This statement presents the joint recommendations of the Association of American Universities (AAU) and the Council on Governmental Relations (COGR) to the U.S. Department of Commerce Deemed Export Advisory Committee (DEAC). 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.

Before making specific recommendations to the DEAC, AAU and COGR would like to commend officials at the Commerce Department Bureau of Industry and Security (BIS) for their willingness to work with the university community in understanding our concerns about the recommendations made by the Commerce Inspector General in 2004 and for the decision to reject the Inspector General’s recommendations. We would further like to recognize and express our appreciation to the Department for convening the DEAC to examine current deemed export control regulations and determine what policies make sense for the future. Our members greatly appreciate the work of the Committee, as well as the Department’s efforts to engage the higher education community in thoughtful discussions about deemed export policy.

We would like to offer a number of observations and recommendations for the Committee’s consideration. Many of these points and the basis for the recommendations have been made in comments and materials that the Committee already has received. However, we wish to reinforce them and provide a clear statement of our perspective in four specific areas.

I. Reaffirm that classification is the appropriate means to protect research and clarify that the fundamental research exclusion includes both the conduct and results of research.

a. The DEAC should reaffirm classification, not export controls, to be the appropriate means to protect both the conduct and results of research which has implications for national security. As university witnesses have consistently expressed in their statements to the DEAC, we are convinced that the principles expressed in National Security Decision Directive (NSDD)-189 remain sound national policy for the control of scientific, technological, and engineering information produced by fundamental research at universities. That policy provides that products of fundamental research normally should remain unrestricted. Where national security requires control, the mechanism for control of scientific information is classification. The “bright line” approach of NSDD-189 should be maintained, and “gray area” controls such as those
provided by deemed export requirements should be minimized with regard to university research. Given the open and spontaneous nature of the university research environment, it is difficult, if not impossible, to determine in advance whether or what research is in fact controlled. “Gray area” controls have a pernicious effect, not only with regard to the freedom to publish, but also with regard to participation of foreign national students and researchers in research projects. Moreover, in restricting the essential openness of the university research environment, such controls end up harming rather than enhancing national security. It is our strong view that technical information that needs to be protected can be protected through the classification system.

b. The DEAC should reaffirm that “conduct” of research, including the transfer of knowledge required to operate and fully utilize research-related tools and techniques, is covered under the fundamental research exclusion. Research equipment, tools, and materials must be used to conduct fundamental research and cannot be considered as distinct and severable elements in that process. Therefore, both the process and outcomes of fundamental research must be excluded from deemed export control rules. The notion that only publishable outcomes of research are protected under the fundamental exclusion directly contradicts both the wording and intent of NSDD-189. If this interpretation is not clarified, the ability of foreign nationals to conduct fundamental research on our campuses and in our laboratories will remain severely constrained. Moreover, these restrictions will inhibit the free flow of information that is necessary for the advancement of science critical to U.S. economic competitiveness and national security. The path to discovery and new knowledge is iterative; individual researchers must be free to fully convey information at all steps in the discovery process for that process to be successful.

II. Review and revise the Commerce Control List.

a. The Commerce Control List (CCL) should be revised and updated to better reflect the narrow set of technologies that should be protected and which are not already readily available overseas. The existing CCL is overly complex, too long, and overbroad. We have heard frequently from universities that many of the technologies controlled under the CCL are not viewed by their researchers as “cutting edge,” and often are available globally in a more recent and state-of-the-art form. Imposing controls on such technologies creates costs and burdens without corresponding benefits to U.S. national security interests. The control list needs to be shorter, continually updated, and focused on technologies of real concern for deemed exports, particularly for university-based research. AAU and COGR welcome the systematic review of the CCL that BIS is currently undertaking. AAU and COGR will provide more specific comments in response to this review.

b. Sunset provisions should be built into the CCL to ensure that it is regularly updated and that certain non-cutting-edge, widely available technologies are removed from the list. The current list is maintained in such a way that a technology added to the list is assumed to remain there until it is no longer deemed a threat to national security. Given the rapid pace of technological advances, it would be better 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.

c. AAU and COGR would like to discuss with Commerce Department staff how universities and campus experts in specific science and technology fields might play a greater role in helping determine which technologies should be on the control list for deemed exports. Campus experts can help Commerce/BIS assess which technologies pose real risks and which do not, so that the CCL protects areas where the U.S. is the clear technological leader. One means to accomplish this may be through greater participation of university experts in existing Commerce technical advisory committees.

d. 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. While we recognize the inherent difficulties of maintaining two lists, the current CCL comprises multiple lists that already differentiate between technical information and physical items and software. AAU and COGR support the goal of creating high fences around a very limited amount of technical information for which a significant security risk actually exists. The existing multilateral treaty regime primarily regulates physical exports, and should not present a serious obstacle to the U.S. reconceptualizing its approach to deemed exports.

