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Via Internet (www.regulations.gov)

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

Re: Comments Concerning Revisions to Definitions in the Export Administration Regulations (RIN 0694-AG32)

Dear Ms. Hess:

The University of Minnesota's Office of Sponsored Projects Administration (the "University") respectfully submits these comments to the Bureau of Industry and Security (the "Bureau") in response to the proposed rule (the "Rule")[1] that revises several key definitions in the Export Administration Regulations ("EAR"). We applaud the U.S. Government's prodigious efforts in the ongoing Export Control Reform initiative, and are grateful for the opportunity to provide input that we hope is useful in developing an improved regime that focuses resources on transactions of real concern while reducing undue constraints on the global exchange of ideas, international commerce, and cooperation with our strategic allies.

1. Results of "fundamental research"

As a general matter, the University supports the Bureau's efforts in clarifying the fundamental research exclusion ("FRE"). In particular, the discussion of proprietary sponsor review in paragraphs 734.8(b)(1) and (2) provides welcome clarity, as do the descriptions of "basic research" and "applied research" in paragraphs 734.8(c)(1) and (2).

[1] Revisions to Definitions in the Export Administration Regulations, 80 Fed. Reg. 31,505 (June 3, 2015).

We do, however, have concerns with two other aspects of proposed section 734.8: an overbroad element of the prepublication review language in paragraph 734.8(b), and the section's overall ambiguous treatment of software.

A. The "or delay" clause in the prepublication review paragraph should be removed.

While proposed section 734.8 largely preserves the existing contours of the FRE, paragraph 734.8(b) appears to impose a broad time-based limitation that is contrary to standard academic research practice, and that might nullify the exclusion as a practical matter. The language states that data qualify for the FRE only "to the extent that the researchers are free to publish the technical data contained in the research *without any* restriction or *delay*" (emphasis added).

The "without any . . . delay" construction is unworkably vague and overbroad. Publication can be (and very often is) delayed for any number of reasons having nothing to do with the content or sensitivity of research results. Moreover, it is a standard practice and courtesy to allow research sponsors a specified period of time to review research results before publication.[2] Limiting the FRE to research results that will be published "without any . . . delay" could have the same practical effect as eliminating the FRE entirely—a catastrophic result for the university community, and one the U.S. Government cannot intend. The University recommends that "or delay" be deleted.

B. The revised fundamental research exclusion should clearly encompass not only information but also software.

There appears to be a discrepancy regarding software between the proposed texts of section 734.3 ("items subject to the EAR") and section 734.8 ("technology" arising during or resulting from "fundamental research"). Revised paragraph 734.3(b)(3) states, in pertinent part, that the EAR do not govern "Information *and 'software' that . . . [a]rise* during, or result from, 'fundamental research,' as described in § 734.8" (emphasis added). This is materially the same as the current version of paragraph 734.3(b)(3), which describes "Publicly available technology *and software . . . that . . . [a]rise* during, or result from, fundamental research, as described in § 734.8" (emphasis added). The plural subject-verb agreement indicates that both technology/information *and* software can qualify, and will be able to qualify, for the FRE.[3]

Yet the proposed new version of section 734.8 seems to explain the FRE solely in terms of "technology," which the EAR treat as being distinct from "software." The University recommends that section 734.8 be revised to clearly encompass both "technology" *and* "software," to be consistent with paragraph 734.3(b)(3). Moreover, given the Bureau's position that there is no need to regulate technology/information and software differently from one another for purposes of section 734.7 ("published"), we can think of no reason to do so for purposes of section 734.8. In fact, removing

[2] Requirements to obtain substantive sponsor *approval* to publish results, as opposed to mere review, are not typical. We agree such conditions are generally inconsistent with the FRE.

[3] This interpretation is confirmed by the long-standing exclusion of certain 5D002 encryption software from the FRE, as stated in the existing text of paragraph 734.8(a). If all software in general were outside the scope of the FRE, such language about encryption software in particular would be redundant and nonsensical.

software from the scope of the FRE would be a substantive and disastrous change—well beyond a mere clarification—in the requirements governing the academic research community.

2. **The vague qualifiers "general" and "commonly" should be considered for removal from paragraph 734.3(b)(3)(iii).**

Paragraph 734.3(b)(3)(iii) excludes from the EAR information and software that concern "general scientific, mathematical, or engineering principals" that are "commonly taught in schools" and released in academic fora. The University recommends that BIS consider removing "general" and "commonly" from this clause. These words strike us as inherently subjective. At what point does a course about satellites and orbital mechanics cross the line from "general" to specific? What percentage of universities must offer laboratory seminars about high-performance nanocomposites for the content to become "commonly" taught? "General" and "commonly" are vague, problematic concepts for compliance programs and, we can imagine, in enforcement situations.

3. **Conclusion**

Please don't hesitate to contact me at bris0022@umn.edu or 612-625-3860 with any questions regarding these comments. Thank you for your efforts, and for encouraging public participation in the conversation on Export Control Reform.

Respectfully submitted,
/s/
J. Patrick Briscoe
Export Controls and International Projects Officer