECCNs) define controlled "software" (ECCN 9D515) and "technology" (ECCN 9E515) as that specially designed or required "for the 'development,' 'production,' operation, installation, maintenance, repair, overhaul, **or** (emphasis added) refurbishing of 'spacecraft' and related commodities…" Similar language was included in the new 600 series ECCNs 9E610 and 9E619, published as a final rule in April (RIN0694—AF65).

In our comments we noted that this is inconsistent with the definition of "use" in EAR Part 772.1, which is defined as "operation, installation…, maintenance…, repair, overhaul **and** (emphasis added) refurbishing." It raises issues that were of great concern to the university community when a similar change (use of "or" instead of "and") with regard to use technology was proposed by the Commerce Inspector General in 2004. While access to technology for production and

development purposes is unlikely to have much impact on universities, access for any category of "use" is another matter. It raises the potential of a greatly increased need for deemed export licenses. Many fundamental research projects at universities involving 500 or 600 series items will require determinations of the need for deemed export licenses in order for foreign students, faculty, visitors, technicians and other research staff to work on such projects, including merely operating equipment where no information is conveyed. Security will have to be implemented to ensure in such cases that non-licensed foreign nationals, who are members of the campus community, and visitors to the campus, will not have access to controlled equipment for any one of these purposes. This may require substantial investment of staff and resources by universities, and lead to an increased licensing burden for BIS with no clear national security benefit.

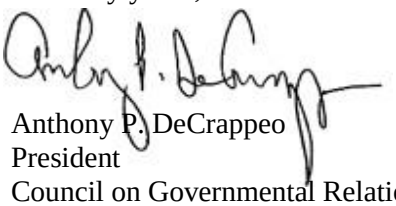
Similar concerns arise under the subject proposed rule for transfer of military electronics. Some of the new proposed "600 series" ECCNs contain the same expansive definition of "use" that we objected to in the previous comment letter to BIS (e.g. ECCN 3E611; 9E620—"technology required for the production, development, operation, installation, maintenance, repair, overhaul **or** refurbishing of commodities or software enumerated in other 600 series ECCNs)."

COGR and AAU did not comment when the proposed rule for transfer of military equipment and related items to the CCL was first proposed last year (77FR70945). However, we note that two other commenters raised the identical issue of the consistency of the rule with BIS's previous interpretation of "use." Under the previous BIS view only the totality of the "use" activities should trigger controls ("and" vs. "or"). In response to the commenters on this rule, BIS states that its interpretation of "use" applied to CCL-controlled software and technology prior to creation of 600 series ECCNs. "Nearly all of the software and technology in existing and proposed 600 series ECCNs comes from USML categories. One goal of the U.S. government in the Export Control Reform Initiative is not to decontrol completely and inadvertently items the President determines no longer warrant control on the USML." BIS believes the "or" formulation achieves this objective.

We find this response unpersuasive. It essentially states that even though the items are being transferred to the CCL they still will be subject to USML type controls. In our opinion, this contradicts the objectives of the Export Control Reform Initiative to create "bright lines" between the two control lists. We worry that by creating inconsistencies within the EAR this will lead to confusion and misunderstanding. Moreover, this outcome appears inconsistent with the goal of the Export Control Reform Initiative to reduce unnecessary and burdensome controls and to allow the government and regulated community to focus resources on transactions that pose the greatest concern.

For these reasons we urge BIS to reconsider its interpretation.

Sincerely yours,



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