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Chair of the Assembly of the Academic Senate
Faculty Representative to the Regents
University of California
1111 Franklin Street, 12th Floor
Oakland, California 94607-5200

June 8, 2017

SUSAN CARLSON, VICE PROVOST
ACADEMIC PERSONNEL

Re: Systemwide Review of New Presidential Policy on Export Controls

Dear Susan:

As you requested, I distributed for systemwide Senate review the proposed Presidential Policy on Export Controls. Nine Academic Senate divisions (UCB, UCD, UCI, UCLA, UCM, UCR, UCSB, UCSD, and UCSF) and three systemwide committees (UCFW, UCPB, and UCORP) submitted comments. These comments were discussed at Academic Council's May 24, 2017 meeting. They are summarized below and attached for your reference.

We understand that the proposed policy is intended to ensure the University's compliance with federal laws and regulations restricting the export of specific materials, information, and technology, and to provide a framework for individual UC locations to develop local Export Control Compliance programs. We also understand that the federal government's Fundamental Research Exclusion (FRE) provides an important exception to policy that allows universities to share with foreign faculty and students technology or software that arises from basic research and is intended for publication.

Unfortunately the Senate is unable to endorse this version of the policy due to a number of concerns about its clarity and potential effect on faculty and their research. Although some Senate reviewers noted that the policy provides a helpful structure for aligning the University's procedures with federal regulations and for protecting its employees from non-compliance, the majority of commentary we received was more critical.

First, reviewers are concerned that the policy is ambiguous and difficult to understand and would impose additional administrative burdens on faculty. They fear that the ambiguities around compliance requirements could lead faculty to unintentionally violate the policy and encourage administrators to be overly conservative in their interpretation of the rules, which could unnecessarily restrain research activities. There are also concerns that an expensive new compliance infrastructure will be required to implement the policy with no benefit to the research enterprise.

Reviewers made several specific recommendations for improving the clarity of the policy: 1) adding an introductory statement that provides a clear rationale and more context for the policy; 2) adding a FAQ section with more detail about the export-controlled items covered under the policy and the actions required of faculty in certain situations; 3) clarifying the boundaries of the FRE; 4) clarifying how the proposed policy would affect other non-scientific research areas that are not explicitly identified; and 5) expanding Appendix A to provide more details about managing controlled items in a UC research setting.

Reviewers agree that the policy should support researchers affected by the regulations and minimize additional burdens on faculty and impacts on the research enterprise by focusing compliance training requirements only on those members of the UC community likely to need it, by increasing awareness and education about export control issues and restrictions, and by providing clear guidelines and appropriate staff support for faculty who may need to implement new or different protections or protocols. Reviewers also recommend that the policy include an appeal mechanism that addresses exceptions to the policy and instances in which the University or UC locations may incorrectly identify an innocent activity as a violation.

UCFW suggests, as an alternative to the administration-centric oversight system outlined in the policy, a joint faculty-led review committee for export control issues that could provide timely feedback on applications or appeals. UCFW also notes that the policy should include provisions that address rapidly changing areas of research, and the committee provides several specific examples of research that could be affected.

Finally, several reviewers expressed disappointment that an “Openness in Research” policy mentioned in the document was not being reviewed alongside the proposed export control policy. However, we now understand that UCOP has put development of the Openness in Research policy on hold. It would be helpful for the next draft of the proposal to make this clear.

We appreciate consideration of our comments and concerns as you revise the proposed policy. Please do not hesitate to contact me if you have further questions.

Sincerely,



Jim Chalfant, Chair
Academic Council

Encl

Cc: Academic Council
Vice President Ellis
Policy Manager Lockwood
Research Policy Manager Demattos
Senate Director Baxter
Senate Executive Directors



320 STEPHENS HALL
UNIVERSITY OF CALIFORNIA

May 15, 2017

JAMES CHALFANT
Chair, Academic Council

Subject: Proposed presidential policy on export controls

Dear Jim,

On May 8, 2017, the Divisional Council (DIVCO) of the Berkeley Division considered the proposed policy cited in the subject line, informed by the commentary of our divisional Committee on Faculty Welfare. DIVCO declined to endorse the proposal.

