August 15, 2008

U.S. Department of Commerce
Bureau of Industry and Security, Regulatory Policy Division
14th & Pennsylvania Avenue, NW, Room 2705
Washington, DC 20230

Via Fax: 202-482-3355

RE: Comments on DEAC Report Recommendations (Docket No. 080512652-8653-01)

On behalf of the Association of American Universities (AAU) and the Council on Governmental Relations (COGR), we are pleased to respond to the May 19, 2008 Federal Register Notice soliciting comments on two specific recommendations made by the Deemed Export Advisory Committee (DEAC) in its report, “The Deemed Export Rule in the Era of Globalization.”

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 178 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 its member institutions. COGR and AAU and our member universities participated in many of the DEAC’s regional public meetings; we were pleased the DEAC chose to hold several of those meetings on university campuses. Our associations greatly appreciate the work of the DEAC and its members’ thoughtful analysis of problems with the current deemed export control rules.

The Commerce Department Bureau of Information and Security (BIS) has requested information from the affected communities on two specific issues examined by the DEAC. The first issue concerns narrowing the scope of technologies on the Commerce Control List (CCL) subject to deemed export licensing requirements and conducting an outside review of such technologies. The second issue concerns whether the various affiliations that a foreign national might have with countries other than those in which they enjoy citizenship should be factored into export license requirements and if so, what types of affiliations should be considered and by whom.

Below are our joint comments concerning these two matters.

1) Narrowing the Scope of Technologies on the Commerce Control List Subject to Deemed Export Licensing Requirements and Conducting an Outside Review of Technologies

For the most part, the research conducted on university campuses is of a fundamental nature and specifically intended for broad-based dissemination for purposes of scientific advancement. It is therefore excluded from current deemed export control licensing requirements under parts 734.3 and 734.8 of the Export Administration Regulations (EAR).
In those areas where our universities are under contractual agreement to control particular technologies, have agreed not to publish or disseminate research findings, or have made specific agreements that require confidentiality or involve non-disclosure agreements, clearly deemed export licensing may apply if the technical information is, in fact, controlled. In such situations our universities must be vigilant in ensuring that they have adequate export control compliance and control plans in place. In these areas, export controls can have a significant impact on our ability to conduct university based research.

With this in mind, we offer the following comments on the DEAC’s specific recommendation to narrow the scope of technologies on the CCL subject to deemed export licensing requirements.

**As we have expressed in previous comments to BIS, we fully concur with the DEAC’s basic finding that too many technologies are subject to deemed export control. We believe the list of covered technologies should be drastically reduced.** Particularly important is the DEAC report’s recognition of the increasingly global nature of the scientific and engineering enterprise and the critical need for the U.S. scientific community to partner in that enterprise.

We also agree fully with the report’s conclusion that erecting high walls around large segments of the nation’s scientific and engineering knowledge is not only increasingly impracticable, but also counterproductive to our economic competitiveness and national security. Clearly, the current Commerce Control List (CCL) is applied far too broadly for purposes of deemed exports and should be greatly reduced.

We believe that deemed export requirements should be applied to only a very narrow subset of technologies for two reasons. First, since other countries do not have regulations which are comparable to our U.S. deemed export policies, experts in those countries are free to share the same information the United States seeks to restrict. Hence the U.S.’ deemed export rule is more likely to hurt U.S. industry and our universities as well as U.S. economic competitiveness, instead of preventing the dissemination of information.

Second, in many instances knowledge transferred to foreign nationals in the U.S. is transferred for specific work or research that the foreign national is conducting in the U.S either at a particular company, or at a U.S. university. We question the basis for a presumption that such knowledge will be exported abroad. In fact, a vast majority of these foreign nationals have no intention of exporting that information abroad. We, therefore, believe that clear intent to export information must be incorporated by the Commerce Department as a consideration in determining if a deemed export license is required.

How then do we best limit access to technologies and for whom and when specifically should such limitations apply? Clearly, careful consideration is needed as to which of these technologies warrant such high fences. Such decisions must be based upon clear criteria as discussed below. In accordance with the DEAC report, a zero-based review of CCL technologies currently controlled for deemed export should be conducted. Moreover, the technologies on the list need to be reviewed annually and updated by removing those that no longer warrant protection and adding as necessary new emerging technologies of concern.

**The zero-based assessment should be undertaken by the new BIS Emerging Technologies and Research Advisory Committee (ETRAC).** Recently, the university community enthusiastically recommended a number of experts from our campuses for membership on the new Emerging Technologies and Research Advisory Committee (ETRAC). This group would be in a position to help to
assess which very short list of technologies can and should be protected for national security purposes through the use of deemed export control licenses as opposed to classification.

To supplement and support the work of the ETRAC, BIS must be provided with the resources and technical staff capabilities to support this review process on an annual basis. Obviously, a review of this nature will be a daunting task with more than five hundred Export Control Classification Numbers (ECCNs), which, in turn, have many different subcomponents that must be considered. Additional BIS staff may be required to undertake the initial review and to update the CCL regularly. We call upon the Department and the Congress to ensure that BIS has the appropriate personnel to carry out this review process annually. We also encourage BIS to examine if there is a role for the National Academies in making recommendations pertaining to the review.

