University of Idaho
A LEGACY OF LEADING

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July 31, 2015

Bureau of Industry and Security
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230
Submitted electronically at publiccomments@bis.doc.gov

Re: Response to Proposed EAR Changes (BIS-2015-0019; RIN 0694-AG32)

Dear Ms. Hess:

The University of Idaho generally supports the proposed EAR changes with some comments. The University is the state's land-grant research university. It engages in extensive research activities, often sponsored by industry partners and involving proprietary information. In addition to its general statement of support, the University has provided a response to the eight issues solicited by BIS for comment, which greatly mirrors the comments provided by Association of American Universities and the Council on Government Relations—

1. Whether the proposed revisions create gaps, overlaps, or contradictions between the EAR and the ITAR, or among various provisions within the EAR.

Response: There are a number of inconsistencies between the EAR and ITAR which are either relatively minor or reflect longstanding practices. However, there is a major disconnect with regard to prepublication review to assure publication would not divulge a sponsor's proprietary information. EAR 734.8 continues to provide that such review does not change the status of technology that arises during or results from fundamental research as still "intended to be published." ITAR 120.49 states that technical data that arises during, or results from, fundamental research is intended to be published to the extent that the researchers are free to publish the technical data without any restriction or delay, including research sponsor proprietary information review. It is common practice for company sponsors to require proprietary information review. The effect of the ITAR provision is to remove any research

projects involving defense articles subject to such review from fundamental research. This will have a chilling effect on innovation and University-industry partnerships. No explanation is provided as to the reason for the different policies. The University strongly opposes the proposed change to the ITAR that would now exclude any research subject to prepublication review from being considered fundamental research and urge that the ITAR be aligned with the EAR interpretation and definition of fundamental research.

Another point of difference is the provisions related to government-sponsored research covered by contract controls (EAR 734.11). The proposed EAR rule essentially restates the current 734.11(a), which universities have found confusing. The University prefers the ITAR language at 120.49(b) Note 3, suitably modified to apply to technology arising during or resulting from fundamental research. The examples in 734.11(b) are helpful and should be retained.

A change in the proposed EAR rule of particular relevance to educational institutions is the proposed restatement of the "educational exemption" in the current EAR 734.9, which is removed and reserved. The new statement in the proposed EAR 734.3(b)(3)(iii) merges current ITAR (120.10(b)) and EAR text to state "information and software that ...concern general scientific, mathematical, or engineering principles commonly taught in schools, and released by instruction in a catalog course or associated teaching laboratory of an academic institution." The University suggests that the "and" be changed to " or" to avoid unintentionally limiting this section, i.e., to clearly cover a new university course in an emerging technology area so long as it is included in a course catalog.

2. Whether the alternative definition of fundamental research suggested in the preamble should be adopted.

Response: The proposed alternative definition would read: "Fundamental research" means non-proprietary research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community." This appears to restate the current definition in a shorter fashion, and on its face we do not see a sharp distinction. However, there may be some vagueness in the term "non-proprietary." Also caution perhaps should be exercised in changing a definition that has been endorsed by a series of Administrations and that has served the scientific community well.

Currently the EAR (§734.3(b)(3)), states that "publicly available technology and software...[that] arise during, or result from, fundamental research" are not subject to the EAR. Under the proposed §734.8(a), "'technology'" that arises during, or results from, fundamental research and is "intended to be published" would not be subject to the EAR. The proposed rule preamble refers to a proposed note "to clarify that software and commodities are not 'technology resulting from fundamental research.'"

This change would significantly complicate and restrict university research. While natural-language documents written by a researcher would be "technology" that could be freely shared as arising during fundamental research, a computer-language document written by the same researcher, working on the same project (a program in source code), would be subject to deemed export restrictions. "Software" resulting from university research is "published" as well as "technology," as recognized in the current §734.7(b). The export definitions in §734.2(b) recognize the similarities between software and technology. The University strongly recommends that software arising during, or resulting from, fundamental research should not be subject to the EAR.

The University also notes with concern that the current presumption in EAR 734.8(b) that university-

based research will be considered fundamental research appears to have been eliminated. There is no clear policy reason stated for this change. The applicability should continue to be determined by the other criteria in 734.8(b). The University urges BIS to restate the presumption in the final rule.

3. Whether the alternative definition of applied research suggested in the preamble should be adopted, or whether basic and applied research definitions are needed given that they are subsumed by fundamental research.

Response: The EAR changes also include definitions of "basic research" (734.8, currently found at EAR 772.1) and "applied research" (drawn from DFARS 31.205-18). The suggested alternate definition of applied research is taken from OMB Circular A-11: "Systematic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met." The University prefers the DFARS definition proposed in 734.8(c)(2) since it is already established in the DFARS and, to our knowledge, has not previously raised concerns.

4. Whether the questions and answers in existing Supplement no. 1 to part 734 proposed to be removed (to the BIS website) have criteria that should be retained in part 734.

Response: the Q&A's have been very helpful to the universities. They are unlikely to have the same weight if removed from the EAR and placed on the website. The University also notes that supplements to other parts of the EAR contain important regulatory information (e.g., Supplement No. 1 to Part 740).

5. With respect to end-to-end encryption as described in the proposed rule (sec. 734.18), whether the illustrative standard in the proposed EAR rule also should be adopted in the ITAR; whether the safe harbor standard in the proposed ITAR rule also should be adopted in the EAR, or whether the two bodies of regulations should have different standards.

Response: The University appreciates that the proposed rules address cloud computing situations, which have been an area of considerable uncertainty under the current rules. BIS asks for comments as to which proposed rule more clearly describes the intended control. The University prefers the proposed EAR definition in 734.13(a)(6), which requires knowledge that releasing information relating to encryption will cause or permit the transfer of technology to a foreign national. In general, the University believes that knowledge or intent to transfer controlled information should be required for an "export" or "deemed export" to occur.

In addition, the restriction in 734.18(a)(4)(iv) to countries not listed in Country Group D:5 unfortunately may substantially limit the usefulness of the proposed rule. The University suggests BIS consider adding a note that a contract that imposes these obligations on a vendor is sufficient for compliance purposes, to provide a greater safe harbor. Ensuring actual compliance is beyond a univeristy's control.

6. Whether encryption standards adequately address data storage and transmission issues.

Response: The University has no comment on this issue.

7. Whether the proposed definition of "peculiarly responsible" effectively explains how items may be "required" or "specially designed" for particular functions.

Response: These definitions appear reasonable.

8. The effective date of the final rule.

Response: BIS proposes a 30-day delayed effective date. Changes to ECCNs generally have had a six-month delayed effective date while other rules affecting export controls have been effective on the date of publication. Obviously the content of the final rule is an important consideration. Significant changes in definitions should have as long a lead time as possible for implementation. Therefore, the University supports a six-month delayed effective date.

Sincerely,

Robert Smith, Ph.D.
Senior Associate Vice President for Research and Economic Development
University of Idaho