July 8, 2013

Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
14th St. and Pennsylvania Ave. NW
Washington, D.C. 20230

Re: RIN 0694—AF87

Dear Sir/Madame:

We are pleased to respond on behalf of the Council on Governmental Relations (COGR) and the Association of American Universities (AAU) to the May 24, 2013 Federal Register Notice (78 FR 31431) on the changes proposed by the U.S. Department of Commerce's Bureau of Industry and Security (BIS) with regard to the transfer of spacecraft systems and related items from the United States Munitions List (USML) to the Commerce Control List (CCL) (RIN 0694-AF87). COGR is an association of 189 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. AAU is an association of 60 U.S. and two Canadian preeminent 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.

COGR and AAU have strongly supported the transfer of export control jurisdiction for satellites and related items from the International Traffic in Arms Regulations (ITAR) to the Export Administration Regulations (EAR) administered by BIS. In November 2012, the associations sent a letter to the Senate Armed Services Committee to express our support for the amendment to the FY 2013 National Defense Authorization Act (NDAA) that returned to the executive branch the authority to determine export control jurisdiction for such items. The former FY 1999 NDAA requirement for ITAR control of these items adversely affected the ability of universities and their faculty to conduct important space science research and to train students in related subjects. Problems associated with ITAR control of space-related research and education activities led some of our member institutions to decrease their efforts in these areas. Our hope was that transferring less militarily sensitive satellites and space-related technologies to EAR jurisdiction, as recommended in the FY 2010 NDAA Section 1248 report, would enhance the ability of our institutions to engage in space-related research and education.

The proposed rule establishes a new "500 series" of Export Control Classification Numbers (ECCNs) for control of spacecraft systems and related items on the CCL. The companion proposed ITAR rule (RIN 1400-AD33) maintains ITAR control for certain items such as military and intelligence satellites, launch vehicles and related technologies. Spacecraft other than those

enumerated in the proposed new USML Category XV or in ECCN 9A004, including satellites, manned or unmanned space vehicles, whether designated developmental, experimental, research or scientific, would be controlled under proposed ECCN 9A515.

We believe the proposed rule is consistent with the Section 1248 report recommendations and the interests of the university research community, with one important exception. Certain new proposed 500 series ECCNs define controlled "software" (ECCN 9D515) and "technology" (ECCN 9E515) as that specially designed or required "for the 'development,' 'production,' operation, installation, maintenance, repair, overhaul, **or** (emphasis added) refurbishing of 'spacecraft' and related commodities…" Similar language was included in the new 600 series ECCNs 9E610 and 9E619, published as a final rule in April (RIN0694—AF65).

Particularly with regard to technology, this is inconsistent with the definition of "use" in EAR Part 772.1, which is defined as "operation, installation…, maintenance…, repair, overhaul **and** (emphasis added) refurbishing." It raises issues that were of great concern to the university community when a similar change (use of "or" instead of "and") with regard to use technology was proposed by the Commerce Inspector General in 2004. While access to technology for production and development purposes may have less impact at universities, access for any category of "use" is another matter. It raises the potential of a greatly increased need for deemed export licenses. Many fundamental research projects at universities involving 500 or 600 series controlled items will require determinations of the need for deemed export licenses in order for foreign students, faculty, visitors, technicians and other research staff to work on such projects, including merely operating equipment where no information is conveyed. Security will have to be implemented to ensure in such cases that non-licensed foreign members of the campus community and visitors to the campus will not have access to controlled equipment for any one of these purposes. This may require substantial investment of staff and resources by universities, and lead to an increased licensing burden for BIS with no clear national security benefit.

Moreover, in neither the proposed 500 series rule nor the 600 series rules has BIS provided any explanation of this change or why it is needed for items controlled in these series. It creates a dissymmetry in the EAR, and is likely to lead to confusion and misunderstanding. It is inconsistent with BIS's previous clarification of deemed export regulatory requirements in response to the Inspector General's report, which concluded that the definition of "use" in EAR 772.1 "appropriately implements the underlying export control policy rationale in the EAR" (78 FR 30840; May 31, 2006). BIS previously determined that the totality of the "use" activities should trigger the requirement (rather than mere operation of a controlled item by a foreign national), and that the change from "and" to "or" "would result in an expansion of deemed export licensing applications imposing a substantial licensing burden on the regulated community, without a corresponding benefit to national security." Nowhere is there any explanation as to why BIS believes this "coherent, bright line rule" it previously espoused should not apply to 500 or 600 series items. It also appears inconsistent with the goal of the President's Export Control Reform Initiative to reduce unnecessary controls by building higher walls around fewer items. It seems especially ironic in that the companion proposed ITAR rule includes a redefinition of "defense services" which in essence lowers the walls around providing assistance to a foreign person in basic operation, installation, intermediate maintenance and servicing of military critical technologies that remain controlled on the USML.

We request that BIS reconsider the need for this significant change with regard to "use" as defined in the EAR. Given that more transfers from the ITAR to the EAR 600 series are ongoing and

planned in the near future, this is a matter of significant concern to our institutions. The failure to provide any justification or discussion concerning the rationale for this change is particularly troubling. The effect may be to vitiate much of the presumed benefit of the transfer of items from the ITAR to the EAR.

Our concern is heightened by the failure to fully incorporate the existing ITAR bona fide employee license exemption into the EAR 740.13(f). As we pointed out in comments to BIS last August, the end use restrictions may limit the usefulness of this exemption to universities. The ITAR also contains a specific exemption for the export by U.S. institutions of higher learning of satellites fabricated for fundamental research purposes (123.16(10)) which has not been incorporated into the proposed EAR 500 series. Lack of full ITAR exemptions in the EAR limits the harmonization that was one of the goals of the Reform Initiative.

These changes are likely to impose substantial additional compliance burdens on the university community with regard to both research and training programs related to spacecraft systems and related items controlled under the proposed 500 as well as items controlled under the 600 series. In our view they are likely to lead to undue complexity and confusion, which undermines the goals of the Reform Initiative and will neither enhance compliance nor national security.

We appreciate the opportunity to comment on the proposed rule.

Sincerely,

Anthony P. DeCrappeo
President
Council on Governmental Relations

Hunter R. Rawlings III
President
Association of American Universities