August 6, 2012

Regulatory Policy Division
Bureau of Industry and Security
Room 2099B, U.S. Department of Commerce
Washington, D.C. 20239

Re: RIN 0694-AF65

Dear Sir/Madame:

We are pleased to respond on behalf of the Association of American Universities (AAU) and the Council on Governmental Relations (COGR) to the June 21, 2012, Federal Register Notice on Proposed Revisions to the Export Administration Regulations (EAR): Implementation of Export Control Reform, Revisions to License Exceptions After Retrospective Regulatory Review (RIN 0694-AF65).

AAU is an association of 59 U.S. and two Canadian preeminent research universities organized to develop and implement effective national and institutional policies supporting research and scholarship, graduate and undergraduate education, and public service in research universities. COGR is an association of more than 185 U.S. research universities and their affiliated academic medical centers and research institutes that concerns itself with the impact of federal regulations, policies, and practices on the performance of research and other sponsored activities conducted at its member institutions.

AAU and COGR strongly support the Administration's Export Control Reform Initiative. As stated in previous comments to the Bureau of Industry and Security (BIS), we believe the reforms, if implemented appropriately, will enhance national security and facilitate compliance while reducing related costs and regulatory burdens for exporters, including our member institutions. We supported the revisions to the Export Administration Regulations (EAR) proposed by BIS on July 15, 2011. Our comments submitted on September 13th expressed the view that the proposed rule would help increase efficiency and reduce costs by providing a construct for removing less-militarily- sensitive items from the United States Munitions List (USML) to the more flexible licensing regime of the Export Administration Regulations (EAR).

We generally support the proposed implementation of the regulatory framework announced last July in the subject proposed rule. The General Order No. 5 authorizing continued use of State Department authorizations for transferred items, the extension of validity of EAR licenses from two to four years to harmonize with license terms under the International Traffic in Arms (ITAR) regulations, and harmonization of EAR license exceptions with those available under the ITAR all appear consistent with the objectives of the Reform Initiative.

We do have two possible concerns with the proposed license exception revisions. First, in our September 13, 2011, comments we expressed the need for the "bona fide" employee exemption for institutions of higher education provided by ITAR 125.4(b)(10) to continue to apply to items transferred from the USML to the EAR. We urged BIS to consider including the bona fide employee exemption in the reform construct

as the reform initiative proceeds. We were pleased to see that BIS has responded to our comments by incorporating the bona fide employee exemption for universities in License Exception TSU (EAR 740.13). Further, it appears BIS has generally incorporated this exemption in the EAR through the proposed 740.13(f), consistent with the overall harmonization objective.

However, the proposed 740.13(f) license exception is subject to a large number of restrictions, including those set forth in part 740.2 of the EAR, part 744 regarding end use/end user restrictions, and a prohibition on release of technology or source code subject to missile technology (MT) or encryption (EI) controls. These restrictions appear to apply generally to all EAR controlled technologies and software, not just those included in the "600 series" transferred items.

The ITAR bona fide employee exemption does not exclude particular types of technology or software. While we have not been able to assess specific potential impacts on universities, it appears these restrictions may limit the usefulness of the exemption to universities, especially as applied to the 600 series transferred items. Their inclusion in 740.13(f) also raises issues of consistency with the harmonization objective, since the scope of the EAR exemption appears more limited than that under the ITAR. We understand that the EAR will control many more items, especially as the reform initiative proceeds and more items are transferred. We further understand that some restrictions, e.g. MT, may be statutorily mandated. Nevertheless, we urge BIS to reconsider whether all these restrictions are in fact warranted.

Second, in transitioning the bona fide full time employee exemption to the EAR, the qualifying terms of 740.13(f)(3)(i) include the ITAR requirement that "The employee's permanent abode throughout the period of employment is in the U.S." Many U.S. institutions of higher learning do not use the current ITAR exemption because the use of the term "permanent abode" appears to contradict the terms of the employee's nonimmigrant visa.

We understand that in discussions with the Association of University Export Control Officers (AUECO) Chuck Shotwell, then-Director of Defense Trade Controls Policy, provided the following guidance:

"I've conferred with our legal counsel who agrees that "permanent abode" in this context really was intended to mean "residence" in the U.S. for the period of employment. "Permanent" was meant to distinguish it from "temporary" residence, e.g., short term, in the U.S."

Given this clarification, we support AUECO's view that BIS should consider modifying the proposed language or that the matter should be clarified by note in the proposed changes to the EAR.

We appreciate the opportunity to comment, and would be pleased to further discuss our concerns with BIS staff.

Sincerely,

Anthony DeCrappeo
President
Council on Governmental Relations

Hunter R. Rawlings III
President
Association of American Universities