

AAU Association of American Universities
COGR Council on Governmental Relations

November 7, 2011

Mr. Richard Goorevich
Senior Advisor
Office of Nonproliferation and International Security
NA 24
National Nuclear Security Administration
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

RE: RIN 1994-AA02 Assistance to Foreign Atomic Energy Activities

Dear Mr. Goorevich:

On behalf of the Association of American Universities (AAU) and the Council on Governmental Relations (COGR), we are pleased to respond to the September 7, 2011 Federal Register Notice on 10 CFR 810 regarding Assistance to Foreign Atomic Energy activities.

AAU represents 59 leading U.S. public and private research universities and is devoted to maintaining a strong national system of academic research and graduate and undergraduate education. COGR is an association of over 185 U.S. 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. While we do not expect many of our member institutions to be substantially impacted by the proposed rule, there are some who operate nuclear reactors or engage in research on nuclear technologies subject to the rule.

AAU and COGR have fully supported the Administration's initiative to streamline and harmonize the export control regulations of the Departments of State and Commerce. Consistent with the initiative, we believe that it should be the goal of federal policy to align export control related regulations as closely as possible across all federal agencies and departments, including the Department of Energy (DOE). We are concerned that some of the proposed changes in Part 810 in the proposed rule are not fully consistent with this objective.

We agree that listing countries for which a general authorization for foreign atomic energy activities is available – as opposed to the approach in the current regulations which list countries for which specific authorizations are required – is a helpful change that will reduce uncertainties and reporting burdens for users. We also appreciate DOE's proposal to address deemed exports in the regulations, which is particularly relevant for our member institutions who conduct research in areas subject to the regulations. Also of relevance is the proposed clarification that Part 810 does not apply to public information or basic scientific research. The proposed definition of "Public Information" in 10 CFR 810.3 is consistent with the definitions of "Public Domain" in the State Department's International Traffic in Arms Regulations (ITAR) and "Published Information" in the Commerce Department's Export Administration Regulations (EAR). This should improve consistency and also help reduce uncertainties for our member institutions.

However, we are concerned that the proposed definition of "Basic Scientific Research" departs significantly from the definition of Fundamental Research that has been in use in the EAR and ITAR for many years. This

definition is derived from National Security Decision Directive (NSDD) 189. The policy recognizing the exemption for Fundamental Research has been repeatedly reaffirmed since it was articulated in 1985 by successive presidential administrations as well as by the Department of Defense.¹

“Fundamental research” was defined in NSDD 189 to mean:

Basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.

That definition was adopted in the EAR and ITAR. However, instead of using Fundamental Research to define information that is outside of the scope of the regulations, the proposed 10 CFR 810.3 defines “Basic Scientific Research” as:

Experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena and observable facts, not primarily directed towards a specific practical aim or objective.

The key difference between the definitions of Fundamental Research and the proposed definition of Basic Scientific Research is that Fundamental Research uses the objective test of whether the results of the research will be published or broadly disseminated within the scientific community. In contrast, the proposed definition of Basic Scientific Research requires a subjective determination of whether the research is intended for the acquisition of new knowledge of the fundamental principles of phenomena and observable facts. This subjective test creates the possibility for reasonable minds to differ as to whether research qualifies under the definition.

It would appear that the intent of the proposed revisions to Part 810 is to make the regulations consistent with the concepts in the ITAR and EAR that publicly available information is outside of the regulations. In fact, the Notice states that the proposed rule is intended to be comparable to the “deemed export” rule in the EAR (p. 55280). The proposed definition appears inconsistent with this intent. To be consistent, and to avoid confusion, we respectfully urge that the proposed definition of “Basic Scientific Research” be revised to be consistent with the definition of Fundamental Research in NSDD 189 as well as with the definitions used in the ITAR and EAR.

We also are concerned that some of the other terms and definitions in the proposed DOE regulation are not fully consistent with those used in the State and Commerce regulations. The definition of “U.S. person” in the proposed 810.2 is inconsistent with the counterpart definition in the ITAR and EAR. This leads to anomalies in the terms “foreign person” and “foreign national” in 810.3 since these terms would exclude U.S. permanent residents who are treated the same as U.S. persons in the ITAR and EAR. Also, the term “specially designed” used in 810.2 and 810.3 recently has been clarified by the Commerce Department. The definitions should be consistent. We urge DOE to consider defining the term in a similar manner as its use and interpretation has proved problematic under the other export control regulations.

¹ See Ashton Carter, Memorandum on Fundamental Research for Secretaries of the Military Departments, May 24, 2010, <http://www.aau.edu/WorkArea/DownloadAsset.aspx?id=10846>.

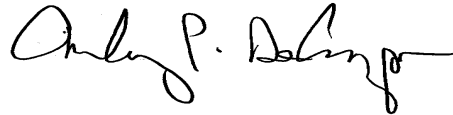
Again, we support DOE's efforts to clarify the Part 810 regulations. However, we believe that it is essential that the regulations be as consistent as possible with the counterpart export control regulations of the Departments of State and Commerce. In particular, we urge that the term "Basic Scientific Research" be changed to "Fundamental Research" and that it be consistent with the NSDD 189 definition followed in the ITAR and EAR. Otherwise we fear that the proposed rule will lead to substantial compliance burdens for our members impacted by these regulations.

Thank you for the opportunity to comment on this important proposed rulemaking.

Sincerely,

A handwritten signature in black ink, reading "Hunter R. Rawlings III" with a stylized flourish at the end.

Hunter R. Rawlings III
President
Association of American Universities

A handwritten signature in black ink, reading "Anthony P. DeCrappeo" with a stylized flourish at the end.

Anthony DeCrappeo
President
Council on Governmental Relations