PAUL HORN
Senior Vice Provost for Research

Office of the Provost
70 Washington Square South, rm 1228
New York, NY 10012
P: 212 998 3228
paul.horn@nyu.edu

Regulatory Policy Division
Bureau of Industry and Security, Room 2099B
U.S. Department of Commerce
Washington, D.C. 20230
Subject: RIN 0694-AG32

Dear Ladies and Gentlemen:

We are writing to comment on the proposed revisions to the EAR. We applaud the goal of harmonizing the EAR with the ITAR and in large measure agree that this goal has been met. In addition, we have reviewed the AAU/APLU/COGR response to you and agree with all of the points contained therein.

We wish to highlight a few areas which are of particular concern to New York University as a major research university. A major inconsistency has arisen between the proposed EAR and ITAR regulations with the latter stating that sponsor review of proprietary information removes it from "fundamental research". We have indicated in our comment letter to the DDTC that their provision would have a chilling effect on innovation and university-industry partnerships and directly works against the Administration's efforts which have sought to increase university-industry collaboration and move new ideas quickly from the lab to the marketplace. The proposed ITAR provision would impede the ability of universities to achieve these objectives, particularly in defense-related areas where universities often serve as subcontractors to defense contractors for research related to particular defense technologies. It is hard to see how this serves our national security interests and we would argue that it clearly does not serve our economic interests. We strongly prefer the EAR version in 734.8 to the ITAR 120.49(b).

Under the proposed 15 CFR 734.8(a), software was removed. Therefore, while natural-language documents written by a researcher would be "technology" that could be freely shared as arising during fundamental research, a computer-language document (a program in source code) written by the same researcher would be subject to deemed export restrictions. "Software" resulting from university research is "published" as well as "technology", as recognized in the current 15 CFR 734.7(b). The export definitions in 15 CFR 734.2(b) recognize the similarities between software and technology. We recommend that software arising during, or resulting from, fundamental research should not be subject to the EAR.

As the AAU/COGR/APLU letter states, another point of difference in the provisions is related to government-sponsored research covered by contract controls (EAR 734.11). The proposed EAR rule essentially restates the current 734.11(a), which universities have found confusing. We prefer the ITAR language at 120.49(b) Note 3, suitably modified to apply to technology arising during or resulting from fundamental research. The examples in 734.11(b) are helpful and should be retained.

The removal of the specific criteria for university-based research currently found in 15 CFR 734.8(b) creates interpretive uncertainty in the new proposed definitions. Universities use this regulation to

make determinations as to the applicability of fundamental research by evaluating proposed research activities using paragraphs 2-6, and assuming that the research qualifies as “fundamental research” if all conditions are met. The development of a decision tree tool for the determination of fundamental research for universities that incorporates the current criteria for university-based fundamental research would be most helpful.

A change in the proposed EAR rule of particular relevance to NYU as an educational institution is the proposed restatement of the "education exemption" in the current EAR 734.9, which is removed and reserved. The new statement in the proposed EAR 734.3(b)(3)(iii) merges current ITAR (120.10(b)) and EAR text to state "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." We suggest that the "and" be changed to "and/or" to avoid unintentionally limiting this section, i.e., to clearly cover a new university course in an emerging technology area so long as it is included in a course catalog.

The addition of 15 CFR 734.18 which lists activities that are not exports, re-exports or transfers is a useful addition to the EAR. In particular, the exclusion of sending, taking, or storing software that is secured using end-to-end encryption from export activities is welcome to the academic research community as it will reduce the faculty burden associated with international travel and the need to monitor and conduct research using main campus resources while abroad. The proposed EAR illustrative standard of FIPS 140-2 supplemented in accordance with NIST guidance or other similarly effective means is also quite helpful.

We believe that the Q&A in Supplemental no 1 to part 734 should be retained. While the Q&A is illustrative, including them in the EAR removes the uncertainty created by changes due to interpretive differences without the benefit of the rulemaking process. Removal would result in an increased uncertainty in the application of key concepts including fundamental research, publication, and educational instruction.

We appreciate the opportunity to comment on these proposed new definitions and thank you for your willingness to continue the dialogue on these important issues.

Sincerely,

Paul Horn
Senior Vice Provost for Research