Our discussion highlighted the following concerns. We found the proposed policy to be poorly written and difficult to understand. In addition, there is no discernable justification or rationale provided.

We are concerned that the proposed policy will serve to impede faculty research and could lead researchers to violate the policy without being aware of doing so. Further, we believe the policy will fuel the need for more compliance-related administrative positions and processes, without any material benefit to researchers. Any new policy should serve to facilitate faculty compliance with federal regulations and not impose new administrative burdens.

In sum, we do not support the proposed policy. Any subsequent proposal should be clearly written, supported by a cogent justification, and take the needs of UC researchers into consideration. Toward that end, we recommend that the Office of the President solicit input from researchers likely to be affected by the policy, in order to formulate a new proposal.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Powell'.

Robert Powell
Chair, Berkeley Division of the Academic Senate
Professor of Political Science

Cc: Terrence Hendershott and Caroline Kane, Co-chairs, Committee on Faculty Welfare
Anita Ross, Senate Analyst, Committee on Faculty Welfare



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May 12, 2017

Jim Chalfant

Chair, Academic Council

RE: Proposed Presidential Policy on Export Controls

Dear Jim:

The proposed Presidential Policy on Export Controls was forwarded to all standing committee of the Davis Division. The Committee on Academic Freedom and Responsibility (CAFR) responded.

In the interest of clarity, CAFR recommends including an FAQ section containing “a clear definition of what is included in the list of export-controlled items and information, and what actions the policy will require on the part of faculty for certain events (travel, shipping of samples, research collaborations).”

The Davis Division appreciates the opportunity to comment.

Sincerely,

A handwritten signature in cursive script that reads "Rachael E. Goodhue".

Rachael E. Goodhue

Chair, Davis Division of the Academic Senate

Professor and Chair, Agricultural and Resource Economics

Enclosed: Davis Division Committee Responses

c: Edwin M. Arevalo, Executive Director, Davis Division of the Academic Senate
Hilary Baxter, Executive Director, Systemwide Academic Senate
Michael LaBriola, Principal Policy Analyst, Systemwide Academic Senate

May 17, 2017

Jim Chalfant
Chair, Academic Council

RE: Systemwide Senate Review: Proposed Presidential Policy on Export Controls

Dear Jim,

The Executive Board solicited comments on the proposed Presidential Policy on Export Controls from the standing committees of the Senate, as well as the Faculty Executive Committees, to maximize faculty feedback; the individual responses from our various committees are available [online](#).

The members briefly discussed the proposed policy but had no additional comments or suggestions.

The Executive Board appreciates the opportunity to opine. Please feel free to contact me should have any questions.

Sincerely,



Chair, UCLA Academic Senate

cc: Hilary Baxter, Executive Director, Systemwide Academic Senate
Leo Estrada, Immediate Past Chair, UCLA Academic Senate
Sandra Graham, Vice Chair/Chair-Elect, UCLA Academic Senate
Michael LaBriola, Principal Policy Analyst, Systemwide Academic Senate
Linda Mohr, Chief Administrative Officer, UCLA Academic Senate
Shane White, Vice Chair, Academic Council

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OFFICE OF THE ACADEMIC SENATE
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MAY 16, 2017

JIM CHALFANT, CHAIR, ACADEMIC COUNCIL

RE: PROPOSED PRESIDENTIAL POLICY ON EXPORT CONTROLS

The draft *Presidential Policy on Export Controls* was distributed to the standing committees of the Merced Division of the Academic Senate and the school executive committees. The Committee on Research endorsed the policy, concluding it provides a helpful structure for aligning the procedures of the University of California with federal export control regulations, and protecting the University and its employees from non-compliance while allowing for the development of local practices and processes.

The remaining committees appreciated the opportunity to opine, but had no comment.

We thank you for the opportunity to opine.

Sincerely,

A handwritten signature in cursive script, appearing to read "Susan Amussen".

