Mr. Timothy Mooney  
Office of Exporter Services  
Regulatory Policy Division  
Bureau of Industry and Security  
Department of Commerce  
14th St. & Pennsylvania Ave., N.W., Room 2705  
Washington, D.C. 20230


Dear Mr. Mooney,

On behalf of the Association of American Universities (AAU) and the Council on Governmental Relations (COGR), we write to provide comments in response to the systematic review of the Commerce Control List (CCL) that is being undertaken by the Commerce Department Bureau of Industry and Security (BIS). AAU represents 60 leading U.S. public and private research universities and is devoted to maintaining a strong national system of academic research and education. COGR is an association of 175 research-intensive universities, affiliated hospitals, and research institutes that is specifically concerned with the impact of government regulations, policies, and practices on the performance of research conducted at U.S. colleges and universities.

We are pleased that BIS is conducting a thorough review of the CCL and is seeking public input. We believe this review is timely and appropriate, particularly given the recent review and pending report on deemed exports by the Commerce Deemed Export Advisory Committee (DEAC).

Many of the concerns of the university community with regard to the CCL have focused on the implications of deemed exports on U.S. institutions of higher education, particularly with regard to technologies controlled for “use” that are involved in university research. Our comments focus mainly on the structure of the CCL and its applicability to activities of U.S. educational institutions. In general, we believe the CCL should be shortened, simplified, and focused on cutting-edge technologies where the U.S. is a clear leader and that have a real bearing on national security.

1) **The CCL should be simplified to help to ensure understandability and compliance.** The current structure of the CCL and the way technologies are listed and described make it difficult for well-meaning individuals—even those with a fair amount of experience working with the CCL—to ascertain when technologies are covered and if export licenses are required. Interpreting the list in order to evaluate an ECCN entry requires significant technical expertise. This may lead to inadvertent non-compliance. We encourage BIS to find ways to make the list clearer and more user-friendly, and to scale the amount of effort needed to interpret the list to the degree of risk associated with specific institutions.
2) The CCL should be updated and streamlined to better reflect the narrow set of technologies that should be protected for national security reasons and which are not already readily available overseas. AAU and COGR are willing to work to provide campus-based experts to assist in making such assessments of the CCL on an ongoing basis. As noted in our comments to the DEAC, we believe the existing CCL is overly complex, too long, and overbroad, perhaps reflecting its multiple purposes. We have heard frequently from universities that many CCL-controlled technologies are not viewed by their researchers as “cutting edge,” and often are available worldwide in a more recent, state-of-the-art form. Imposing controls on such technologies creates costs and burdens, fails to benefit U.S. national security interests and diminishes the credibility of the control list.

Similar points were made at a hearing on export controls held July 26, 2007 held by the House Foreign Affairs Subcommittee on Terrorism, Nonproliferation and Trade. Specific examples were discussed, including some provided by the Commerce Department. The CCL needs to be shorter, continually updated, and focused on technologies of real concern.

AAU and COGR would like to discuss with Commerce/BIS staff how university experts in specific science and technology fields might play a greater role in helping determine which technologies should be on the control list particularly for deemed exports. We also are willing to encourage such campus experts to participate in the existing BIS technical advisory committees that review the various CCL categories.

3) Sunset provisions should be built into the CCL to ensure it is regularly updated and that certain non-cutting-edge, widely available technologies are removed from the list. Under current rules, a technology on the CCL is assumed to be a threat to national security, even if it has become widely available both in the U.S. and abroad. The unilateral Antiterrorism controls on the CCL provide many such examples. For instance, the CCL at ECCN 5E991 controls technology for the development, production, or use of mobile telecommunications equipment. Much of the equipment controlled there, such as that used in civilian cell phones, is a ubiquitous technology for which regulation makes no sense. The CCL should be scrubbed and such technologies should be removed from the list.

A process for regularly pruning the CCL should be developed based on availability of the technology in the U.S. or abroad. Given the rapid pace of technological advances, it would be useful to presume that certain technologies will be removed from the list after a certain period of time, unless their potential threat to security is such that they should remain on the CCL.

4) The CCL should be re-examined to eliminate technologies that are now being created and developed overseas -- An additional dysfunctional feature of the treatment of technology under the CCL is that it reaches information that is predominantly or entirely of “foreign content.” Although the Export Administration Regulations (EAR) do not apply to “re-export” of predominantly foreign content technology, once the technology enters the United States, it becomes subject to the EAR. In general, this type of export licensing obstacle undermines the scientific and economic competitiveness of US universities by reducing our ability to recruit top foreign students to our campuses. And when technologies have been created overseas and are widely available, such rules do not even serve clear national security or foreign policy purposes. A good example of this is the control placed on “design rules” for manufacturing integrated circuits (ECCN 3A991; 3E991). Leading foundries for chip manufacturing are located in Taiwan. When these companies’ technologies enter the U.S, they become subject to the EAR, which means an export license may be needed for students to access their design technology. Thus, requiring licenses in such cases delays and obstructs US research, with no discernible benefit.
5) Protection of commercial proprietary information should not be considered in adding or excluding technologies in the CCL.