We recommend that the ETRAC and BIS staff adopt the following principles in conducting their review:

a) Only information about specific technologies that pose a clear threat to U.S. security interests and cannot be controlled more appropriately by classification should be controlled as deemed exports. An assessment of whether and how information about a particular technology, if exported from the U.S., could threaten U.S. national security interests must be conducted. Is the technology a unique emerging technology that poses a clear security threat? If no valid security threat from the transfer of specific knowledge about a particular technology from the United States exists, then it should be removed from the CCL for purposes of deemed exports.

b) If information about a particular technology is reasonably available and can readily be gleaned from elsewhere in the world, deemed export controls should not be applied to it. The current state of international technological knowhow must be evaluated. There is no value in controlling technological information which is widely available outside of the United States. The technological information that most deserves protection is that which is exclusively confined to the United States and our allies.

c) All “use” technology should be removed from regulation by deemed export controls except for specific instances where it is demonstrated that it meets the criteria set forth above. “Use” technology has value only to the extent that someone has the physical technology in hand and can thereby take advantage of that technology. Because the CCL provides rigorous controls on physical exports, additional constraints through the application of deemed export controls on use technology are redundant. Regulating the transfer of information about use technology serves only to overburden Commerce staff while serving no useful purpose in protecting our national security. If a technology should be controlled for deemed export under a) or b) above, controls will apply to the technical data, and the scope of control may be addressed in the listing. The focus of our deemed export regulations should rightfully be on “production” and “development” technology, as opposed to “use” technology.

d) Dual-use items and information controlled for purposes of deemed export should be consistent with regulations issued by other federal agencies pertaining to the protection of national and homeland security. For example, the Department of Commerce should reconcile the Category I biological agents on the CCL (1C351-4, 1C360 and 1C35) with the agents regulated by the CDC, USDA and NIH from which the CCL is derived. To the extent that biologicals are listed on the CCL, the DOC should include all the exemptions that those agencies recognize. “Vesicular Stomatitis Virus” (ECCN 1C352) is a specific example, and there are others. While the USDA has identified “Vesicular Stomatitis Virus (exotic)” as a Select Agent, the CCL listing includes domestic and
attenuated strains that are not regulated by the USDA. It makes no sense to regulate for deemed export information about a biological agent that the CDC, USDA and NIH have determined to pose no security risk. This is an issue that applies equally to actual physical exports.

As the BIS moves to create the ETRAC and to assess current and future technologies that are controlled for purposes of deemed export, we would strongly encourage BIS to adopt these principles.

2) Comprehensive Assessment of Foreign National Affiliation

The DEAC recommended a broad-based review of the background of foreign nationals and specifically that an individual’s personal loyalty to countries of concern should be assessed in determining if export licenses are required. An earlier recommendation put forward by the Commerce Department’s Inspector General (IG) proposed that an individual’s birthplace should be considered in determining if export licenses were required.

AAU and COGR have expressed deep concern about both the IG’s recommendation concerning country of birth and the DEAC’s recommendation suggesting that universities and industry assess individual loyalties in their determination whether an export license application is required. However, universities do not have the information, expertise or resources to adequately conduct such security, background or loyalty checks on our foreign national students and employees. Once foreign nationals, especially students, arrive at our campuses to conduct research, we are not in a position to further assess their foreign loyalties or affiliations beyond citizenship. Expecting universities to do this, as opposed to the government, is unreasonable and certainly will not be an effective means to ensure our national security. We continue to maintain that the visa screening process provides our best defense against individuals affiliated with nations, foreign entities, or terrorist groups that threaten our national and homeland security or who have criminal intent and aim to do our country harm.

Moreover, we believe that such an expansion of export control requirements raises serious questions about privacy and civil liberties that arise when the federal government makes distinctions based on national origin or perceived foreign loyalties. While national security is certainly a compelling interest, any blanket policy premised on the assumption that all individuals who hold affiliations with particular foreign countries, but who are not citizens of those countries, still may hold some foreign allegiance is overly broad.

As an alternative, we recommend that the Department of Commerce establish clear and reasonable criteria for what justifies a determination that an individual could not be trusted with access to technologies on the CCL. We believe the criteria should be consistent with the standards used in Visa Mantis reviews. If a particular individual is deemed to pose a threat to the United States such that he or she cannot be trusted with access to CCL technologies, that person should not be granted a visa to study or work in such fields in the first place. Once an individual is admitted to the United States, knowledge provided to them about specific export controlled technologies should only require an export license if a university has actual knowledge that the individual being provided the information has the specific intent of exporting it to a controlled country.

It is important that the criteria reflect the recognition that pervades the DEAC report—that international scientific exchanges are in the United States' interests. We suggest that the basis of the new criteria should be:
A foreign national from a country of concern for a particular technology should be excluded from access to that controlled technology only if the person transferring the technical information to a foreign national has specific and credible information that this individual will: a) export controlled technology abroad to a country for which the technology is controlled, or b) commit or support an attack on the United States with information they have obtained about a controlled technology.

The university community stands ready to work with the Department to develop such criteria and enact more reasonable ways to facilitate security, such as the use of non-disclosure agreements or affidavits.

**Conclusion**

Current deemed export control policy has been damaging to U.S. industry, U.S. research and U.S. competitiveness. We therefore commend the DEAC and the Department of Commerce for their work in reviewing the current deemed export system. We agree fully with the DEAC’s primary finding that “...the existing Deemed Export Regulatory Regime no longer effectively serves its intended purpose and should be replaced with an approach that better reflects the realities of today’s national security needs and global economy.”

We believe that part this system is failing in part because the list of technologies for which we are trying to regulate knowledge transfer abroad is far too expansive and based upon technological information for which the U.S. no longer has a world leadership position. We look forward to the ETRAC review of the current CCL to determine if there is an identifiable set of emerging technologies with substantial security implications for which deemed export control rules do actually make sense as well as existing technologies that should remain controlled based on revised, realistic criteria.

On behalf of the AAU and COGR, we greatly appreciate this opportunity to provide you with our views and look forward to continuing to engage with you on this matter as the Commerce Department looks to enact significant reforms to current deemed export control policies.

Sincerely,

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