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U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
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Room 2705
Washington, DC 20230
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To Whom It May Concern:

The American Association for the Advancement of Science (AAAS) appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking (ANPR) published in the *Federal Register* on March 28, 2005, (RIN 0694-AD29) on the “Revision and Clarification of Deemed Export Control Regulatory Requirements.” Founded in 1848, AAAS is the world’s largest general science society with some 262 affiliated societies and academies of science, serving 10 million individuals. Since the Cold War, AAAS has upheld the standard that “freedom and national security are best preserved by adherence to the principles of openness that are a fundamental tenet of both American society and of the scientific process.”¹

The Department of Commerce Office of the Inspector General (OIG) report, “Deemed Export Controls May Not Stop the Transfer of Sensitive Technologies to Foreign Nationals in the U.S.,” to which this ANPR is a response, concludes that existing Bureau of Industry and Security (BIS) policies could enable foreign nationals access to controlled technology and recommends revising the definition of “use” technology under the Export Administration Regulations (EAR) and applying deemed export licenses to individuals based on country of birth rather than current citizenship. While AAAS understands Commerce’s interest in protecting the commercial transfer of technologies to certain nations, the Association believes that the OIG recommendations will further restrict the conduct of fundamental research and diminish our national security rather than increase it.

¹ “National Security and Secrecy,” AAAS Council Resolution, adopted January 7, 1982 (http://archives.aaas.org/docs/resolutions.php?.doc_id=357).

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Neither the ANPR nor the OIG report provide evidence that current policies and practices that allow for the classification of research; screen foreign nationals entering our country (e.g., Visas Mantis); and control access to certain technologies (e.g., select agent rules) are insufficient to protect against the transfer of dual-use technologies. At the same time, the proposal lacks a fundamental vision of the national security gains that BIS hopes to achieve by making these changes and a cost/benefit analysis to determine the impact on our national interest. AAAS urges BIS to weigh carefully any proposed changes against the additional burdens placed upon research institutions created by the proposals.

In the absence of clear evidence that current laws and policies are creating an unacceptable national security threat, we question the need for the proposed revisions, especially given the problems discussed below. Before proceeding further with the proposed changes the Department of Commerce should sponsor a study that clearly identifies the nature and extent of the problem that such revisions are intended to solve.

Control of “use” technology. In 1985, President Ronald Reagan issued National Security Decision Directive 189 (NSDD-189) that called for “no restrictions... upon the conduct or reporting of federally-funded fundamental research that has not received national security classification.”² This principle has been upheld for decades by the Departments of State and Commerce, thereby exempting fundamental research from classification as long as the research findings are made publicly available. At the same time, the Departments’ munitions and control lists provide an additional layer of scrutiny that is applied both to foreign nationals entering our country and to the conduct of federally-funded research through individual grants and contracts.

AAAS is concerned that the proposed changes to the definition of “use” technology will drastically change the character of basic research due to the ambiguity of the language and the inevitable confusion within the research community that will result from variations in the way that institutions interpret the language. The OIG report fails to take account of the fact that the conduct of fundamental research requires many forms of operating, utilizing, adapting, and modifying tools and equipment as part of the serendipitous nature of scientific inquiry and the relationship between basic and applied research. We risk creating an environment where institutions broadly apply the interpretation of “use” technology in ways that lead to delays in research or unduly restrict the free flow of scientific exchange vital to advancing research and innovation.

² National Security Decision Directive 189, “National Policy on the Transfer of Scientific, Technical, and Engineering Information,” September 21, 1985.

National origin as a criterion for license. AAAS questions whether institutions should be made responsible for determining the country of birth of foreign nationals in addition to citizenship when considering whether to apply for a deemed export license.

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Aside from whether such a distinction based on national origin would pass judicial scrutiny, BIS fails to articulate the justification for focusing on the country of birth as a risk factor as compared to citizenship. Foreign nationals who apply for student visas already must submit to an extensive examination by State Department consular offices and to Visas Mantis screening. Requiring an additional layer of scrutiny by institutions is overly burdensome and unnecessary.

Since September 11, 2001, AAAS and other scientific and higher education associations have worked diligently with the Departments of Homeland Security and State in revising and refining visa processing procedures that maintain an appropriate balance between national security and academic interests. Both the proposed revisions to “use” technology and the application of national origin for a deemed export license would place added administrative burdens on research institutions already weighted down by other post-911 policies and procedures. Furthermore, these proposed changes will inevitably lead to more licensure applications and a greater workload for BIS staff. We know from the visa processing experience that the State Department has had to greatly augment its staffing and training capabilities in order to minimize delays. What assurance is there that BIS will have the required personnel, funding, and training to make licensure decisions in a timely and effective manner?

In conclusion, the impact of the proposed revisions on scientific research and our nation’s economic competitiveness would be substantial, while expected improvements to national security have not been persuasively presented by the Department of Commerce. To the extent that the proposed changes lead to delays or unnecessary denials of licenses for foreign nationals seeking to work on fundamental research in the U.S., they have the potential to set back research, alienate foreign scholars and students, and exacerbate the declining enrollment of foreign nationals in U.S. science and engineering graduate school. In addition, the proposed rules threaten the important public policy objective of preserving the accepted understanding of fundamental research as defined by NSDD-189.

Should you have any questions or wish additional comments, please contact Mark S. Frankel, director of the AAAS Scientific Freedom, Responsibility and Law Program, at 202.326.6793, or email mfrankel@aaas.org.

Sincerely,

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Director