Susan Amussen, Chair
Division Council

CC: Divisional Council
Hilary Baxter, Executive Director, Systemwide Academic Senate
Laura Martin, Executive Director, Merced Senate Office



CHAIR, ACADEMIC SENATE
RIVERSIDE DIVISION
UNIVERSITY OFFICE BUILDING, RM 225

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May 15, 2017

Jim Chalfant, Chair, Academic Council
1111 Franklin Street, 12th Floor
Oakland, CA 94607-5200

RE: (Systemwide Senate Review) Proposed Presidential Policy on Export Controls

Dear Jim,

The UCR Division Executive Council and several Divisional Senate Committees discussed the Proposed Policy and offer the following feedback.

Executive Council engaged a significant discussion on this matter and discussed a number of matters. There were general concerns regarding the potential over-reach of the Proposed Policy in possible and potential abrogation of faculty rights and privileges, including the possibility that the policy could lead to forms of discrimination and racial profiling on campuses. There would need to be appropriate training, staffing, and alert time for faculty that would be affected by this policy. Lack of proper training of faculty and staff could delay research out of fear of breaking the law or being out of compliance with policy. Council also suggests that there be a dedicated staff person at UCOP or on each campus to adjudicate issues that could arise related to this issue. One Council member suggested creation of a Q&A form similar to the APM 025 Conflict of Commitment form.

The Committee on Research offers two suggestions: first, that the policy should be managed at a systemwide rather than campus level in order to maintain consistence; second, that there an appeals process should be created to deal with any appropriate exceptions to the policy. Graduate Council chose not to provide an opinion, citing its lack of expertise in the areas covered by the Proposed Policy. The Committee on International Education is generally supportive of the policy, and notes that the absence of specific policy prescriptions can facilitate robust future engagement with the Academic Senate on balancing legal compliance and Academic Freedom.

The Committee on Library and Information and Technology comments on two issues. First, the Proposed Policy makes repeated reference to “training” as a solution for actual and potential problems; the Committee is concerned that faculty are being asked to devote too much time to peripheral matters, and that requiring more training on a matter that concerns only a small number of faculty members is not an efficient use of their time. Training should be required of a focused number of people. Second, there were questions regarding the distinction between and possible conflation of “source code” and “object (executable) code” in the writing of the policy, particularly on pgs. 3-4 and 11.

Sincerely yours,



Dylan Rodríguez

Professor of Ethnic Studies and Chair of the Riverside Division

CC: Hilary Baxter, Executive Director of the Academic Senate
Cherysa Cortez, Executive Director of UCR Academic Senate Office

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Henning Bohn, Chair

May 8, 2017

To: Jim Chalfant, Chair
Academic Council

From: Henning Bohn, Chair
Santa Barbara Division

A handwritten signature in black ink that reads "Henning Bohn". The signature is written in a cursive style and is positioned to the right of the typed name and title.

Re: Proposed Presidential Policy on Export Controls

The Santa Barbara Division's Committee on Research Policy and Procedures (CRPP) conducted a careful review the Proposed Presidential Policy on Export Controls, which aims to issue uniform guidelines on how each campus must organize locally to ensure compliance with federal regulations on ITAR and other export control laws.

It was unclear to the Committee what problems this proposed policy is trying to solve and whether some campus is indeed out of compliance. This made it quite difficult to make specific comments. CRPP agreed with the overall suggestions outlined in the proposed policy, but members sensed that UCSB is likely already on top of these concerns. The Committee was aware that the Vice Chancellor for Research was running a small pilot program on Export Controls with the Department of Electrical & Computer Engineering last year. It was therefore hoped that this policy was drawn after consultation with local campuses that have already implemented specific policies.

The proposal mentions that there will be one further document on "Openness in Research". Since this is critical to how the Fundamental Research Exclusion (FRE) clause is applied, it would have been more appropriate to review both documents at the same time.

For example, simple questions about FRE and how it affects Export Control regulations are hard to answer from the current document. If a faculty member accepts a research contract from a company with an agreement to delay publications to handle IP issues, does it imply that that particular project falls out of FRE, or does all of the faculty member's research fall out of FRE?

It might be the case that such issues are not appropriate for this policy document. However, we note that UCOP might better serve the campuses by dealing with these types of issues where there clearly is a lack of knowledge among the faculty (and this is probably common across many campuses).



