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**Department of State Amendments to ITAR**

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**COMMENTS ON THE ITAR AMENDMENTS ADOPTED BY THE STATE DEPARTMENT:**

1. Fundamental Research Exemption- The State Department, in the Supplementary Information section of the March 29, 2002 Federal Register interim rule, reasserts that publicly available information and academic exchanges are not treated as controlled technical data by the ITAR, provides useful explanations of information in the public domain, and affirms that the ITAR is consistent with NSDD 189. We welcome and appreciate the affirmation by the State Dept. that, consistent with NSDD 189, it does not regulate fundamental research conducted at universities and that the March 1999 transfer of commercial satellites to the Military Control List did nothing to change this policy. Most of the problems encountered by universities in the past few years stem from a lack of understanding on the part of federal agencies and commercial contractors of the definitions of technical data and public domain. The result has been contracts and subcontracts issued to universities where the research to be performed by the university is incorrectly designated as ITAR-controlled, with unacceptable limitations on collaborations with foreign scientists and students, making it impossible to carry out the research.

While the State Department statements are helpful, we fear they do not go far enough to help resolve the issue for government and commercial partners, because the clarity of the Supplementary Information has not been specifically codified in the regulation. Accordingly, in **Attachment 1**, we provide revisions to ITAR that would specifically allow universities performing fundamental research to obtain technical data from federal and non-federal sponsors and to share the information with foreign nationals involved in the fundamental research without first having to apply for, and obtain, government licenses.

To be covered by the amendments, the information provided would have to meet three tests: It would have to be (1) provided to an accredited institution of higher learning in the United States, (2) provided for use by the institution in connection with fundamental research, and (3) provided without any restriction on the institution's ability to publicly release the information or share it broadly within the scientific community.

2. Limited Practical Applicability of New Exemptions- The new exemption of "articles fabricated only for fundamental research purposes otherwise controlled by Category XV" is of limited usefulness. The exclusivity requirement that only nationals of the designated countries may be involved in such research activities or participate in the launch without the need for an export license is problematic. It would not be feasible, we believe, to insist that foreign institutions impose these restrictions on themselves, nor can we see how the exporting institution entity could ensure compliance. To ensure ITAR compliance, the likely approach of most U.S. institutions would be to seek export licenses.

Unfortunately, unless this basic flaw in the construction of the new exemptions is corrected, international scientific research and collaboration cannot be reasonably conducted under the exemption and institutions will bear the burden of securing ITAR licenses, even for collaborations involving NATO and non-NATO allies. While we have outlined some further recommendations to improve the clarity of the exception in **Attachment 2**, the exception itself will be of little practical value unless this restriction is removed.

## **Attachment 1**

### **Proposed Revision to Incorporate Clarifications from the Supplementary Information into ITAR and Improve the Clarity of the Definition of Public Domain, Consistent with NSDD 189**

Amend 22 CFR Section 120.11, Public Domain:

(a) Public Domain means information which is or will be published or disseminated and generally accessible or available to the public:

(6) Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public or the scientific community;

7) Through public release (i.e., unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency; or through provision by commercial contractors and other entities without restriction as to public release to an accredited institution of higher learning in the U.S., for use in connection with fundamental research which is ordinarily published or shared broadly within the scientific community (see also § 125.4 (b)(13) of this subchapter);

(8) Through fundamental research in science and engineering where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. Disclosure of information for use in fundamental research will also constitute fundamental research, as long as there are no restrictions on use or publication of the results. Research will not be considered fundamental research if:

(i) The university or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, other than a temporary delay in publication to allow prepublication review solely to identify patentable subject matter or inadvertent disclosure of proprietary information that a sponsor has provided, or

(ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable, and the export violates such specific controls.

## **Attachment 1 cont'd**

Amend 22 CFR Section 125.4, Exemptions of General Applicability:

(b) The following exports are exempt from the licensing requirements of this subchapter.

