SUNY RF
The Research Foundation for
The State University of New York

Stony Brook University

Office of the Vice President of Research

S5422 Frank Melville Library
Stony Brook, NY 11794

Telephone: 631-632-7932
Fax: 631-632-5074

www.stonybrook.edu/research

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

RE: RIN 0694-AG32

Dear Ms. Hess,

I am writing on behalf of State University of New York at Stony Brook ("SBU"), a public academic, research and medical center and member of the American Association of Universities (AAU) and the Council on Governmental Relations (COGR). SBU concurs and supports the joint comment letter submitted by AAU and COGR as well as the comment letter submitted by the Association of University Export Control Officers (AUECO).

SBU appreciates the opportunity to offer further comment on the proposed Revisions to Definitions in the Export Administration Regulations (EAR) and corresponding changes to the International Traffic in Arms Regulations (ITAR) as they will have a significant impact on SBU and other U.S. academic institutions.

SBU primarily conducts fundamental research and educates students of all nationalities. The State University of New York policies require (1) research activities to be open for participation of foreign nationals, (2) conduct, progress and results of sponsored research to be unrestricted for dissemination, and (3) non-discrimination based on citizenship or national origin in all academic programs. We believe that there are additional areas in the proposed revisions to the definitions that require further harmonization or clarification to avoid a negative effect on research and education at SBU and other U.S. academic/research institutions.

Changes to Educational Information

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 proposed change adds uncertainty and potentially narrows the scope of applicability of the exclusion. For example, will SBU when contemplating new curricular additions need to be concerned that the course may not be commonly taught at other universities? Would the content of catalog courses that include hands on design laboratories, such a capstone experience (multi-faceted assignment that serves as a culminating academic experience for students), previously treated as "educational information" become subject to the EAR by virtue of including more than general principles? A narrow interpretation of the revised §734.3(b)(3)(iii) would inhibit the ability of the SBU to develop new courses in emerging areas in science and engineering critical to employability of their graduates and the future competitiveness of the industrial sector.

SBU prefers that the qualifier "concern general scientific, mathematical, or engineering principles commonly taught in schools" be removed and that the simpler "is released by instruction in catalog courses and associated teaching laboratories of academic institutions " be retained for §734.3(b)(3)(iii).

As an alternative, changing the proposed description to "information and "software" that concern general scientific, mathematical, or engineering principles commonly taught in schools and /or released by instruction in a catalog course or associated teaching laboratory of an academic institution" would describe educational information more fully without narrowing the scope of the exclusion.

Definition of "Fundamental Research"

SBU supports the proposed definition of "fundamental research" using the language of NSDD-189 in the EAR and the ITAR as it is consistent with our understanding of the concept. SBU also generally supports the 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 with the assumption that it would not alter the proposed language of permitting prepublication review under specific circumstances within the fundamental research domain.

If the NSDD definition is selected, 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. SBU favors the adoption of the OMB Circular A-11 language as it is already used in the context of reporting federal expenditure to NSF. If the DFARS definition is adopted, the inclusion of 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" would help clarify "applied research". The "for sale" criterion would clearly distinguish "applied research" and "development" activities.

SBU requests that the specific language of §734.8(b) be retained in the EAR or that BIS develop a decision tree tool for the determination of fundamental research for universities that incorporates the current criteria for university based fundamental research. As a primarily fundamental research institution, SBU uses §734.8(b) 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.

<u>"Fundamental research", "technology", and "software"</u>

Currently, SBU fundamental research includes the creation of software as a research result and/or a research tool. For example, SBU is the recipient of federal grants where the research result is software that is intended to be shared broadly. In fact, in some cases it is a requirement of the grant to share the resulting software with the larger academic community.

The proposed change under §734.8(a) would significantly complicate and restrict university research; 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.

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. The proposed rule refers to a proposed note "to clarify that software and commodities are not 'technology resulting from fundamental research'" (although we were unable to locate the note). Software" resulting from university research is "published" as well as "technology", as recognized in the current §734.7(b). The export definitions in §734.2(b) recognize the similarities between software and technology.

SBU supports AUECO's recommendation that §734.8(a) be revised as follows:

> § 734.8 "Technology" and "software" that arises during, or results from, fundamental research.
> (a) "Technology" or "software" that arises during, or results from, fundamental research and is 'intended to be published' is not "subject to the EAR."
> (b) Prepublication review. "Technology" or "software" that arises during, or results, from fundamental research is "intended to be published" to the extent that the researchers are free to publish the technology and software source code without restriction or delay. "Technology" that arises during or

results from fundamental research subject to prepublication review is still "intended to be published" when:

Questions and Answers- Technology and Software Subject to the EAR

SBU is concerned that the removal of the questions and answers found in Supplement No. 1 to part 734 in the regulations, which we use to guide export control decisions, would create an increased uncertainty in our applications of key concepts including fundamental research, publication, and educational instruction. While SBU agrees and recognizes that the questions and answers are illustrative, we encourage that BIS retain them.

End to End Encryption Standard

The addition of §734.18 listing activities that are not exports, reexports 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. SBU favors the proposed EAR illustrative standard of FIPS 140-2 supplemented in accordance with NIST guidance or other similarly effective means.

Effective Date of the Final Rule

Although the revised definitions do not make changes to the USML or the CCL, as written they have a significant impact on regulatory burden for U.S. universities. If the proposed changes to ITAR §120.49(b) Prepublication Review go to final rule without changes, SBU will need to significantly change their business practices associated with review and negotiation of sponsored research agreements as well as the management of access to sponsored research.

SBU, like most other institutions, seeks a balance when negotiating contracts with industry for university research. Most industry sponsors, as well as many foundations, acknowledge the institution's right to publish the results of the research but also require limited time prepublication review to prevent the inadvertent disclosure of sponsor proprietary information and to permit seeking of patent protection as applicable. SBU, along with other U.S. universities, has until now interpreted such reviews as within the scope of fundamental research.

Further these changes will require implementation of new procedures to determine applicability of the ITAR to fundamental research with prepublication review, implementation of technology control plans and submission of license applications for the participation of foreign nationals in the research, monitoring of those plans, and eventual removal of the plans once the prepublication review has occurred, as well as revised export compliance training for affected departments on campus. More importantly, such review would be required retrospectively for current projects. These procedures will also require additional staffing for export compliance. Universities will not be able to meet the compliance obligations imposed by the addition of the prepublication review language of ITAR §120.49(b) within 30 days of

the publication date. SBU suggests at minimum a 6-month delay in effective date, and further that the revised regulations be applicable only to new sponsored research begun after the effective date of the Final Rule.

SBU appreciates the opportunity to provide comments on these proposed changes.

Respectfully submitted,

David Conover
Vice President for Research,
Operations Manager,
The Research Foundation for SUNY