Duke | OFFICE OF EXPORT CONTROLS

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Hillary Hess, Director
Regulatory Policy Division
Office of Exporter Services
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
14th Street and Pennsylvania Avenue, NW
Washington, DC 20230

Re: Proposed Revisions to Definitions in the Export Administration Regulations
RIN 0694-AG32

Dear Bureau of Industry and Security,

Thank you for inviting comments on the proposed changes to the Export Administration Regulations (RIN 0694-AG32). We welcome this opportunity to address the impacts envisioned by the proposed rule on Duke University and similar academic research institutions.

Comments related to specific proposed changes:
734.8 "Technology that arises during, or results from, fundamental research:

Paragraph (a) removes "software" from the definition of fundamental research. We request that BIS include both technology and software since software resulting from a university research project may also be published. Indeed, proposed 734.3(b) already identifies "information and "software"" as items that are not subject to the EAR.

The existing language in 734.8(b) states that, "Research conducted by scientists, engineers, or students at a university normally will be considered fundamental research, as described in paragraphs (b)(2) through (6) of this section." This presumption has been removed in proposed 734.8. We urge BIS to restate the current language in the final rule.

Paragraph (c) includes a proposed definition of "fundamental research". We prefer the language proposed in paragraph (c) over the alternate definition which is slightly confusing since patents are occasionally sought for the products of fundamental research. We believe that the term "non-proprietary research" may be confusing to the academic community. The proposed definition which more closely follows NSDD-189 has been used by a number of government administrations and has been widely accepted by the research community.

We support inclusion of definitions for "basic research" and "applied research" since this issue is often a stumbling block during negotiation of research contracts with US government agencies. Inclusion of the definitions in the regulations will discourage government contracting officers from defaulting to a stance that their research is one of the exceptions to NSDD-189.

734.11 Government-sponsored research covered by contract controls:

The language, based upon existing 734.11(a), has been a source of confusion for universities. We prefer that the ITAR language proposed in 120.49(b) Note 3 be used instead.

In addition, we find that the examples in existing 734.11(b) are helpful and should be retained.

734.13 Export

Paragraph (a) appears to have a typographical error, referring to 734.17, instead of 734.18.

We prefer the proposed EAR definition in 734.13(a)(6), which requires "knowledge" that releasing decryption keys, etc. will result in the release of controlled technology as opposed to the proposed ITAR definition [22 CFR §120.17(a)(6)], which would consider it an export "regardless of whether such data has been or will be transferred," since no there obviously cannot be an export if no data is ever provided. However, paragraph 734.13(a)(6) is cumbersome and could to lead to confusion. In order to clarify, we suggest replacing the second "other" in the paragraph with "controlled."

We request that BIS clarify the language proposed in § 734.13(b) in stating that an export occurring in the United States is considered an export to the foreign national's most recent country of citizenship or permanent residence. Is there a hierarchy in determining whether citizenship or permanent residency should be used? Should the export be considered deemed to both countries?

We support keeping Supplement No. 1 to Part 734. These Q&A have been very helpful to universities and moving them to a website may lessen the effectiveness and force of such guidance.

740.9 Temporary imports, exports reexports, and transfers (in-country) (TMP):

Clarification is requested on paragraph (a)(3)(v). In particular, what document is required? Should the documentation be maintained by the company, or retained by the individual while traveling?

772.1 Definitions of terms as used in the Export Administration Regulations (EAR):

"Basic scientific research" uses a name that is not typically found in either the proposed ITAR language (120.49(c)(1)), nor in language used by government administrations (NSDD-189, etc.) We recommend striking the word "scientific". Furthermore, if "basic research" is defined in 772.1, it would seem appropriate for "applied research" and "fundamental research" to also be defined.

The definition for "Peculiarly responsible" includes both the term "use" as well as "operation, installation, maintenance, repair, overhaul, or refurbishing". Although the latter is no doubt listed to cover 600 series items, it appears redundant for the definition to be stating "operation, installation, maintenance, repair, overhaul, and refurbishing, 'operation, installation, maintenance repair, overhaul, or refurbishing.'" We recommend clarifying the need for this distinction perhaps by stating that the specific addition of "operation, installation, maintenance, repair, overhaul, or refurbishing" only applies to 600 series items.

The definition for "technology" should also be modified as recommended for "Peculiarly responsible" above.

Effective date of the final rule:
We support a six-month lead time for implementation of the final rule. The proposed changes to the definitions will require compliance personnel to revise training materials, in some cases implement new procedures, and may require significant consultation with other groups in the organization.

Sincerely,

Mark Stomski
Director of Export Controls