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May 12, 2017

Professor Jim Chalfant
Chair, Academic Senate
University of California
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SUBJECT: Proposed Presidential Export Control Policy

Dear Jim:

The proposed Presidential Policy on Export Controls was circulated to standing Divisional Senate committees for review and comment. Reviewers had no objections to the proposed policy. Comments from the reviewers are summarized below.

Reviewers noted that the language in section III. A. *Purpose*, that states “the export from the United States to a foreign country of certain items, information, or software” seems ambiguous and suggested clarifying what “certain items” means. Reviewers commented on the importance of increasing awareness of this policy and providing adequate training, and pointed out the need to ensure that this policy is not implemented in such a way that would impede faculty research.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kaustuv Roy".

Kaustuv Roy, Chair
Academic Senate, San Diego Division

cc: F. Ackerman
H. Baxter
R. Rodriguez



UNIVERSITY COMMITTEE ON FACULTY WELFARE (UCFW)
Lori Lubin, Chair
llubin@ucdavis.edu

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May 16, 2017

**JIM CHALFANT, CHAIR
ACADEMIC COUNCIL**

RE: Proposed Presidential Policy on Export Controls

Dear Jim,

The University Committee on Faculty Welfare (UCFW) has discussed the proposed Presidential Policy on Export Controls, and we have several concerns that center on 1) additional work expectations for faculty and 2) what appears to be administration-centric drafting of the proposal. That is, the entire proposal seems written to manage risk rather than to enable and assist those (primarily faculty) engaged in research that might be impacted by Export Controls. A policy that is difficult to interpret and operate may lead to two problems. One problem is for researchers who may unintentionally violate Federal laws under the spirit of enabling research collaboration (read that as asking forgiveness rather than permission). And a second problem faces administrators, who may stifle innovation by conservative actions in the face of unclear policy. The whole of UC, researchers and administrators, deserves a policy, and implementation, that clarifies the laws and regulations while supporting their daily actions to enable innovation and communicate broadly.

Because the policy contemplates new responsibilities for faculty (page 11), UC should ensure that the administration does their part to support faculty needs. The details will be location and discipline specific, so clear guidelines and appropriate staff support must accompany this policy. For example, it would not be unusual for a faculty member to hold, and need to protect, controlled information in digital form. UC should provide a means for ensuring that protection, not simply dictate that the faculty member create one. Other faculty may have physical assets that require such safe keeping.

As part of the accompanying guidelines, the chart at the end of the draft policy, at Appendix A, should be more thorough. Inclusion of a process map or an additional column containing "Managing controlled items in a UC research setting", and then columns showing what offices are assigned those duties, would help save faculty time and effort and further streamline the process.

This particular UC policy should also include provisions that address rapidly changing areas of research. We provide below several examples of research in flux that could be impacted by new scientific or commercial advances.

Moreover, some feel that the draft policy cedes too much authority to administration officials to regulate and approve research; this imperils the goals of shared governance and could even infringe on academic freedom. Since there is an incredibly diverse range of activities that could be impacted by

export controls, it is likely that staff will not have enough breadth and depth to fully understand all the relevant research issues. This is a recipe for staff members to fall back to the most conservative interpretation of the rules to limit their own liability and the liability of the University. Unfortunately, this approach can have a negative impact of slowing/stopping research that will ultimately hurt the University.

A joint, but still faculty-led, approach was proposed as an alternative, in the hopes that it could be both more nimble and more comprehensive. A faculty review committee for export control issues that would have a broad range of expertise and that could provide timely feedback on license applications (or appeals) could achieve these goals. The staff positions would play a support role to this faculty review committee. The senior export control officer could even be a member of the committee (but not chair) and help support the committee by making sure the activities comply with all relevant laws and regulations.

Thank you for your concern to these important topics.

