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August 3, 2015
(email to publiccomments@bis.doc.gov)

Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
14th Street and Pennsylvania Avenue NW, Room 2099B
Washington, DC 20230

RE: RIN 0694–AG32

Dear Sirs/Madams,

The University of California (UC) system, consisting of ten research-intensive campuses and involved in the management of three DOE national laboratories, applauds the efforts undertaken by agencies committed to supporting the President's Export Control Reform initiative. Specifically, we applaud the Department of Commerce, Bureau of Industry and Security's (BIS) efforts to provide greater clarity of terms used in the Export Administration Regulations (EAR) and the harmonization of these definitions with the International Traffic in Arms Regulations (ITAR).

We believe many of the proposed definitions are certainly meeting the objectives of the Export Control Reform initiative. For example, the notes to §734.3(b) more clearly lay out which items are not subject to the EAR. The comments below are primarily requests for greater precision, both in new definitions and in areas that have historically been a source of confusion.

In addition to the specific comments provided below, UC generally supports the remarks submitted by the Council on Governmental Relations (COGR) and Association of University Export Control Officers (AUECO).

§734.15 Release

We note that the preamble to the proposed changes clearly explains what is meant by §734.15: principally that "merely seeing an item briefly is not necessarily sufficient to constitute a release." It would be useful if this same type of clarity were provided in the definition itself, or alternatively as a note to the section. The term "actually" is used in the preamble as well, but we believe the term "substantively" would be more precise. Thus, borrowing from the definition of technology, a recommended rewrite of this section is:

(1) Visual or other inspection by a foreign national of items that substantively reveals ‘‘technology’’ or ‘‘source code’’ sufficient to enable the development, production, use, operation, installation, maintenance, repair, overhaul, or refurbishing (or other terms specified in ECCNs on the CCL that control ‘‘technology’’) of an item.

§734.3(b)(3)(iii) (Not subject to the EAR)

UC appreciates the clarification in the note to paragraph (b)(3) that information that is not "technology" as defined in the EAR is not subject to the EAR. With regard to subsection (iii), although we recognize the clause "general scientific, mathematical, or engineering principles commonly taught in schools" has been used in the ITAR for many years, we would recommend that the terms "general" and "commonly" be removed from this definition. Indeed, core to the University's mission is to teach and involve students in knowledge (and in the pursuit of knowledge and innovation) beyond "general" or "common" introductory coursework. Although we do not think that the intent was ever to limit this exclusion to general basic coursework, removal of these terms would resolve potential ambiguity. Thus, we recommend §734.3(b)(iii) be modified to read:

> "(iii) Concern scientific, mathematical and engineering principles, processes, and techniques taught in schools, and released by instruction in a catalog course or associated teaching laboratory of an academic institution;"

§734.11 Government-sponsored research covered by contract controls and 734.8 Fundamental Research

The proposed §734.11 reads:

> (a) If research is funded by the U.S. Government, and specific national security controls are agreed on to protect information resulting from the research, the provisions of §734.3(b)(3) will not apply to any export or reexport of such information in violation of such controls. However, any export or reexport of information resulting from the research that is consistent with the specific controls may nonetheless be made under this provision.
>
> (b) Examples of ‘‘specific national security controls’’ include requirements for prepublication review by the Government, with right to withhold permission for publication; restrictions on prepublication dissemination of information to non-U.S. citizens or other categories of persons; or restrictions on participation of non-U.S. citizens or other categories of persons in the research. A general reference to one or more export control laws or regulations or a general reminder that the Government retains the right to classify is not a ‘‘specific national security control.’’

We recognize that this section essentially remains the same; however because it has been a source of confusion, we request greater clarity about the meaning of this section, specifically, whether/how agreeing to "specific national security controls" of the type listed in §734.11(b) affects the status of research that would otherwise be considered "fundamental research."

Such clarification would be especially welcome given that the reference to §734.11in §734.8 has been changed. Currently, §734.8(a) states that fundamental research is distinguishable from research the results of which ordinarily are restricted for specific national security reasons as defined in §734.11(b). This has been understood by many to mean that accepting controls such as those listed in §734.11(b) (including restrictions imposed by the U.S. government on participation of non-citizens or other categories of persons in the research, as well as publication restrictions) would take research subject to those controls out of the fundamental research exclusion. Under the proposed revision, the reference to §734.11 has been moved to Note 2 of §734.8(b), which states that *except as provided in §734.11* , technology subject to *publication restrictions* such as U.S.

government-imposed *access and* d*issemination controls* is not "intended to be published" (which means it would not qualify as fundamental research). We think it is important for the BIS to clarify:

(1) Which types of controls negate categorization of research as fundamental? That is, is it only *publication restrictions* controlling access to and dissemination of *results* that would take research outside of the fundamental research exemption, as is suggested by the language of §734.8 as it is proposed to be amended? Or, conversely, would the same consequence result from acceptance of restrictions on *participation* in the research project itself (i.e., where there are no restrictions on publication), given that §734.11(b) specifically lists such participation controls as an example of "specific national security controls"?

