AAU *Association of American Universities*
APLU *Association of Public and Land-grant Universities*
COGR *Council on Governmental Relations*

August 3, 2015

Kevin Wolf
Assistant Secretary of Commerce for Export Administration
Regulatory Policy Division
Bureau of Industry and Security, Room 2099B
U.S. Department of Commerce
Washington, D.C. 20230

Via Email: publiccomments@bis.doc.gov

Re: Revisions to Definitions in the Export Administration Regulations (RIN 0694-AG32)

Dear Assistant Secretary Wolf:

Enclosed please find comments from the Association of American Universities, the Association of Public and Land-grant Universities, and the Council on Governmental Relations on the Department of Commerce Bureau of Industry and Security Revisions to Definitions in the Export Administration Regulations (RIN 0694-AG32). Our staff is available to provide more information or discuss these matters further should you have any questions regarding our comments.

Sincerely,

Hunter R. Rawlings III President AAU	Peter McPherson President APLU	Anthony DeCrappeo President COGR

Attachment 1

MEMORANDUM

August 3, 2015

TO: **Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce**

FROM: **Association of American Universities**
Contact: Tobin Smith, toby.smith@aau.edu (202) 408-7500
Association of Public and Land-grant Universities
Contact: Jennifer Poulakidas, jpoulakidas@aplu.org (202) 478-5344
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Re: **RIN 0694-AG32**
Revisions to Definitions in the Export Administration Regulations

On behalf of the over 200 universities represented by our associations, we greatly appreciate the opportunity to comment on the revision of definitions relating to the export administration regulations (RIN 0694-AG32).

The Association of American Universities (AAU) is an association of 60 U.S. and two Canadian leading research universities organized to develop and implement effective national and institutional policies supporting research and scholarship, graduate and undergraduate education, and public service in research universities. The Association of Public and Land-grant Universities (APLU) is a research, policy, and advocacy organization of 238 public research universities, land-grant institutions, state university systems, and affiliated organizations, dedicated to increasing degree completion and academic success, advancing scientific research, and expanding engagement. The Council on Governmental Relations (COGR) is an association of 190 U.S. research universities and their affiliated academic medical centers and research institutes that concerns itself with the impact of federal regulations, policies, and practices on the performance of research and other sponsored activities conducted at its member institutions.

Our associations value the close working relationship that we have established over the years with BIS and appreciate the opportunity to comment on harmonized export control related definitions. We believe the harmonized definitions are an important step forward. On the whole they represent substantial progress in achieving meaningful export control reform, with many helpful changes and clarifications (e.g. redefinition of "release," clarification that submission of manuscripts to journal editors constitutes "published" information). Below are our associations' joint comments in response to the eight issues on which BIS has requested specific comments:

1. Whether the proposed revisions create gaps, overlaps, or contradictions between the EAR and the ITAR, or among various provisions within the EAR.

Response: There are a number of inconsistencies between the EAR and ITAR which are either relatively minor

or reflect longstanding practices. However, there is a major disconnect between the proposed EAR and ITAR definitions in their treatment of prepublication review to assure that publication does not divulge a sponsor's proprietary information. EAR 734.8 continues to provide that such review does not change the status of technology that arises during or results from fundamental research as still "intended to be published." ITAR 120.49 states 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 proposed ITAR interpretation of sponsor proprietary information review greatly concerns our associations, since it is currently common practice for company sponsors to require proprietary information review for university contracted and subcontracted research. The effect of the proposed ITAR provision is to remove any research projects involving defense articles subject to such review from fundamental research. This will have a chilling effect on innovation and university-industry partnerships. No explanation is provided as to the reason for the 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.

Other points of difference are the provisions 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.

A change in the proposed EAR rule of particular relevance to educational institutions is the proposed restatement of the "education exemption" in the current EAR 734.9, which is removed. 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 "**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.

2. Whether the alternative definition of fundamental research suggested in the preamble should be adopted.

Response: The proposed alternative definition would read: "Fundamental research means non-proprietary research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community." This appears to restate the current definition in a shorter fashion, and on its face we do not see a sharp distinction. However, there may be some vagueness in the term "non-proprietary." In fact, the proposed ITAR rule discussed above demonstrates confusion about what constitutes non-proprietary research. Additionally we urge significant caution in changing a definition of fundamental research that has been endorsed by White House Administrations of both parties over the years and that has served the scientific community well.

Currently the EAR (§734.3(b)(3)) states that "publicly available technology and software...[that] arise during, or result from, fundamental research" are not subject to the EAR. The proposed 734.3(b) (3) and 734.7(a) also treat technology and software similarly. However, 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. The

proposed rule preamble 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 in the Federal Register notice).