(13) Technical data (i) approved for public release (i.e., unlimited distribution) by the cognizant U.S. government department or agency or Directorate for Freedom of Information and Security Review, or

(ii) provided by commercial contractors and other entities without restriction as to public release to an accredited institution of higher learning in the U.S., for use in connection with fundamental research which is ordinarily published or shared broadly within the scientific community. This exemption is applicable to information approved by the cognizant U.S. government department or agency, or to information provided to an accredited institution of higher learning, for public release in any forum. It does not require that the information be published in order to qualify for the exemption.

## **Attachment 2**

### **Proposed Technical Amendments to the Interim Final Rule**

1. New Section 123.16 Exemptions of General Applicability- There is ambiguity in 123.16(b)(10)(ii). This requires that "all the information about the article(s)" ... "will be published and shared broadly within the scientific community...." This appears to narrow the definition of "public domain" stated in 120.11 and referenced parenthetically at the end of the section. Using "will be published" also appears narrower than the statement in the "Supplementary Information" that the intent of the change was to exempt exports by U.S. accredited institutions of articles "as long as all of the information about the article, including its design, is in the public domain." The definition of public domain, 120.11 is broader than "will be published", and in particular includes the critical paragraphs (6) which includes dissemination at conferences, and (8) which defines a category of "public domain" to be "basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly in the scientific community." In sum, there are a number of ways in which information is shared within the scientific community, including discussion in open classrooms and laboratories, at conferences, and on websites or floppy discs. A narrow interpretation of

“published” can be made to the extent that the new regulation does not merely refer to the existing definitions at Part 120.10(a)(5) and Part 120.11. For these reasons, it is recommended that Section 123.16(b)(10)(ii) read: The information about the article(s), including its design, qualifies under Part 120.10(a)(5) or under Part 120.11.

2. New Section 125.4 Exemptions of General Applicability- Section 125.4(d) allows the export of defense services (including training) to nationals of specified countries when engaged in international fundamental research “conducted under the aegis of an accredited US institution of higher learning”. This language suggest that the U.S. university must be the lead university on all research projects involving articles described in new section 123 16(b)(10). If it were not intended to so restrict this exemption, more appropriate language would be “involving an accredited US institution of higher learning”. This is a critical correction, as US institutions are not always the lead institution and it is important to the advancement of fundamental research that institutions be encouraged to collaborate regardless of which one is the primary funded institution.

### 3. Potential Conflicts with other Sections of ITAR

A. Section 124.1(a) of the ITAR, establishing what constitutes a defense service, states that the provision to a foreign national of even public domain information otherwise exempted from licensing requirements in section 125.4 is a defense service requiring a license. Arguably the new exemption provided at 125.4(d) for accredited U.S. institutions of higher learning is swept away by 124.1(a). To assure that there is no conflict among these provisions, we recommend that 124.1(a) be clarified by a specific statement that the exemption provided at 125.4(d) nonetheless continues to have force and effect.

B. Some confusion may be generated by the fact that 22 CFR 121.1, Category XV, (f) provides that technical data directly related to the manufacture or production of all spacecraft is to be designated Significant Military Equipment (SME), regardless of intended end use or whether the hardware is SME. This conflicts with the highlighted note at 121.1, XV, (a): “...scientific satellites, research satellites and experimental satellites are designated as SME only when the equipment is intended for use by the armed forces of any foreign country.” Because the new exemptions of general applicability at 123.16(b)(10) and 125.4(d)(1) are limited to public domain information, and because SME information is, by definition, not public domain information, the restriction imposed by 121.1, XV, (f) may be construed to eviscerate the new exemptions.

We believe that the better interpretation is that information deriving from fundamental research is public domain information expressly excluded from the definition of technical data at 120.10(5); thus, the reference to “technical data” at 121.1, XV, (f) would not capture information deriving from fundamental research. However, to assure that there is no conflict among these provisions, we recommend that 121.1, XV, (f) be clarified by a specific statement that it does not apply to the exemptions provided for at 123.16(b)(10) and 125.4(d).