(2) Whether/how the effect of accepting such controls is different depending on whether the controls are imposed by U.S. Government or by a non-governmental sponsor of research. Because §734.11 applies only to research funded by the U.S. Government, some might conclude that institutions have more leeway to accept controls from U.S. Government sponsors than from non-governmental sponsors (as long as they comply with the accepted controls) without entirely negating the classification of the research as fundamental research, but the meaning of the section is confusing.

(3) Whether/how agreeing to "specific national security controls" with respect to U.S. Government-funded research affects the status of research that would otherwise qualify as "fundamental research." For example, if we accept and comply with "specific national security controls" imposed by a U.S. Government funder (such as citizenship restrictions or foreign national prior approval requirements), would acceptance of those controls negate the fundamental research exclusion? Or, does §734.11(a) mean that the project could be conducted as fundamental research, that is, with no export licensing required, as long as we complied with the government imposed citizenship restrictions or foreign national prior approval requirements? Or, are such projects considered controlled by the EAR only *during* the conduct of the research?

We would appreciate revisions to this section to clarify the intent of the clause.

§734.8 Technology that arises during, or results from, fundamental research

In addition to the comments made above with regard to the connections between §734.11 and §734.8, we have the following comments on §734.8. First, we appreciate that §734.8(a) retains the notion that technology that arises during, or results from, fundamental research is "intended to be published" and thus not subject to the EAR. However, we note that "software" is missing from this paragraph, even though it is included in the proposed definitions at §734.3(b)(3) and §734.7(a). There is no apparent reason to treat software differently from technology and request its reinsertion at §734.8(a).

UC also appreciates that §734.8(b) continues to recognize that prepublication review to assure that a sponsor's proprietary information is not divulged or that the publication does not compromise patent rights is still "intended to be published." The currently proposed ITAR definitions, in contrast, do not have the same protections provided by paragraph (b). This is a great concern to the university community, and has been communicated to the Department of State.

With regard to §734.8(c), UC appreciates the clarifications provided in the fundamental research, basic research, and applied research definitions. We believe these do not contradict the intent of National Security Decision Directive 189. BIS requested comments on whether the proposed definition for basic research is preferable to the definition contained within Office of Management and Budget Circular A-11. UC prefers the definition in the proposed regulations, as this definition is consistent with the current EAR definition, the ITAR proposed definition, and with the Wassenaar Arrangement's General Technology Note:

(1) ‘‘Basic research’’ means experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective.

In addition, we recommend the addition of a note to §734.8(c) to clarify that academic prototypes and mock-ups which originate under a fundamental research project and are not intended for commercial use, are considered to be within the definition of “applied research.”

§734.18 Activities that are not exports, reexports, or transfers

UC welcomes the consolidation into a single provision of existing EAR exclusions from exports, reexports, and transfers and the addition of end-to-end encryption at§734(a)(4)(iv). However, we request a definition for “storage” to assure that exports currently allowed with the use license exceptions would still be permitted. For example, if a U.S. person using a temporary export license exception travels with their laptop computer to a D:5 country, their possession of the laptop computer while in the D:5 country should not be considered “storage.” Furthermore, electronic transmissions (such as email) of technology subject to the EAR transiting through a D:5 country or the Russian Federation that would otherwise meet the conditions of this provision, should likewise not be considered “storage” if the sender does not know that the email server is located in a D:5 country or in the Russian Federation.

Supplement no. 1 to Part 734

BIS requested comments on whether the questions and answers currently incorporated into Part 734 as a supplement should be extracted from the regulations and posted on the BIS website. UC urges the continued incorporation of these as a supplement. A posting on the BIS website would not provide the same weight, and we believe that the questions and answers should be fairly static. Furthermore, the public should be provided with the opportunity to comment on alterations to the answers. If they are posted on the BIS website, the public would not necessarily be consulted on subtle or substantive changes, potentially impacting existing compliance procedures implemented by businesses and universities alike.

Implementation

Finally, UC would like to request a 6 month implementation period for the revised definitions of this proposed rule to allow for proper analysis of business practices and modifications as appropriate.

Thank you for this opportunity to comment. We greatly appreciate your efforts to seek input regarding the EAR Amendment—Revisions to Definitions in the Export Administration Regulations and are in the main supportive of the clarifications made in these proposed definitions.

Sincerely yours,

Wendy D. Streitz
Executive Director
Research Policy Analysis & Coordination
Office of Research & Graduate Studies