Sincerely,

Lori Lubin, UCFW Chair

Copy: UCFW
Hilary Baxter, Executive Director, Academic Senate

- UC should consider how rapidly some commercial technology is developing and becoming available for purchase at low cost.
- UAS with swarming capability is on the U.S. munitions list. If a professor were to commercially acquire a low cost system that has this emerging technology (not yet available, but could be soon), then UC would need to ensure that their research USING the system (not only developing things like this) would be in compliance with deemed export laws with foreign national researchers. Perhaps there should be some way to note campus purchases of EAR and ITAR controlled technology when it arrives on site? The campus can then automatically apply for an export license to use the technologies on campus (not hard, just time consuming). UC should ensure that current acquisition processes are not limited, though. Any change to purchasing commercial equipment deemed important to pursue a faculty member's research would fall under our academic freedom. We would oppose any measures to limit what we can purchase on campus. We need to remember that as recently as the last 10 years, many high-end oscilloscopes were EAR/ITAR, and they are a fundamental part of our research.
- Non-attenuated biological agents with targeted mutations are sometimes (but very rarely) used in fundamental research to understand pathogen and immune responses (e.g. for vaccine development). There is a separate "Select Agent List" that governs who can legally handle those materials, which is enforced by federal permit. However, these pathogens are also almost always also on the EAR list. It will be important for UC to decide how they will continue to support researchers in these areas (especially with issues around deemed exports, e.g. foreign nationals handling those pathogens in the lab). Some leading journals (e.g. Science/Nature) are considering modified publication practices to redact information that can weaponize a pathogen. But this now means that universities might not always fall under the fundamental research clause due to this publication/dissemination restriction. UC will need to decide how to handle this, and should aggressively apply for permits/export licenses to ensure our fundamental research can move forward.
- As a second point on biological pathogens: Specific disease strains are not always readily obtained from commercial repositories. Some are more/less virulent than others. There is only 1 major (non-profit) repository for the entire biodefense community, and it has limited selection of pathogens. University and biodefense researchers are more likely to obtain native strains from their collaborators at international locations (where many zoonotic diseases emerge from). UC should develop a policy to help mitigate this risk, while embracing the importance that obtaining/hosting these "emerging" pathogens will have on the scientific community. Many will not land on the EAR/ITAR list for at least 1 year after discovery (or maybe never). UC should have a proactive plan on how to handle collections of rare pathogens like this.
- Plant sciences are very similar to pathogens that affect human/animal health. The same things apply.
- There could be Technology Transfer issues that arise if a professor on campus comes up with a new idea that is on the U.S. munitions list, and the TTO office (and UCOP) are obligated to let any company (foreign or domestic) apply to try and license the technology. To our knowledge this has not happened. UC should write into their procedures for licensing that export control laws must be followed to protect our interests. As a state agency, we are obligated to let everyone/anyone bid to license technology/software. This may be inconsistent with federal law in cases of sensitive technologies.



UNIVERSITY COMMITTEE ON PLANNING AND BUDGET (UCPB)
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May 17, 2017

**JIM CHALFANT, CHAIR
ACADEMIC COUNCIL**

RE: Proposed Presidential Policy on Export Controls

Dear Jim,

The University Committee on Planning and Budget (UCPB) has discussed the proposed Presidential Policy on Export Controls, and we have considerable feedback. In large part, this response is based on interviews conducted by our lead reviewer (and UCSD representative).¹ As such, specific examples may lean toward one campus, but the principle involved is general. One general principle that we want to highlight is the increasing administrative and regulatory onus on faculty; in this arena, quality staff support is needed, as we discuss below.

The policy is straightforward and follows the legal and regulatory obligations to which the University is subject. Our concerns and issues center on (i) how the policy is implemented, (ii) how implementation is resourced, and (iii) how faculty are ultimately protected from inadvertent missteps regarding export control.

Export control (EC) is a real and serious issue. Violations at one campus can affect other campuses. E.g., UC, as a state corporation (Regents of the University of California), has a single registration for ITAR. Debarment would affect the entire system.

The proposed policy appears to have been carefully crafted to “set the right tone for the UC system”. Drafting took three years. All campuses were involved. The team was much broader than OP, and included expertise in contracts and grants, shipping, visas, etc. PIs and staff were involved.

Local (per-campus) implementation of EC procedures and practices is likely a good thing.² However, it exposes the need for adequate staffing at each campus³, along with system-wide sharing of understanding

¹ In addition to suggestions from CPB members, this review reflects conversations with and emails from Brittany Whiting, UCSD’s Export Control Officer.