In addition to the internal inconsistency, this change would significantly complicate and restrict university research. Research findings resulting from fundamental research may be written in natural-language or computer language. In either case it is "technology" that should be able to be freely shared as arising during or resulting from fundamental research. No explanation is provided as to the reason for changing the recognition of the similarities between software and technology in the current EAR (734.2(b); 734.7(b)). We strongly recommend that software arising during, or resulting from, fundamental research should not be subject to the EAR.

We also note with concern that the current presumption in EAR 734.8(b) that university based research will be considered fundamental research appears to have been eliminated. There is no clear policy reason stated for this change. The applicability should continue to be determined by the other criteria in 734.8(b).We urge BIS to restate the presumption in the final rule.

Finally, the proposed EAR 734.8 Note 1 to paragraph (a) 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 believe the statement may be misleading. Official government policy on the transfer of scientific and technical information as reflected in National Security Decision Directive (NSDD) 189 states that "No restrictions may be placed upon the **conduct** [emphasis added] or reporting of federally-funded fundamental research that has not received national security classification, except as provided in applicable U.S. statutes." Conduct of fundamental research may draw upon a wide range of information and other inputs. In drawing a sharp distinction between the conduct and results of fundamental research, BIS appears to be arbitrarily restricting NSDD-189 without clear authority. We question the need for this statement and urge that it be removed.

3. Whether the alternative definition of applied research suggested in the preamble should be adopted, or whether basic and applied research definitions are needed given that they are subsumed by fundamental research.

Response: The EAR changes include definitions of "basic research" (734.8, currently found at EAR 772.1) and "applied research" (currently found in the DFARS). The preamble suggests that the DFARS definition be used, which is reflected in the ITAR (120.49). It also suggests an alternate definition of applied research taken from OMB Circular A-11: "Systematic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met." Our member institutions are split on this issue. However, universities use the A-11 definition in reporting federal expenditures. Therefore, we suggest that it be adopted. The definition used in the annual NSF Higher Education Research and Development Survey also is very familiar to universities, and would be another good alternative.

4. Whether the questions and answers in existing Supplement no. 1 to part 734 proposed to be removed (to the BIS website) have criteria that should be retained in part 734.

Response: The Q&A's have been very helpful to the universities. They are unlikely to have the same weight if

removed from the EAR and placed on the website. We also note that supplements to other parts of the EAR contain important regulatory information (e.g. Supplement No. 1 to Part 740).

5. With respect to end-to-end encryption as described in the proposed rule (sec. 734.18), whether the illustrative standard in the proposed EAR rule also should be adopted in the ITAR; whether the safe harbor standard in the proposed ITAR rule also should be adopted in the EAR, or whether the two bodies of regulations should have different standards.

Response: We appreciate that the proposed rules address cloud computing situations, which have been an area of considerable uncertainty under the current rules. BIS asks for comments as to which proposed rule more clearly describes the intended control. We prefer the proposed EAR definition in 734.13(a)(6), which requires knowledge that releasing information relating to encryption will cause or permit the transfer of technology to a foreign national. In general, we believe that knowledge or intent to transfer controlled information should be required for an "export" or "deemed export" to occur. We also prefer the EAR provision in 734.18(4)(iii) providing for “other similarly effective cryptographic means” for securing technology or software. While the NIST standards are widely accepted, not all our members necessarily implement them and may use other means to assure effective cryptographic management.

In addition, the restriction in 734.18(a)(4)(iv) to countries not listed in Country Group D:5 unfortunately may substantially limit the usefulness of the proposed rule. In the experience of our members, most cloud providers insist on storing data anywhere that they want. We suggest BIS consider adding a note that a contract that imposes these obligations on a vendor is sufficient for compliance purposes, to provide a greater safe harbor. Ensuring actual compliance is beyond our members' control.

6. Whether encryption standards adequately address data storage and transmission issues.

Response: Our associations lack the technical expertise to comment on this issue. However, we have encouraged our member institutions to review and provide comments.

7. Whether the proposed definition of "peculiarly responsible" effectively explains how items may be "required" or "specially designed" for particular functions.

Response: these definitions appear reasonable. However, this is another question where we have suggested our member institutions review the application to particular technologies in submitting comments.

8. The effective date of the final rule.

Response: BIS proposes a 30-day delayed effective date. Changes to ECCNs generally have had a six-month delayed effective date while other rules affecting export controls have been effective on the date of publication. Obviously the content of the final rule is an important consideration. Our view is that significant changes in definitions should have as long a lead time as possible for implementation. Therefore we support a six-month delayed effective date.

Conclusion

In closing, we again want to express our appreciation to BIS for their responsiveness to many of the issues and concerns that our members have raised, and your willingness to engage our associations and university

members in dialogue on these issues. We believe the EAR changes are mostly positive and deserving of support. We hope BIS will consider our comments in finalizing the proposed definitions, and are available to provide more information or discuss these matters further.