III. Clarify the definition of “publicly available” and “proprietary” technology as it relates to deemed export controls.

a. The DEAC should urge that the definition of “publicly available” technology be clarified. Much of the equipment used for fundamental research at universities is controlled for export abroad but is freely available on the commercial market to anyone in the United States. Moreover, because many other countries do not operate under the same deemed export rules, such equipment can be readily purchased, accessed, and used in laboratories overseas.

To provide additional clarity to the Export Administration Regulations (EAR) §734.7(a)(1), AAU and COGR suggest that Commerce define “publicly available information” as “technology which is not subject to the protections of non-disclosure agreements or trade secrets.” Along these same lines, user manuals for publicly available equipment and technology should not be controlled unless such manuals specifically contain information of a nature not ordinarily made available to the public or provided with the public sale of the equipment.

The DEAC also should urge the Commerce Department to reaffirm that publicly available technology includes otherwise proprietary information that is disclosed in the course of a specific industry-university research collaboration at a U.S. university, provided the specific arrangements between the firm and the university do not permit the sponsor to withhold from publication any of the information provided to the researchers. (This is presently covered in Q/A D(2) in Supplement No. 1 to Part 734 of the EAR).
Finally, the DEAC should recommend that the Department of Commerce formally state that information which can be obtained from access to equipment available for sale to the public is not controlled and/or subject to export controls. This would ensure that information gleaned through tearing apart—or “reverse engineering”—publicly available items is not subject to export control licensing requirements.

b. The Committee should clarify that proprietary information should not by definition be subject to deemed export controls. 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. Moreover, private companies may at any time choose to publicly release information previously held as proprietary. Private interests should not determine whether information 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 NSDD-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 national security goals to distinguish specific technologies and reduce the scope of university concerns.

IV. Streamline, simplify, and harmonize the export control rules, regulations, and licensing procedures.

a. The licensing paradigm for deemed exports currently follows the transaction-based model used for actual exports. A more streamlined approach should be considered. For those instances where a university uses technology or software that is not subject to fundamental research exclusions and exemptions, the Commerce Department should consider allowing the institution to secure an annual certification and registration for particular facilities and/or laboratories in lieu of individual licenses. This could be accomplished through authorizations similar to the validated end user concept which BIS adopted last year for tangible exports to the Peoples’ Republic of China. Universities currently are able to certify compliance with a large number of federal laws and regulations without case-by-case review and approval. They have well-established institutional systems and processes to assure compliance. We also encourage the Department to consider blanket and portable licenses for individuals to work with and have access to particular technologies of concern. Such approvals for access by foreign nationals might be integrated with visa approvals when individuals enter the U.S., based on the types of activities for which the visas are granted.

b. We encourage the Committee to examine if “intent” to transfer export-controlled information should be reconsidered as a basis for assessing the need to obtain deemed export licenses, as was the case prior to 1995 export control rule changes. Prior to 1995, the presumption that knowledge transferred to a foreign national would be exported abroad was rebuttable unless it was otherwise known by the individual,
company, or university transferring this information that it would be taken and shared abroad. Foreign nationals were only required to have export licenses when there was known intent to transfer export-controlled information abroad. This information was based on language in section 16(5)(c) of the Export Administration Act that defines an “export” as:

A transfer to any person of goods or technology either within the United States or outside of the United States with the knowledge or intent [emphasis added] that the goods or technology will be shipped, transferred, or transmitted to an unauthorized recipient.

In 1995, export administration rules were changed to assume that any foreign national from an export-controlled country would automatically transfer export-controlled technical information to their home country. Such individuals were subject to export control licenses, regardless of their intentions. This assumption and the statutory basis for it are open to serious question and should be reconsidered. Many foreign students and scholars on our campuses choose to study, conduct research, and ultimately stay in the U.S. These individuals have little incentive to and, in fact, are unlikely to transfer export-controlled information to their home countries. The same could be said for a foreign national based in the U.S. working for a U.S. company. Moreover, in today’s global economy the presumption that foreign nationals are more likely than U.S. citizens to transfer knowledge abroad—the very presumption upon which deemed exports are based—appears questionable, as does the notion that an export license would prevent anyone from transferring such information.

c. The DEAC should recommend harmonization of existing export rules and regulations. There are many differences between the EAR and the International Traffic in Arms Regulations (ITAR) that are not statutorily based and do not appear to serve a clear purpose. While not solely within Commerce’s purview, we believe that a recommendation from the DEAC to better harmonize these regulations could be helpful in reducing inefficiencies that arise from trying to comply with the EAR and ITAR.

Conclusion

The higher education community wishes, once again, to thank the Commerce Department for establishing the Committee. We also appreciate the Department’s willingness to seek meaningful reforms in export control policy that will both protect national security and recognize the importance of ensuring that the nation’s research universities can continue to engage the most talented individuals from around the world in research on our campuses.