² UC campuses vary widely in their exposure to EC issues. For example, in the case of UCSD, the Scripps Institution of Oceanography (SIO) accounts for a large fraction of UC shipping activity and handling of ITAR equipment (at one time even the Navy-owned vessels in the academic fleet were ITAR). Space Sciences activities are centered at Berkeley. Interactions with Iran are centered at LA and Irvine.

³ According to UCSD’s EC officer, at present only four of the 10 campuses have any EC staffing (UCSD = 1.5 headcount; UCB = 0.5 headcount which may be on its way to zero (part-time staff member is transitioning to a position at a national lab); Irvine =

and best practices regarding EC. Per UCSD's EC Officer, who was a member of the policy working group, the recommended "at minimum" EC staffing level is a 1.0 headcount.

Implementation of training and oversight needs to be as "bulletproof" as possible, while minimizing impact on faculty. The policy places significant responsibilities on individual faculty (as do the federal regulations), as seen in Appendix A. In implementing the policy, the need to educate and train should be balanced with reducing additional burdens placed on faculty. In the context of limiting the burdens placed on faculty, while also limiting the risk to UC, it is important that the administration develop and deploy business processes to catch missteps by faculty and researchers. This might include new IT mechanisms and oversight of travel requests, research proposals, shipping, human resources, etc.⁴ On the other hand, administration needs to be careful that these layers of oversight do not impede the efficient functioning of the research enterprise.

Implementation should also be carefully calibrated to the disciplinary area. Exposure to EC issues will vary tremendously across any given campus. At one end of the spectrum, some faculty work in areas (e.g., Humanities) where there is only rare exposure to EC issues; they might only need periodic reminders that should their activities change in significant ways that increase their exposure they need to seek advice and training (e.g., traveling to restricted countries). At the other end of the spectrum, faculty in, e.g., engineering are likely to have much greater exposure.⁵ A member of UCSD's CPB works in a field that lies somewhere "in between" and realized that they might have been exposed to EC issues, yet had no idea that UCSD had an Export Control Office. This group of faculty probably represents the most challenging population in terms of increasing awareness and education.

EC burdens are only increasing. Example metrics of EC activity at UCSD during 2015-2016: (i) 453 International Shipments Export license reviews; (ii) 50 export license or license exceptions for international shipping – which equates to 11% of shipments – required some type of U.S. Government authorization for export (the vast majority was for SIO, but this also included Medicine and Chemistry and Physics); (iii) two Sanctioned Country OFAC export licenses for Iran for Social Sciences and Health Sciences; (iv) 661 UCSD personnel received in-person Export Control Training at 32 training events; (v) 111 Agreement Export License Reviews (contracts, grants, MTAs, service agreements, NDAs); (vi) 8569 Restricted entity screenings performed; (vii) 415 Restricted entity export license reviews (8% of total volume screened) with 19 control plans implemented for restricted entities in Engineering, Health Sciences, Social Sciences and Division of Biological Sciences.

1.0 headcount; LA = newly-hired 1.0 headcount). Some overlap/synergy may be possible with another compliance area (e.g., COI at SB handles EC?). And, at least one campus (SC?) may currently rely on OP to handle EC issues.

⁴ From discussions with faculty and UCSD's EC Officer, it seems that root causes of faculty/researcher misconduct are lack of awareness/training ("I had no idea") and overly cumbersome processes ("it was such an incredible hassle that I just went to the post office and mailed the package myself"). Increased protection of PIs through business processes and trainings that span contracting (e.g., NDAs not covered by the fundamental research exception), proposal and award reviews, fund management, purchasing, shipping, disbursements (e.g., foreign payments), human resources, etc. is doable. At UCSD, the EC Officer pointed out (i) IT enhancements for processes involving postdocs and visiting scholars, (ii) a new shipping system (possibly shared with Davis and SF?) with built-in business rules regarding EC and dangerous goods, and (iii) ePD review for EC (transparent to faculty) at proposal and award stages. There are also 5-minute videos online for training on various EC topics: <http://blink.ucsd.edu/sponsor/exportcontrol/training.html>.

