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August 3, 2015

C. Edward Peartree
Director, Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
U.S. Department of State
PM/DDTC, SA-1, 12th Floor
Washington, DC 20522

Hillary Hess
Director, 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 1400-AD70 and RIN 0694-AG32)
Comments on Proposed Revisions to ITAR and EAR Definitions

Dear Mr. Peartree and Ms. Hess:

The University of California, Berkeley ("Berkeley") appreciates the opportunity to comment on the proposed amendments to the International Traffic in Arms Regulation (ITAR) and to the Export Administration Regulations (EAR), which are designed to harmonize the two sets of definitions, and which are published at 80 Fed. Reg. 31525 and 80 Fed. Reg. 31505 (June 3, 2015).

Berkeley supports and incorporates by reference comments submitted by the University of California's Office of the President, the Association of University Export Control Officers (AUECO), the Association of American Universities, the Council on Government Relations, and the American Bar Association's Section of International Law. As with the other commenters, Berkeley appreciates the efforts that State and Commerce have made to remove substantive differences between the two regulatory schemes. However, we agree with the other commenters that additional work is required.

Definition of Fundamental Research

Berkeley supports State's decision to separate "fundamental research" from the definition of "public domain" and the recognition in both the EAR and ITAR that fundamental research should include information that "arises during, or results from, fundamental research." However, Berkeley agrees with other commenters that the description of fundamental research that appears in the jurisdictional language of §120.6 should carry through to §120.49.

Berkeley also agrees that a serious problem exists is the current form of §120.49(b). As drafted, the technical data that arises during, or results from, fundamental research and that is intended to be published only qualifies to the extent that the researchers are free to publish the "technical data" contained in the research "without <u>any</u> restriction or delay", including "U.S. government-imposed access and dissemination controls or research sponsor proprietary information <u>review</u>." (Emphasis added.) This approach is not harmonized with the EAR and is completely at odds with the way

DDTC, the Department of Commerce, and the Department of Defense have interpreted the concept of fundamental research since it was first adopted in the EAR and ITAR.

NSDD-189 distinguishes fundamental research, the results of which are published and shared broadly within the scientific community, from proprietary and restricted research, the results of which are restricted for proprietary or national security reasons. The key point is the restriction. As described in the EAR §734.8(b)(2), "[p]republication review by a sponsor of university research solely to insure that the publication would not inadvertently divulge proprietary information that the sponsor has furnished to the researchers does not change the status of the research as fundamental research." Similarly, the EAR provides that "[p]republication review by a sponsor of university research solely to ensure that the publication would not compromise patent rights does not change the status of fundamental research, so long as the review causes no more than a temporary delay in publication of the research results." (15 CFR §734.8(b)(3)) As with the other commenters, Berkeley acknowledges that when proprietary technical information is furnished by outside sources, the furnished data and any derivative data do not fall under the same protected status as the data resulting from fundamental research.

Berkeley agrees with the other commenters that the proposed rule confuses two very different concepts. In the case of governmental access and dissemination controls, the government does not simply review a research publication but makes a decision to approve the publication for public release or to restrict the release based on national security considerations. Industry sponsors of university fundamental research insist on reviews simply to ensure that none of the company's proprietary material has made its way in to the research report before it is published and to give it a brief opportunity to decide whether the research has resulted in any patentable inventions. Once any proprietary material is removed and it has made its patenting decision, the company has no further interest in controlling or restricting the publication. If, by contrast, the research sponsor has reserved for itself the ability to restrict the research for proprietary reasons and will use the research results for proprietary purposes, then it no longer qualifies as fundamental research under NSDD-189, the EAR (present or revised), or the present version of the ITAR.

If the §120.49(b) language were to be adopted in its present form, this would prevent Berkeley from performing fundamental research of interest to industry in areas in which it might use such fundamental research results in its own industrial development activities under ITAR. This is because industry always insists on a prepublication review to ensure that no proprietary information has been been included in the final publication. Today, such prepublication review does not destroy the fundamental research character of the activity. Under §120.49(b) as proposed, it would.

At the beginning of the proposed rule, the Department notes that it will harmonize certain terms under the ITAR with terms under the EAR to the extent appropriate. Berkeley acknowledges that it may not be possible to make all of the definitions identical under the two sets of regulations due to differences in the underlying reasons for control of items on the U.S. Munitions List or Commerce Control List. However, because information arising during, or resulting from, fundamental research is publicly available and shared broadly in the scientific community, and therefore should not be subject to control under either set of regulations, there is no reason not to harmonize the definition of "fundamental research" across both regulatory regimes.

Definition of Educational Information

In the EAR §734.9 and various parts of the ITAR, including §120.6(b)(3)(iii) and the note to paragraph (a) in §120.9(a), the agencies have exempted application of the restriction EAR and ITAR restrictions to educational information when it concerns "general" scientific, mathematical, and engineering principles that are "commonly" taught in schools. Berkeley believes that this unduly limited in several respects. As other commenters have noted, the definition raises the concern that the exemption does not apply to current and innovative courses. In addition, because the definition of "applied research" within the definition of fundamental research in §120.49(c)(2)(ii) covers processes and techniques, these activities should be carried over into the context of educational activities. Berkeley believes that educational information

should include instruction in "scientific, mathematical, or engineering principles, processes, and techniques taught in schools and released by instruction in a catalog course or associated teaching laboratory of an academic institution."

Definitions of basic research, applied research, and development

Berkeley appreciates the efforts of State and Commerce to clarify the distinctions between "basic research" and "applied research" within fundamental research in §120.49(c) and §734.8(c) and "development as defined in §120.47. However, Berkeley also supports AUECO's recommendations for revisions to "applied research."

Definition of public domain

Berkeley also agrees that the definition used for "public domain" in the proposed regulations should follow the statements contained in the regulatory preamble. The revised §120.11 definition for "public domain" includes information that is submitted to co-authors, editors, or reviewers of journals, magazines, newspapers or trade publications, or to organizers of open conferences or other open gatherings for review for publication. The preamble to the proposed change states that this includes information that is submitted for review prior to actual publication. However, the revised §120.11(a)(5) appears to require that information also be accepted for publication to qualify as "public domain". Berkeley believes that the language should be changed to clarify that information submitted for review for publication qualifies as "public domain" under §120.11(a)(5) regardless of acceptance for publication or actual publication. This clarification would allow information that is not favorably received or actually published to still qualify as "public domain."

Respectfully submitted,

Patrick Schlesinger

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