While one of the primary purposes of the EAR is to protect US commercial interests, in an age of globalization and free trade agreements, we believe that the proprietary nature of technologies should not be a significant factor in deciding if those technologies are included in the CCL, especially for deemed export purposes. The existing “one size fits all” approach to proprietary information in the EAR fails to recognize that information may be proprietary for reasons of private economic interests having little to do with national security. Private companies may at any time choose to publicly release information previously held as proprietary. Such private interests should not determine whether a particular technology is controlled by the government, particularly when unauthorized disclosure can result in criminal sanctions. Moreover, imposing controls on university research which are based on the financial decisions of private companies is inconsistent with National Security Decision Directive -189, which states there shall be no controls on the conduct of fundamental research unless required by statute. If export controls are needed for certain non-classified, proprietary information at universities, it would be better for these determinations to be made based on national security goals as opposed to private commercial interests.

6) Given that the deemed export rule is largely a U.S. construct and unilateral in nature, we suggest that the Commerce Department consider developing a significantly shorter list for deemed exports than for actual physical exports. The current structure of the CCL was intended primarily to regulate export of commodities. It was not designed to address deemed exports nor risks associated with the conduct of campus-based research. For example, some types of equipment that might have national security implications and so ought to be on the CCL for tangible export purposes are difficult to manufacture and to re-engineer, even if certain information about their technical makeup is known. Even when they are accompanied by commercially proprietary information, many of these potentially controllable pieces of equipment do not convey information about their technologies merely through visual inspection or use. Therefore, they should not be on the CCL for deemed export purposes. We suggest that Commerce seriously consider developing a considerably shorter list for deemed exports of technologies more commensurate with the risks posed. For example, carbon fiber tape is classified as controlled under the EAR at ECCN 1C010. Controls on actual export of these materials may be reasonable, but controlling them under deemed export rules may inhibit sharing them for research purposes, with no clear benefit for national security.

While we recognize the inherent difficulties of maintaining separate lists, the current CCL already is comprised of multiple lists. The existing multilateral export control regimes cited in the Federal Register notice primarily regulate tangible exports. They should not present a serious obstacle to the U.S. rethinking a new and more simplified approach to deemed exports. Such a separation of lists would minimize the regulatory burden, while assuring protection of cutting-edge U.S. technologies where the potential for reverse engineering through dissemination to foreign sources raises legitimate national security concerns.

7) The Commerce Department should recognize that the CCL is, in fact, not a list of comparable technologies, and that controls should be designed and administered differently depending on the specific nature of the area of technology being regulated. On many occasions we have discussed with BIS the difficulties universities have faced in determining the applicability of the CCL to technologies used in university research. One difficulty is that the CCL encompasses very different technologies with very different characteristics. Some of the technology areas covered by the EAR are rapidly evolving; others less so. The CCL “one size fits all” approach to listing and delisting items does not adequately acknowledge these differences.
As an example, the human pathogens and toxins listed under ECCN 1C351 are not likely to require relatively frequent revisions (although it may be necessary to add to the list as new virulent disease agents are identified). On the other hand, a very different situation exists for electronic and computer items. Here rapid technology changes are likely to render any list obsolete within a relatively short time.

There needs to be clearer recognition that the CCL is not a list of comparable technologies. Controls need to be administered differently depending on the regulated area of technology. The Department might wish to consider bolstering the role of technical experts in other government agencies in helping determine both the items that should be listed in particular technology areas and the appropriate level of controls. University experts also could be helpful, perhaps through expanded participation in the technical advisory committees, particularly in those areas where technology is rapidly evolving.

8) The Commerce Department should reconsider the need for EAR 99, particularly since the Office of Foreign Assets Control (OFAC) already sanctions the same countries.

At the very least, the Commerce Department should consider clarifying the CCL to provide that information about technologies controlled only at the level of EAR 99 is not subject to deemed exports. The vagueness of the EAR 99 concept makes the application of deemed export rules to such technologies particularly difficult.

Conclusion

On behalf of the research university community, we want to again express our appreciation to BIS for the opportunity to comment. AAU and COGR value the good working relationship we have established with BIS and look forward to the opportunity for further discussion of these matters.

Thank you for your consideration of our comments.

Sincerely,

Robert M. Berdahl
President
Association of American Universities

Anthony P. DeCrappeo
President
Council on Governmental Relations