⁵ This being said, there are no hard and fast rules about which disciplines can be less vigilant or less well-trained regarding EC. At UCSD, faculty in psychology, art, communications, neurosciences, health sciences, etc. have all had EC cases due to the nature of their research activities. Speaking at a conference can trigger EC issues. Restricted party screening is fluid and potentially burdensome (e.g., interactions with Sichuan University; see next footnote).

Faculty must be aware of “safe harbors” as well as “landmines”. The two basic EC exceptions, for “fundamental research” and for “publicly available”, must be comprehended. At the same time, the EC implications of NDAs, WAN connectivity and use remote presentation facilities, open-sourcing (even, posting on Github), etc. must also be comprehended.⁶ **Export control is complicated!**

Thank you for your attention to this important issue.

Sincerely,



Bernard Sadoulet, Chair
UCPB

cc: UCPB
Hilary Baxter, Executive Director, Systemwide Academic Senate

⁶ I posed a hypothetical to UCSD’s EC Officer. “Scenario: UCSD professor is invited to give a WebEx presentation of latest research results to a U.S.-headquartered technology company (e.g., a “corporate advanced technology group”). This is usually a prestigious invitation, and would likely be accepted. Unbeknownst to the professor, the WebEx is available to the company’s Shanghai office, and a visitor from Sichuan University sits in that office. Furthermore, the WebEx is recorded by the host (i.e., the company) and the recording is available to all company employees on an internal wiki/website. The visitor, it turns out, not only views the WebEx but also downloads the recording of the presentation and shares it at Sichuan University. Question: If the subject matter of the presentation is export-controlled, would the professor – by giving this WebEx presentation – have made a “deemed export”?” I received the following response. “If there were material that were subject to publication restrictions provided during the presentation, an export license could have been required for the export to China, depending on the export classification of the technology, and would require an export license for the disclosure of any confidential or proprietary information to Sichuan University. (Sichuan University is on the Commerce “[entity list](#)”; the export license requirement is “For all items subject to the EAR.”. If the technology were ITAR controlled, there is an arms embargo against China as they are a [126.1 prohibited exports country](#) and the U.S. government will not issue export licenses to China.) This is considered an export; a deemed export would be if this same information were provided in the US to a foreign person. The best practice for faculty would be don’t present information that is under a NDA or publication restriction or service agreement, only present on fundamental research or better yet already published material. Additionally the faculty could ask via email if there will be any non-US locations participating in the webex in advance of the presentation. Export Control regulations are strict liability.”



UNIVERSITY COMMITTEE ON RESEARCH POLICY (UCORP)
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May 17, 2017

JAMES A. CHALFANT
CHAIR, ACADEMIC COUNCIL

Re: Proposed Presidential Policy on Export Controls

Dear Jim,

On Monday, April 10, the University Committee on Research Policy (UCORP) met and discussed the proposed university policy on export controls.

The members of UCORP recognized the need for a policy to respond to federal law on export controls, but raised several concerns about the proposed policy as written, and offered some suggestions with respect to implementation.

First, the boundaries of the fundamental research exclusion (FRE), as defined under II.G. and II.H., and applied in IV.A., may require clarification. UCORP members identified several research activities that might or might not fall within the FRE depending on how the language of the policy is interpreted. One example is a laboratory investigation that would produce information that is published and shared broadly in the scientific community, but that uses an ITAR-controlled item as part of the research apparatus to produce that information. Another example is a project that uses social science data subject to certain federal access controls that are related to privacy and confidentiality. It is common, for example, for UC-affiliated social scientists to use confidential microdata from the Bureau of the Census or the Internal Revenue Service that can only be accessed at a particular federal government location, subject to restrictions on publication of certain details that may compromise privacy or confidentiality. It is not entirely clear whether the proposed policy, as it interprets the relevant federal regulations, would permit such projects to be considered fundamental research.

