THE OHIO STATE UNIVERSITY

Office of Research

208 Bricker Hall
190 North Oval Mall
Columbus, OH 43210-1321

614-292-1582 Phone
614-292-6602 Fax

research.osu.edu

Caroline Whitacre, PhD
Vice President for Research
Professor of Microbial
Infection and Immunity
614-247-8356 Phone

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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

Subject: RIN 0694-AG32 (Proposed new definitions to the EAR)

Dear Ms. Hess:

On behalf of The Ohio State University (OSU), I am pleased to provide our response to your request for comments on the proposed Revisions to Definitions in the Export Administration Regulations (EAR).

As a thriving $983M research enterprise, OSU takes seriously its responsibilities for effective stewardship of the federal and private-sector funds that support our many research and training activities. While we appreciate the federal government's need to ensure that taxpayer funds are used effectively, we are also acutely aware of the burden that the ever-increasing set of compliance requirements is creating for higher education institutions. Managing the complexities of often-conflicting requirements detracts from productive research time for our investigators and leads to significant delays in the onset and conduct of research projects.

In putting forth the proposed EAR definitions, we believe it was the Department of Commerce's intent to clarify existing rules and harmonize the structure of the rules to align with the ITAR. We applaud this initiative and believe that in many ways the effort has been successful. However, there are several areas where seemingly small changes in the rules could have a significant and deleterious effect on university-based research in the United States.

As a member of COGR, AAU, and APLU (the associations), OSU concurs with the thoughtful and detailed responses these organizations are providing to BIS's request for comment. We will focus here on two topics that are of particular interest and concern to OSU and its research enterprise.

I. Educational Information

One change that could have a marked impact on educational institutions is the restatement of the 'education exemption.' The new EAR language has been combined with ITAR 120.10(b) and now states that "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" are not subject to EAR. *See* 15 C.F.R. § 734.3(b)(3)(iii) (proposed)(emphasis added). The "*commonly taught in schools"* language is new and potentially problematic because some university courses, particularly capstone-type courses, include novel information and/or present cutting-edge research. Furthermore, many catalog courses include hands-on laboratories that will necessarily differ by institution, professor, and class participation. Under a narrow interpretation of the proposed rule, these types of courses would not fall under the education exclusion, and any unpublished material presented would be subject to export rules. As education at universities is intended to be open, and limited only by course prerequisites, this new rule could significantly hinder the ability of U.S. institutions to develop instruction in emerging areas.

OSU would prefer that the current definition of educational information be retained. *See* 15 C.F.R. § 734.9 (eff. Jan. 7, 2011). However, we also support the associations' proposal that the definition be modified to read "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."

II. "Fundamental Research", "Technology", and "Software"

While the definition of Fundamental Research does not appear to have been modified significantly, we strongly support retaining the current definition—15 C.F.R. § 734.8 (eff. Jan. 7, 2011)—which has been endorsed by White House Administrations of both parties over the years and has served the scientific community well.

There is, however, one significant change that causes potential concern. Section 734.3(b)(3) of the current rules states that "publicly available technology and software…[that] arise during, or result from, fundamental research" are not subject to the EAR. The proposed § 734.8(a) states: "'Technology' that arises during, or results from, fundamental research and is 'intended to be published' is . . . not be subject to the EAR." However, there is also a preamble reference to a proposed note "to clarify that software and commodities are not 'technology resulting from fundamental research.'" 80 Fed. Reg. 31,505, 31,507 (Jun. 3, 2015). We interpret this reference to mean that software (source code) which results from fundamental research would be subject to deemed export restrictions, even if the software is intended to be publicly available, while a natural-language document describing that source code would be considered fundamental research. Because there is no obvious or stated rationale for this distinction, we recommend revising the proposed rule to read: "'technology' or 'software' that arises during, or results from, fundamental research and is 'intended to be published' is thus not 'subject to the EAR.'"

III. Conclusion

In summary, we believe that the proposed rules incorporate many helpful changes and clarifications that go a long way towards harmonizing the EAR with the ITAR. However, we are very concerned that the unintended narrowing of the Educational Information exclusion and the removal of "software" from the Fundamental Research exclusion would have significant ramifications for U.S. institutions of higher education and could have a chilling effect on United States research as a whole.

Thank you for your consideration of our input. Should you have questions or require more information, please contact me.

Sincerely,

Caroline C. Whitacre, Ph.D.
Vice President for Research
Professor of Microbial Infection and Immunity