AAAS *American Association for the Advancement of Science*
AAU *Association of American Universities*
APLU *Association of Public and Land-grant Universities*
COGR *Council on Governmental Relations*

February 7, 2011

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Washington, DC 20522-0112

REF: USML—Positive List

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REF: Notice of Inquiry—CCL

The American Association for the Advancement of Science (AAAS), the Association of American Universities (AAU), the Association of Public and Land-grant Universities (APLU) and the Council on Governmental Relations (COGR) appreciate the opportunity to comment on the State Department's Advance Notice of Proposed Rulemaking (ANPR) to revise the United States Munitions List (USML) to a "positive list" of controlled defense articles that was published in the *Federal Register* on December 10, 2010 (22 CFR Part 121, RIN1400-AC78), as well as the opportunity to comment on the Commerce Department's ANPR (15 CFR Part 774; Docket No. 101112562-0577-01) to similarly revise the Commerce Department's Commerce Control List (CCL) that was published in the *Federal Register* on December 9, 2010.

We fully support the Administration's goals of clarifying the export licensing process through the use of proposed "tiered positive control lists." Our understanding is that this phrase refers to a system in which items subject to control are defined in terms of objective performance or capability criteria, rather than inferences about their intended uses, and in which the level of control applied to an exported item is tailored to that item's security significance. We also fully support the concept of drawing jurisdictional bright lines that make clear which federal agencies control the export of which items, and of structurally aligning the current control lists to give Commerce Department controls and State Department controls a common structure. The guidelines proposed in the ANPRs for use of objective criteria should be helpful to universities and other users in reducing the confusion and ambiguity that often are experienced with the control lists, particularly the State Department's U.S. Munitions List. These reforms, if implemented appropriately, will facilitate compliance while reducing the cost and the regulatory burden imposed on exporters.

It will be critically important to implement mechanisms to assure that the control lists are reviewed and updated on an ongoing basis. As pointed out in the 2009 National Academies study *Beyond Fortress America*, "no version of the current control system should survive without an effective method for pruning items from the control lists when they no longer serve a significant definable national security interest."[i] The U.S. scientific community generally believes that current control lists are not sufficiently dynamic and do not adequately capture the rapid pace of technological change. This problem will persist unless the revised control lists and tiers are subject to continuous review and revision. While the *Federal Register* notices on the Administration's Export Control Reform Initiative do not address this issue, we view it as key to the reform activity. Some thought may need to be given as to whether the existing mechanisms for soliciting advice from the U.S. science and technology (S&T) community on controlled technologies are sufficiently adequate and

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timely for this purpose. We recommend that the State and Commerce Departments discuss mechanisms for continuous review with their respective S&T advisory committees.

Lastly, we want to reiterate the importance of the fundamental research exclusion from export controls. This exclusion [EAR 734.8; ITAR 120.11 (8)] is based on President Reagan's National Security Decision Directive (NSDD) 189, which is still in force. This directive provides that no restrictions may be placed upon the conduct or reporting of unclassified federally-funded fundamental research (except as provided in applicable statutes). The Commerce Department's Export Administration Regulations (EAR), and particularly the State Departments International Traffic in Arms Regulations (ITAR), should be interpreted or amended to make clear that the exclusion applies both to the conduct of fundamental research and the dissemination of research results. As recognized in NSDD 189, the free exchange of ideas is vital to our scientific leadership and creativity, upon which much of our national and economic security depends. The conduct of open, publishable non-proprietary fundamental research is not and should not be subject to export controls. It is critical that this be recognized as the reform initiative proceeds.

Sincerely,

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[i] National Research Council, Committee on Science, Security, and Prosperity in a Changing World, *Beyond Fortress America: National Security Controls on Science and Technology in a Globalized World* (Washington, DC: National Academies Press, 2009), p. 7