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TO: US Dept of Commerce
Bureau of Industry and Security
Regulatory Policy Division, Room 2705
14th & Pennsylvania Avenue, NW
Washington, D. C. 20230

FROM: Craig J. Hogan
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SUBJECT: Advanced Notice of Proposed Rulemaking
58 Federal Register 15607-15609, March 28, 2005
RIN 0694-AD29

The University of Washington appreciates the opportunity to comment on the Advanced Notice of Proposed Rulemaking, 58 FR 15607-15609, March 28, 2005, Revision and Clarification of Deemed Export Related Regulatory Requirements. As explained below, we believe the proposed revision and clarification would actually reduce national security by throttling the open exchange of ideas and information and by regulating in an overly broad, untargeted manner.

President Ronald Reagan famously remarked: “True, lasting peace cannot be secured through the strength of arms alone. Among free peoples, the open exchange of ideas ultimately is our greatest security.” At the University of Washington (UW), thousands of faculty, staff and students continue to put President Reagan’s dictum into practice every day.

Our academic and research programs attract talented people from around the world. In Fall Quarter of 2004, there were 1560 international graduate students enrolled at UW, accounting for approximately 15.2 percent of the total graduate enrollment. Foreign students comprise 30 percent of the graduate enrollment in the UW College of Engineering.

UW’s success in scientific research depends on collaboration of communities of talented scholars, and fundamentally requires the open exchange of information. Progress and quality are only possible with access to the best ideas and talent worldwide, and with uncompromisingly comprehensive review and validation. History has shown that our nation’s leadership in technical advances, and ultimately our national security, depends on an open exchange of ideas. From the time of the Manhattan Project to the present day, US national security has relied heavily on unique contributions from foreign-born scholars.

The Reagan administration confirmed the importance of fundamental research and the free exchange of ideas for the advancement of science through National Security Decision Directive

189, which stated that “to the maximum extent possible, the products of fundamental research remain unrestricted.” This policy was reiterated in the November 1, 2001 letter of Condoleezza Rice, then Assistant to the President for National Security Affairs, wherein she confirmed that NSDD 189 remains in effect, and reaffirmed that “[t]he linkage between the free exchange of ideas and scientific innovation, prosperity, and U.S. national security is undeniable.”

At the same time UW recognizes that the need for security and information control is critical in certain areas of research. UW scientists conduct classified research at our Applied Physics Laboratory under the required security regulations. UW has also been vigilant in developing a compliance plan for required export controls. We support the policy laid out in NSDD 189 for managing this work: “... the mechanism for control of information generated during federally-funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification.” We have administrative systems in place for managing sensitive information in this framework, while protecting the free exchange of unclassified information.

We agree with the detailed findings and recommendations in several recent commentaries that describe the likely negative impact of the proposed new regulations on national security. In particular we concur with the letter (September 9, 2004) signed by MIT President Charles Vest and a large group of leading university presidents, addressed to science policy leaders reporting to President Bush. We also concur with the findings and recommendations detailed in the recent White Paper from the Center for Strategic and International Studies, “Security Controls on Scientific Information and the Conduct of Scientific Research.”

[http://www.csis.org/hs/0506_cscans.pdf] The following discussion adds our detailed concerns regarding the proposed changes to the regulations.

Definition of “use”

Nearly all of the research carried out at the UW falls under the fundamental research exemption (FRE): normally, the UW does not accept funding that imposes restrictions on publication or participation by foreign graduate students or post-doctoral fellows. It is our understanding that research covered by the FRE allows foreign graduate students and post doctoral fellows access to controlled laboratory equipment for that research. In light of the high participation of foreign-born scholars in the UW’s world-class research programs, we are concerned that the proposed changes to the “deemed export” regulations will undermine the FRE, impeding our scientific progress and our ability to attract the most talented people to the US scientific workforce in areas of critical need.

Currently “use” is defined as the ability to operate, install, maintain, repair, overhaul *and* refurbish equipment. As proposed, “*and*” would change to “*or*”, which would result in the requirement of licenses for a foreign-born researcher to use controlled equipment in a US laboratory even in research projects under a FRE. These proposed changes would require that

every piece of equipment in a laboratory be identified and linked to the particular technology involved. Then the countries of birth of all foreign researchers would need to be identified and checked against the equipment they would access. This would inflict a huge and expensive administrative burden and would be extremely damaging to research productivity.

We do not believe it is practical to manage any basic research project where access of researchers to basic tools and equipment is restricted. This would create at least two classes of researchers within a laboratory, those with access to all research equipment and those with limited access. Monitoring this activity in a laboratory operating under a fundamental research exemption would seriously affect the productivity of the laboratory, and for many laboratories would be impossible. In practice, many projects would be abandoned in the US but not abroad, endangering national security.

We suggest that regulations need a better definition of “use” versus “use technology”. Using a piece of equipment doesn’t equate with transferring the actual technology of the equipment, any more than driving (or even buying) a car empowers an owner to manufacture one. Narrowly targeting the regulation to the actual “use” of concern would be more practical in the setting of university research collaborations.

Country of birth vs. citizenship

International graduate students working in science and technology areas are currently reviewed under the Visa Mantis program. The proposed regulation change would create a system in which students are forced through two regulatory hoops both of which are federally mandated, but which are implemented separately by separate institutions. Even though a student is issued a visa based on citizenship and interest in science and technology, the university would still be required to verify country of birth and apply for federal licenses.

To use country of birth as the criterion for access to equipment would mean that universities would assume an unfunded administrative and investigatory burden, regardless of the student’s possession of a valid visa. Moreover, it is unclear why allegiance to country of birth would take precedence over citizenship in matters of security in a research laboratory. This can only contribute to a further decline in the number of foreign graduate students and post doctoral fellows entering US graduate scientific programs, reducing the most important source of US talent in critical national security technologies.

The UW does not believe country of birth should be the basis of review, but if that is to be adopted, then this verification process should be done in coordination with the visa issuance process.

Supp No.1, Part 734 – Clarification of Supplemental Questions and Answers on Sponsored Research and Fundamental Research

Question A(4)

This question addresses the issue that prepublication clearance voids exemptions and triggers “deemed export” rules. The UW agrees that this answer could be clarified. It is UW policy that we do not accept restriction on publications. Therefore we would not accept agreement language that requires prepublication clearance (approval) as it would compromise the FRE.

Question D(1) Research Correspondence and Informal Science Exchange -

Does a foreign graduate student require a license to work in a laboratory? The current answer is “not if the research on which the foreign student is working qualifies as fundamental research.” We maintain that that answer is correct. If a clarification is provided it should be that access to proprietary research equipment or data may require a foreign national to have a license even under a FRE.

We are making the following recommendations to the Bureau of Industry and Security for clarifying the Export Administration Regulations (EAR) while maintaining the positive functioning FRE.

- 1.) Review and update the Commerce Control List (CCL), so that it is more current and easier to use.
- 2.) Provide clearer definitions of “use” and “use technology”.
- 3.) Maintain the use of citizenship as the criterion for access to research equipment.
- 4.) Reinforce the importance of the Fundamental Research Exemption for academic research.

The University of Washington wishes to join many other academic institutions and associations expressing concern about the negative impact of the proposed changes both to the progress of science and the health of the US academic research enterprise.