OFFICE OF THE SENIOR VICE PRESIDENT FOR RESEARCH

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By email to publiccomments@bis.doc.gov, subject "RIN 0694-AG32"

August 3, 2015

Ms. Hillary Hess
Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
Washington, DC

Subject: RIN 0694-AG32, *Revisions to Definitions in the Export Administration Regulations*

Dear Ms. Hess:

The University of Rochester appreciates the opportunity to comment in response to the Bureau of Industry and Security (BIS) RIN 0694-AG32, *Revisions to Definitions in the Export Administration Regulations*.

We support the efforts of the Departments of Commerce, Defense, and State to rationalize, clarify, and focus U.S. export controls. RIN 0694-AG32 and the accompanying RIN 1400-AD70 regarding revisions to ITAR definitions, include elements of progress toward harmonized and constructive definitions of terms.

We believe the harmonized definitions are an important step forward. On the whole they represent substantial progress in achieving meaningful export control reform, with many helpful changes and clarifications (e.g. redefinition of "release," clarification that submission of manuscripts to journal editors constitutes "published" information). As such, the University of Rochester supports the joint comment letter submitted by the Association of American University, Council of Governmental Relations and Association of Public and Land-grant Universities

The University of Rochester would like to specifically emphasize the following points raised in the AAU/COGR/APLU joint comment letter in response to select issues on which BIS has requested specific comments.

- *Whether the proposed revisions create gaps, overlaps, or contradictions between the EAR and the ITAR, or among various provisions within the EAR:* There is a major disconnect between the proposed EAR and ITAR definitions in their treatment of prepublication review to assure that publication does 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**. We strongly oppose this proposed change to the ITAR that would now exclude any research subject to prepublication review from being considered fundamental research. We urge that the ITAR be aligned with the EAR.**

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- *Whether the alternative definition of fundamental research suggested in the preamble should be adopted:* 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. The proposed 734.3(b) (3) and 734.7(a) also treat technology and software similarly. However, 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. This change would significantly complicate and restrict university research. Research findings resulting from fundamental research may be written in natural-language or computer language. In either case it is "technology" that should be able to be freely shared as arising during or resulting from fundamental research. No explanation is provided as to the reason for changing the recognition of the similarities between software and technology in the current EAR (734.2(b); 734.7(b)). We strongly recommend that software arising during, or resulting from, fundamental research should not be subject to the EAR.

- *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:* We appreciate 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. We prefer 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.

- *The effective date of the final rule:* 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. We support a six-month delayed effective date.

In closing, we again want to express our appreciation to BIS for their responsiveness to many of the issues and concerns that universities have raised. We believe the EAR changes are mostly positive and deserving of support. We hope BIS will consider the comments of AAU/COGR/APLU in finalizing the proposed definitions, and appreciate the opportunity to comment.

Sincerely,

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