July 8, 2013

United States Department of State
Directorate of Defense Controls
2401 E. Street, NW
Washington, D.C. 20037

Subject: ITAR Amendment—USML Category XV and Defense Services (RIN 1400-AD33)

Dear Sir/Madame:

We are pleased to respond on behalf of the Council on Governmental Relations (COGR) and the Association of American Universities (AAU) to the May 24, 2013 Federal Register Notice (78 FR 31444) on proposed revisions to the International Traffic in Arms Regulations (ITAR) relating to U.S. Munitions List Category XV and Defense Services (RIN 1400-AD33). 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. Our comments on the proposed rule are directed entirely to the revised definition of "Defense Services" (ITAR 120.9). We have provided comments separately to the 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 Commerce Control List (RIN 0694-AF87).

Our associations provided comments on the Department of State's Directorate of Defense Trade Control's (State/DDTC) revision of the defense services definition that was previously proposed in April of 2011 (RIN 1400—AC80; 76 FR 20590). In those comments, COGR and AAU expressed support for the removal of the use of public domain information from the definition of defense services. The change currently proposed in ITAR 120.9(a)(1) is substantively identical to the change that was previously proposed and we again express our strong support for this change. As we noted previously, it will allow U.S. university researchers to collaborate with foreign national students, colleagues, or sponsors on projects related to defense articles so long as they are relying on published information or information developed through fundamental research, without the need for Technology Control Plans (TCPs) or authorization from State/DDTC. The change will reduce the costs and burdens associated with administering a TCP and obtaining authorization for both the university community and the government, and positively impact the scope and volume of research activities at our institutions without any negative impacts on U.S. national security. We also believe it is consistent with the objectives of the President's Export Control Reform Initiative. We appreciate State/DDTC's clarification in the proposed rule that differentiates training in tactical employment of defense articles from training in basic operation, which is not included in

defense services (120.9(a)(3)). The additional clarifications in the proposed 120.9(b) also are helpful. In our previous comments we highlighted the need for such clarifications, which should lead to a clearer understanding of the scope of defense services.

However, after reviewing the Federal Register Notice and conferring with our respective memberships, we have several substantive concerns about the proposed changes to the definition of defense services. First, in the current rule State/DDTC is proposing to include in the defense services definition the furnishing of assistance to a foreign person in the United States or abroad in the integration of any item subject to the ITAR or the Export Administration Regulations into an end item or component controlled as a defense article (120.9(a)(2)). As with the previous proposal, the definition does not exclude use of public domain information in providing such assistance. As previously expressed, we have concerns about the inclusion of this provision. In the proposed rule State/DDTC asserts the belief that the service of integration cannot be effected only with public domain information. No basis for this belief is cited, other than State/DDTC's view that it necessarily involves the use of technical data. In our view, the response from State/DDTC does not adequately address the concern. While we agree that integration generally may involve the transfer of technical data or other proprietary information, there is nothing unique about furnishing this kind of assistance that necessarily precludes the use of only public domain information. (For example, an engineering professor could apply only know-how gained from fundamental research to assist in the integration of radar technology into a military vessel's anti-missile system).

The proposed rule also includes in the definition of defense services the furnishing of assistance including training in the integration of a satellite or spacecraft to a launch vehicle or in launch failure analysis regardless of whether technical data is used (120.9(a) (5) and (6)). No exclusion for use of public domain information is provided for these services as well, nor is any explanation provided. This leads to inconsistencies in the ITAR provisions. It is incongruous that furnishing assistance to a foreign person in the design, development, engineering, manufacture, production, assembly, testing, intermediate- or depot-level maintenance, modification, demilitarization, destruction or processing of a defense article using only public domain information is not a defense service under the proposed redefinition, while assisting a foreign person in integrating components into that article or furnishing assistance with regard to satellites or spacecraft is considered a defense service. It is not clear why use of public domain information for certain types of services or activities related to defense articles should lead to greater concerns than for others.

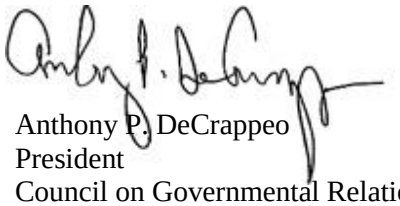
Second, the proposed definition of "integration" is quite broad in scope and a cause for concern for our respective memberships. Apparently, even minor changes or modifications to a defense article (anything other than "plug and play") would constitute integration for purposes of defense services. Coupled with the lack of a public domain exemption, this expansive definition is likely to perpetuate unnecessary burdens for our institutions that are engaged in experimental activities involving software development or systems engineering for defense articles, with little or no benefit. Scientists at our institutions often develop and test new hardware and software which are integrated to validate the experimental designs, or fabricate items for experimental purposes. These research activities typically are fundamental in nature, but under the proposed redefinition would appear to require defense services licenses. We believe there should be a carve-out in the definition for "integration" activities performed in the conduct of fundamental research.

We also note that a helpful provision in the definition previously proposed that would have excluded providing assistance in medical, logistical, or other administrative support activities to a foreign person is missing in the most recent proposed definition. As pointed out in our previous comments, this would have authorized medical faculty and students at our institutions to collaborate with allied militaries and physicians to address battlefield treatment processes and procedures without the need for a defense services authorization. We hope this provision was eliminated since State/DDTC does not view such collaboration as a defense service, and urge State/DDTC to confirm this in its response to the public comments.

Finally, the federal register notice states that revisions in the ITAR definitions of technical data and public domain information will be forthcoming. These definitions are critical for the university community. We trust that State/DDTC will seek the widest possible consultation and outreach with our community and other research institutions before making substantive changes to these definitions. Moreover, we hope that State/DDTC will provide ample opportunity for review and comment on any changes, and look forward to a continued dialogue with State/DDTC about these issues.

We appreciate the opportunity to comment on the proposed rule.

Sincerely,



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