Second, the policy states at IV.B.2. that faculty and other researchers “should contact the local Export Control Officer” when engaging in certain activities, but it is not clear whether this “should” is intended to have the force of a requirement. It also is not clear whether merely contacting the Export Control Officer in these circumstances constitutes compliance with the policy—or whether the Export Control Officer may require additional information. (Suppose that a faculty member planning to travel to a country subject to Office of Foreign Assets control sanctions contacts the Export Control Officer, who requests a list of names of the foreign nationals with whom the faculty member intends to meet. Must the faculty member supply the names, in order to comply with the policy?)

Third, members of UCORP recommend that the policy include a mechanism for appeal, in the event that the University or a location should incorrectly identify an innocent activity as a violation of policy. Quite apart from any faculty disciplinary action or legal action that might result from a violation of policy, the policy, at IV. C., contemplates a separate investigation, in the course of which certain faculty research activities may be suspended (“UC locations should halt transactions”) and as a result of which corrective action plans may be imposed (“Corrective action plans should include provisions to prevent recurrence of any violations arising from systemic institutional practices or procedures”). No investigative procedure is error-free. In case of error, it would be wise to permit researchers to appeal the suspension of transactions and the imposition of corrective action plans.

UCORP would also like to offer some suggestions for implementation of the export control policy.

First, training in compliance should be well publicized and made available to those who may need it, but it should not be required of all faculty. We note that the policy, at IV.B.2., states that “faculty and other academic appointees, staff, students, and non-employee participants in University programs are responsible for... completing all training as applicable and as required by the location....” It may be appropriate to require training in some circumstances. UCORP urges the University and its campuses to take some care in determining that training is required, so that it is not mandated for faculty who will find it irrelevant to their work at the University. (If scholars of, say, American literature who never deal with export control issues in their work are required to undergo a mandatory training in export control policy, it might breed cynicism, and lead all faculty to take the policy less seriously than they should.)

Second, Export Control Officers should have some mechanism for conferring about their procedures and reconciling inconsistencies. Some members of UCORP expressed concern that inconsistent implementation of the policy on different campuses might lead to arbitrary differences in the academic research environment. The ease of conducting research that requires bringing export-controlled items onto a UC campus, for example, should not vary substantially based on which UC campus happens to employ the researcher.

Finally, members of UCORP also suggested that educational materials for faculty about their responsibilities under the export control policy should include illustrative examples of research that would, and would not, fall afoul of the policy. There will be some frequently asked questions. The University should anticipate them with a FAQ sheet.

Regards,



Isaac Martin
Chair, University Committee on Research Policy

cc: Shane White, Academic Council Vice Chair
Hilary Baxter, Academic Senate Director
UCORP members

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May 22, 2017

Jim Chalfant, PhD
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Re: Review of the Proposed Presidential Policy on Export Controls

Dear Jim,

The San Francisco Division of the Academic Senate has reviewed the proposed Presidential Policy on Export Controls. Both UCSF's Committee on Research (COR) and Rules & Jurisdiction Committee (R&J) have provided comments. Both committees note that the Office of the President (UCOP) is also considering a separate policy on *Openness in Research*, whose principles would intersect with the federal export control regulations. Both COR and R&J strongly advocate for the development of such a policy, and look forward to reviewing it.

COR adds that it had difficulty fully assessing the potential impact of the proposed Presidential Policy on Export Controls without having access to the separate, yet to be proposed policy on *Openness in Research*. On that note, the proposed Presidential Policy states that UCSF's "principal strategy" for compliance is to maintain an open, fundamental research environment. However, the proposed policy does not establish comprehensive, sufficient guidance on maintaining an open, fundamental research environment. Indeed, as noted in the proposed Export Control Policy, violations can result in civil and criminal penalties against the University and individuals including fines and imprisonment. Procedures in response to reports of non-compliance could have serious and immediate effects on faculty and research activities. Therefore, a future *Openness in Research* policy would help to clarify these issues and guide faculty in this important area.

Thank you for the opportunity to review this important Presidential Policy. If you have any questions on UCSF's comments, please do not hesitate to let me know.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ruth Greenblatt', written in a cursive style.

Ruth Greenblatt, MD, 2015-17 Chair
UCSF Academic Senate

Encl. (2)

CC: David Teitel, Vice Chair, UCSF Academic Senate
Stuart Gansky, UCSF COR Chair
Marek Brzezinski, UCSF R&J Chair