Office of the Vice Chancellor
for Research and Graduate Education
UNIVERSITY OF WISCONSIN–MADISON

August 3, 2015

Department of Commerce
Bureau of Industry and Security
Washington, DC
By email to publiccomments@bis.doc.gov

RE: RIN 0694-AG32
15 CFR 734, 740, 750, 764, and 772

Dear Sirs/Madams:

Please accept the following comments from the University of Wisconsin-Madison (UW-Madison) in response to the Department of Commerce Proposed Rule for *Revisions to Definitions in the Export Administration Regulations*. UW-Madison endorses the comments submitted jointly by the Association of American Universities (AAU), the Council on Governmental Relations (COGR), and the Association of Public Land Grant Universities (APLU); we are a member of those associations. As one of the largest public research institutions in the United States, with approximately a billion dollars in annual research expenditures, a broad research portfolio, a strong international presence, and a large number of international students, staff and visitors, UW-Madison believes it is critical that export control laws strike an appropriate balance between the free interchange of scholarly information and the advancement of science, and the protection of national security and economic competitiveness. We appreciate and support the efforts of the Departments of Commerce and State to harmonize the definitions among the EAR and ITAR, and there have been a number of positive outcomes from this process. However, it is important that this progress continue, and UW-Madison is greatly concerned that certain provisions in the above-referenced proposed rules represent a reversal of the overall positive trend of export control reform.

Please allow us to identify the items of most concern.

- **Inconsistent treatment of pre-publication review by a research sponsor under EAR and ITAR.** EAR 734.8 continues to provide that pre-publication review by a research sponsor for a limited time to identify proprietary information or to enable intellectual property protection does not change the status of technology that arises during or results from fundamental research as still "intended to be published" and thus not subject to the EAR. However, under the companion ITAR proposed rule, ITAR 120.49 would state that technical data that arises during, or results from, fundamental research is intended to be published to the extent that the researchers are free to publish the technical data without any restriction or delay, including research sponsor proprietary information review. The effect of the proposed ITAR provision is to effectively preclude any

industry-funded research involving defense articles from treatment as fundamental research, which will greatly hinder innovation and university-industry partnerships, and constrict the transfer of University technology to the private sector.

There a number of reasons why an industrial sponsor might request a brief delay in publication. In addition to providing industrial sponsors a brief window of time to ensure that their proprietary business information is not inadvertently revealed in a publication, industrial sponsors request publication delays to ensure sufficient time to file patent applications, to ensure that descriptions of company activities referenced in manuscripts are accurate, and to allow for the joint publication of collaborative research occurring in multiple sites. Federal government sponsors also frequently request pre-publication review so they can be alerted to the content of impending publications, ensure that federal support is properly attributed, permit the orderly publication of collaborative research, etc. No explanation is provided as to the reason for the proposal for different policies.

We strongly oppose this proposed change to the ITAR that would now exclude any research subject to prepublication review from being considered fundamental research. We urge that the ITAR be aligned with the EAR interpretation and definition of fundamental research.

- **Exclusion of software and commodities from treatment as "technology resulting from fundamental research."** Under current law, "publicly available technology and software... [that] arise during, or result from, fundamental research" are not subject to the EAR. Consistent with current law, 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. However, the proposed rule preamble refers to a proposed note "to clarify that software and commodities are not 'technology resulting from fundamental research.'" This proposed change makes no sense, and would appear to impose export controls for the first time on such things as government-funded open source distributed network computing software including UW-Madison's HTCondor software, as well as the many smartphone "apps" being developed for teaching and research purposes. As noted in the AAU/COGR/APLU comments, software is simply a form of written language, and it is illogical to treat software differently from other written forms of information irrespective of what the software does or how it is disseminated.

  Similarly, excluding commodities from "technology resulting from fundamental research" without regard to the nature or purpose of the commodity or the circumstances under which it was developed would impose controls on a wide range of innocuous devices with no apparent benefit to national security of economic competitiveness. For example, it is very common for simple devices to arise from fundamental research projects, where all information necessary to assemble the device is openly shared, such as enrichment devices which are created to enhance the comfort of laboratory animals.

  Finally, we note that this proposed exclusion of software and commodities from "technology resulting from fundamental research" conflicts with proposed EAR 734.8 Note 1 to paragraph (a), which states: "The inputs used to conduct fundamental research, such as information, equipment, or software, are not "technology that arises during or results from fundamental research" except to the extent that such inputs are technology that arose during or resulted from earlier fundamental research."

We ask that you do not exclude software and commodities from "technology resulting from fundamental research."

- **The description of educational activities not subject to the EAR is unclear and open to broad variations in interpretation.** The word "general" is included, but not defined, in EAR 734.3(b)(3)(iii) to qualify "scientific, mathematical, or engineering principles commonly taught in schools." The proposed wording can be interpreted to mean only entry-level courses. This would severely inhibit ability of universities to develop new upper-level and advanced courses in the competitive fields of engineering and science for fear that what is taught in them would not be considered "general." Such wording has also previously been interpreted to exclude capstone classes, something that is part of normal coursework for a large number of students. "Commonly taught" is also an inexact phrase subject to great variations in interpretation as different universities have different subject areas in which they are leaders. Narrow application of these terms would severely restrict educational activities.

  We suggest retaining the current definition of "educational information" under 734.9 ("information released by instruction in catalog courses and associated teaching laboratories of academic institutions"). If this is not possible, we recommend deleting the word "general" from the proposed definition.

- **General Comment regarding Effective Date.** The proposed changes would require that we review university contracts to ensure compliance, a task that will take more than 30 days. We suggest changing the effective date from 30 days from publication to 180 days from publication. Six month effective dates have been used previously following revisions of some export control rules.

The University of Wisconsin-Madison appreciates the opportunity to provide the Department of Commerce with the above comments. We believe that the laudable effort to harmonize the export control laws should not serve to weaken the essential protections for the results of university-based fundamental research which are so critical to the ability of universities to meet the research needs of the private sector while still maintaining an open research environment that is essential to the education of students, the ability to forge international collaborations, and the creation of innovative technologies.

Sincerely,

Thomas A. Demke
Export Control Officer

Dan Uhlrich
Associate Vice Chancellor for Research Policy