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August 3, 2015

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

Submitted via Email to: publiccomments@bis.doc.gov

RE: RIN 0694-AG32

Dear Ms. Hess,

The Johns Hopkins University (JHU) works with the Council on Governmental Relations (COGR) and the Association of American Universities (AAU). Its Export Control Officer is a member of the Association of University Export Control Officers (AUECO). We have reviewed these organizations' comments in response to the Bureau of Industry and Security's (BIS) RIN 0694-AG32 (*Revisions to Definitions in the Export Administration Regulations*) and in support offer our own, supplementary comments below.

We appreciate the progress that has been made by BIS and DDTC in creating more consistent and clear export control regulations, as well as their willingness to consider the impact of existing and proposed regulations upon U.S. universities. We know quite well that it can be exceedingly difficult to find an acceptable compromise between preserving the freedoms and openness prized by many U.S. institutions and reining in the same freedoms/openness in order to protect national security.

Fundamental Research Definitions

"Non-proprietary": Effective export control compliance practices at JHU's academic divisions require clear rules and definitions associated with fundamental research. We are satisfied with the proposed use of a definition of fundamental research found in NSDD-189. We are also not fundamentally opposed to the suggested, "simpler definition," although we expect that many will require guidance as to the appropriate interpretation of the term "non-proprietary."

"Basic Research" and "Applied Research": In order to accurately and consistently identify its research as "fundamental," JHU relies heavily upon a shared understanding of what "basic research" and "applied research" typically look like, as well an ability to differentiate fundamental research from the "development" of items that are based upon concepts first spawned by basic research and later refined and validated by applied research. We have no objection to the continued use of the definition of basic research currently found at EAR 772.1. As for the definition of applied research, we are also not opposed to the use of language taken from OMB Circular A-11 but nevertheless prefer the language drawn from the Defense Federal Acquisition Regulation Supplement (specifically, DFARS 48 CFR part 31.205-18), so long as it includes the paragraph from that section that begins with, "*Applied research is not... .*" The additional language should help to mark the boundary between activities

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involving the assessment and refinement of basic research discoveries ("applied research") and those subsequent activities involving the practical application of concepts validated by applied research ("development").

Controls on Fundamental Research Inputs: We appreciate the clarity introduced by proposed Note 1 to Paragraph (a) of EAR Section 734.8. JHU's export control compliance program has historically assumed that the information, equipment, or software used to conduct its fundamental research may *not* necessarily be excluded from export controls. In fact, a large proportion of our export compliance screening effort is rooted in this assumption, as it is exceptionally difficult to anticipate and screen all inputs that may occur, especially when we are working with collaborators who may be unable or unwilling to identify the restricted status of what they are offering to us in support of our research. Notwithstanding our assumptions and current practice, we think it would be helpful if BIS were to make clear to the university community how this proposed Note is consistent with the NSDD-189's hands-off approach to the "conduct" of federally –funded fundamental research.

Software as Fundamental Research "Result": We note that proposed EAR Section 734.3(b)(ii) refers to "information and 'software' " that arise during, or result from, fundamental research but that the Section to which it refers (734.8) only mentions "technology." As with other universities, we are concerned that this could mean that that BIS will no longer consider software to be a type of fundamental research "result" of the sort that is included in the NSDD-189's definition of fundamental research. If that is the case, then we believe that this would introduce counterproductive restrictions upon the dissemination of the results of applied research. It makes more sense to us that, perhaps at a later stage of activity, the validated software outputs of applied research may be incorporated into software *development* activity that would warrant the imposition of EAR export control upon items developed. Thus, we suggest that software arising during, or resulting from, fundamental research continue to be excluded from EAR controls.

Educational Information

We support the suggestion made by other universities and organizations that BIS revise proposed EAR Section 734.3(b)(3)(iii) such that it makes clear that, in addition to general, commonly taught principles, new discoveries will also be included among the type of "educational" items that may be incorporated into existing or new catalog courses or teaching laboratories and that they will not be subject to the EAR. This would make less likely a narrow interpretation of the section that could stifle the dissemination of information needed to educate and train students to enter a competitive job market. As an alternative, we support MIT's suggestion that the Section be shortened to read simply as, "(iii) Released by instruction in a catalog course or associated teaching laboratory of an academic institution."

Q&A: Supplement No. 1 to Part 734

Please continue to publish the questions and answers found in Supplement No. 1 to part 734. We acknowledge that offering such a section can create an expectation that it be continually updated – requiring resources that may be in short supply – but we believe that maintaining it promotes consistency in interpretation and likely reduces the overall volume of requests for guidance that is directed to your licensing division.

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Effective Date of Final Rule

JHU's export control compliance practices are dependent upon the sharing of knowledge with – and delegation of responsibility to – a very large population of faculty, administrators and staff. Depending upon the content of the final rule, it could easily take several months for us to be reasonably confident that compliance practices have been modified in accord with the regulatory changes. We note that changes to the EAR have in the past been accompanied by effective-date delays of up to six months and urge BIS to allow at least this much time for us to recalibrate our practices accordingly.

Thank you for providing JHU with an opportunity to offer its comments on these proposed changes to the Export Administration Regulations.

Sincerely,

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