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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

RE: RIN 0694-AG32

Dear Ms. Hess,

I appreciate the opportunity to respond on behalf of the University of Cincinnati to the proposed Revisions to Definitions in the Export Administration Regulations (EAR) and corresponding changes to the International Traffic in Arms Regulations (ITAR). If the definitions are adopted as proposed, they will have significant impact on U.S. academic institutions. We fully support the Export Control Reform Initiative and submit these comments to request further clarification of the definitions to ensure that U.S. research is safeguarded.

Educational Information

Currently, §734.9 defines "educational information" as information released by instruction in catalog courses and associated teaching laboratories of academic institutions, and §734.3(b)(3)(iii) excludes such information from the scope of the EAR. In the proposed rule, the definition of "educational information" is removed, and §734.3(b)(3)(iii) excludes 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 applicability of the exclusion is potentially narrowed by the proposed changes. The concern is that academic institutions will need to consider if other institutions are providing similar curricular to be considered "commonly taught" when developing new curricular. In addition, certain activities that are currently treated as "educational information" may become export controlled if they include more than general principles. A potential issue is raised with the definition of associated teaching laboratory and if that would include such activities as capstone experiences and educational design laboratories. The University environment is open and collaborative with no discrimination on the basis of nationality or citizenship. Academic programs only limit participation by required prerequisites.

The proposed §734.3(b)(3)(iii) could potentially inhibit the ability of U.S. universities to develop new courses in emerging areas of science and engineering. The limitation of the advancement in academic programs would greatly cripple the career options of graduates and the innovation of our country, which would cause a reduction in competitiveness and economic growth. We recommend that the current statement "is released by instruction in catalog courses and associated teaching laboratories of academic institutions" is retained or to include more detail in the description to cover the educational information that the proposed rule removed.

Fundamental Research

The proposed definition of "fundamental research" using the language of NSDD-189 in the EAR and the ITAR is consistent with our understanding. The proposed rule adopts a definition of "applied research" taken from the DFARS (48 CFR part 31.205-18) with an alternate definition adopting OMB Circular A-11 language. The OMB Circular A-11 language reads: "applied research is defined as systematic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met". We appreciate the addition of this definition as it is widely understood and suggest that if the DFARS definition of "applied research" is used, that it would be include the rest of 48 CFR part 31.205-18, "Applied research does not include efforts whose principal aim is design, development, or test of specific items or services to be considered for sale; these efforts are within the definition of the term development, defined in this subsection." The specific statement of "for sale" helps to clearly distinguish between "applied research" and "development" activities.

BIS has also proposed an alternate definition: "fundamental research" means non-proprietary research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community. Clarification of what is considered "non-proprietary" would greatly assist the interpretation of the definition along with prepublication review under specific circumstances.

The proposed definition may be applicable to all organizations and locations, this creates uncertainty in the interpretation of the regulations with the removal of research that is conducted at institutions of higher learning in the U.S., currently §734.8(b). If at all possible, we suggest that the current language of §734.8(b) remain in the EAR as we utilize this definition when making determinations that a research project meets all the criteria to be considered "fundamental research". If the current language will not be retained, then please outline what would be considered fundamental research at an institution of higher learning within the U.S. and abroad.

"Fundamental research", "technology", and "software"

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 is a change from the current §734.3(b)(3), under which "publicly available technology and software…[that] arise during, or result from, fundamental research" are not subject to the EAR. We suggest that you revise the proposed definition to include "software" as the proposed rule potentially restricts university research. The concern is that the same "technology" created by a researcher

under fundamental research could be shared freely in a written document but then subject to the regulations if written in source code in a software program. "Software" resulting from university research is "published" as well as "technology", as recognized in the current §734.7(b). The current export definitions in §734.2(b) recognize the similarities between software and technology.

Questions and Answers- Technology and Software Subject to the EAR

We currently utilize the questions and answers found in Supplement No. 1 to part 734 as they assist in confirming interpretations and understanding of the regulations. As they are illustrative to comparable scenarios commonly found in a university setting. The questions and answers are vital to the clarification of the changes and proper interpretation of the regulations.

End to End Encryption Standard

We are most grateful for the exclusion of sending, taking or storing software that is secured using end to end encryption from export activities. The listed activities defined in the addition of §734.18 to the regulations is quite helpful and reduces the regulatory burden of our faculty and staff.

Effective Date of the Final Rule

We recommend a minimum a six month delay in the effective date and that the revised regulations are to be applied to new projects after the effective date. The reason we recommend this timeframe is that the proposed definitions as they are currently written greatly impact our activities. Under the current regulations, we allow time-limited prepublication reviews by sponsors to ensure that proprietary information or patent seeking protection is safeguarded. If the proposed changes to ITAR §120.49(b) are not altered, the final rule will cause significant changes to our business practices and require the development and implementation of new procedures for review and negotiation of sponsored research projects. In addition to new procedures, these changes will require the implementation and monitor of technology control plans and license submissions for the participation of foreign nationals in the research while the prepublication review occurs. Additional training to the affected departments will be conducted and an increase in workload for the current projects to apply the changes retrospectively will require additional staffing for export compliance.

Thank you for considering our comments to these proposed changes.

Sincerely,

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