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Secrecy Order for Patents - April 2012

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AAU Association of American Universities
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Attn: Jim Moore

Re: 77 FR 23662 (April 20, 2012)

“Notice of Request for Comments on the Feasibility of Placing Economically Significant Patents Under a Secrecy Order and the Need to Review Criteria Used in Determining Secrecy Orders Related to National Security”

This is in response to the April 20, 2012 Federal Register Notice requesting comments on the possibility of placing economically significant patents under a secrecy order. This proposed approach would mean that the Federal government would “identify and bar from publication and issuance certain patent applications as detrimental to the nation’s economic security.”

The Council on Governmental Relations (COGR) is an association of more than 185 U.S. research universities and their affiliated academic medical centers and research institutes. COGR 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. The Association of American Universities (AAU) is an association of 59 U.S. and two Canadian research universities organized to develop and implement effective national and institutional policies supporting research and scholarship, graduate and professional education, undergraduate education, and public service in research universities.

America’s universities are the principal source of fundamental research that expands the frontiers of knowledge and produces discoveries that enhance national security, strengthen economic competitiveness, and enhance the lives of our citizens. Through technology transfer, fundamental university discoveries are moved into the commercial sector for development into useful products. The patent system is an integral part of this process. In recent years well over 3000 patents have been awarded annually to U.S. universities.

The purpose of the patent system is to promote the progress of science and the useful arts. In return for public disclosure, inventors are provided the right to exclude others from making, using, selling or importing a patented invention for the term of the patent (in the U.S. usually 20 years from the date the patent application was filed). Essential to this concept is that the inventor’s right is provided by the government in return for sharing the invention with the public, in order to advance innovation.

We are concerned that the proposal to place economically significant patents under secrecy orders threatens this basic bargain. The proposal would undermine the patent system. Currently secrecy orders are placed only in very limited circumstances where the government determines that national security is at stake. Broadening this exception to encompass patents deemed to be economically significant would deprive U.S. inventors and

innovators of new technical information vital to U.S. economic progress and competitiveness in today's knowledge economy.

We also believe that the concept of determining what patent applications might be detrimental to U.S. economic security is fraught with problems. Typically only in hindsight is the economic significance of new innovations clear. Examples abound. It is not clear what criteria should be used to make such determinations in advance or how government agencies would have the capabilities to make such determinations. Given these issues, and the threat to U.S. innovation and competitiveness that would be raised by such a process, we believe the proposal should be rejected.

We agree that patent pendency is a problem, and note that USPTO has been moving aggressively to address this problem, including implementation of the new prioritized examination procedure provided by the America Invents Act. We believe these procedures offer better mechanisms than the highly problematic imposition of government secrecy orders to address concerns about potential threats to U.S. economic security raised by the publication of patent applications after 18 months.

Sincerely,



Hunter R. Rawlings III
President
Association of American Universities



Anthony DeCrappeo
President
Council on Governmental Relations