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June 23, 2005

U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division, Room 2705
14th & Pennsylvania Avenue, NW
Washington, DC 20230
ATTN: RIN 0694-AD29

Re: Advance Notice of Proposed Rulemaking (70 Fed. Reg. 15607)
Revision and Clarification of Deemed Export Related Regulatory Requirements

The University of California appreciates this opportunity to provide comments on the March 28, 2005 Advance Notice of Proposed Rulemaking (ANPR). The ANPR was issued by the U.S. Department of Commerce Bureau of Industry and Security (BIS) and requested comments on certain Office of Inspector General (OIG) recommendations concerning the deemed export rule under the Export Administration Regulations (EAR). The University of California operates a system of ten campuses and manages three national laboratories (at Berkeley and Livermore, California and at Los Alamos, New Mexico) for the U.S. Department of Energy.

The University would like to submit the following comments with regard to the specific OIG recommendations in the ANPR:

1. **Definition of "Use" Technology.** The University does not object to the change in the definition of "use" so long as (1) BIS does not go further and rewrite and limit the "publicly available" information exemption; and (2) BIS does not adopt an interpretation based on what we believe to be the erroneous assumption of the OIG that "use" of controlled equipment necessarily entails transfer of controlled "technology".
2. **Use of Foreign National's Country of Birth as Criterion for Deemed Export License Requirement.** The University is opposed to this proposed change, which would impose a significant and unnecessary burden on employers and vendors.
3. **Clarification of Supplemental Questions and Answers on Government Sponsored Research and Fundamental Research.** The University is particularly well qualified to comment on these issues based its long experience in managing national laboratories. We have submitted alternative proposed answers to questions A(4) and D(1) in the attached comments to this letter.

Because the OIG's recommendations on the "deemed export" rule raise a number of potential issues for all of the University facilities, the attached comments address these issues in the campus and national

laboratory context. In addition to the comments summarized above, there are three points the University would like to emphasize.

1. *The proposed change in the EAR's definition of "use" relates to "technology" and would not impose new restrictions on the actual use of equipment.* As BIS has noted in the past, the actual use of equipment by a foreign national is not controlled by the EAR. The issue is whether, at the time of use, the foreign national also receives export controlled "technology", or technical data, that is not publicly available.
2. *If the "technology" provided to a foreign national is "publicly available" under the EAR, no deemed export has occurred.* In most cases, the technical data related to the "use" of a piece of equipment is contained in a publicly available owner's manual that is provided to every customer who purchases the equipment, without regard to citizenship. Because this falls under an exemption under the EAR, the manual would not qualify as controlled "technology" even if it described how to operate, install, maintain, repair, overhaul, or refurbish the equipment. By contrast, if the equipment manufacturer is providing proprietary, non-public, export controlled information that may not be freely disseminated, such information could only be transferred to a foreign national under a "deemed export" license (assuming that a license is otherwise required).
3. *"Use" technology that arises during fundamental research is not subject to control under the EAR if it is openly disseminated within the scientific community.* There are times in performing scientific research that equipment is modified or used in a new way in a laboratory. If the information about the modification or use is disseminated by the researchers (and not treated as secret, proprietary information), it would fall under the EAR's fundamental research exemption.

These comments are explained more fully in the attached document. The University appreciates this opportunity to provide comments on the ANPR and the continued efforts of BIS to provide practical, workable guidance in a complex regulatory area.

Sincerely,

Lawrence B. Coleman
Vice Provost for Research

Att.

cc (w/att.): Provost and Senior Vice President Greenwood
General Counsel Holst
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Vice Chancellors for Research
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Executive Director Auriti
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