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October 11, 2005

Ms. Amy Williams
Defense Acquisition Regulations Council
OUSD (AT&L) DPAP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

Dear Ms. Williams:

The proposed rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) published in the Federal Register on July 12, 2005, requests comments on the proposed requirements for preventing unauthorized disclosure of export-controlled information and technology under DOD contracts. It contains a new DFARS Subpart 204.73, Export-Controlled Information and Technology at Contractor, University, and Federally Funded Research and Development Center Facilities and an associated contract clause.

The Council of Graduate Schools (CGS) is an organization of over 460 institutions of higher education in the United States, Canada, and other countries engaged in graduate education, research, scholarship and the preparation of candidates for advanced degrees.

Graduate students play a fundamental role in the conduct of research that occurs at U.S. research universities. The participation of international students and foreign scholars in the university research enterprise is a critical component of both our economic vitality and our national security. Increasing international competition for international students, particularly in science, technology, engineering and mathematics (STEM) fields and declining numbers of U.S. students pursuing graduate education in these fields threatens our continued economic preeminence. Recent CGS data show that U.S. international graduate applications for Fall 2005 decreased by 5 percent as compared to Fall 2004 following a 28% decline from the previous year.

CGS recommends that the proposed rule to prevent unauthorized disclosure of export-controlled information and technology be viewed in the larger context of its potential impact on higher education, economic competitiveness and national security. We would point to not only the potential for a negative impact on university research but also to international educational exchanges as an important means of increasing the understanding of U.S. values and reducing threats from terrorists.

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In our view, a tighter regulatory regime on export-controlled information and technology under DOD contracts has the potential to have a negative impact on university research, creating the perception that U.S. universities are less welcoming to international graduate students and researchers and for accentuating the declining number of international graduate students in U.S. universities.

We note that visa and classification processes exist to address concerns about the potential for transfer of any sensitive technologies at universities. There is already a significant layer of protection against the misuse of U.S. technology by international graduate students and scholars at our nation's institutes of higher education.

Specific comments follow:

Existing rules and policies are not recognized in the proposed rule

The proposed rule fails to acknowledge existing national and DOD policies that directly impact the proposed rules. National Security Decision Directive (NSDD) 189, issued by the Reagan administration in September 1985, established the federal government's policy for controlling information and technology developed through federally-funded research universities and research institutions. NSDD 189 acknowledges the "classification" system as the mechanism for controlling information and technology developed through federally funded research at universities and research institutions and was reconfirmed by the current Administration in November 2001.

The proposed change to DFARS Subpart 204.73 does not explicitly reference applicable exclusions from export controls, such as that for information arising out of or resulting from fundamental research, or the exemptions from licensing requirements. Failure to do this could result in an interpretation of the rule as applying export control requirements as a matter of contract to information and technology used or generated in the performance of the contract, even when application regulations would not apply controls.

The potential impact of this requirement is detrimental to national security because universities would be discouraged from conducting DOD-funded research in order to avoid having to preclude the participation of foreign students and researchers in such research. Creating segregated work areas and laboratories where domestic and international students must be segregated presents serious operational challenges for graduate programs.

The proposed rules should be revised to specifically recognize existing policies and requirements to avoid ambiguity and confusion.

The proposed rule requires new compliance obligations for DOD contractors

Universities receive a significant amount of research funding through DOD contracts, often in the form of subcontracts from defense prime contractors. The proposed rule specifies requirements for access to export-controlled information and technology.

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Among other things, the proposed requirements specify the access control plan shall include unique badging requirements for foreign nationals and foreign persons and segregated work areas for export controlled information and technology. The proposed rule change further specifies that contractors shall not allow access by foreign nationals or foreign persons to export-controlled information and technology without obtaining an export license, other authorization or exemption.

The badging and segregation requirements may result in universities declining to conduct research or a reduction in the open, collaborative and international research environment that has supported the productivity and success of the U.S. academic research enterprise.

International Graduate Students and Scholars are Critical to U.S. Research in Key Fields

DOD implementation of the proposed rules may adversely affect U.S. competitiveness and national security. Universities are likely to be discouraged from conducting DOD-sponsored research in order to avoid having to preclude the participation of foreign nationals. In fall 2004, *50 percent of students in engineering graduate programs were non-U.S. citizens as were 41 percent of graduate students in physical sciences.*

DOD requirements should recognize the important contributions of international graduate students and scholars to cutting edge research, competitiveness and national security.

We have seen no evidence that existing visa and classification processes fail to adequately address concerns about the potential transfer of any sensitive technologies at universities. Extensive background checks are already conducted on foreign students and scholars entering the U.S. to study and conduct research. The visa screening process has been under ongoing review and improvement to make it more effective and efficient. Once cleared to enter through this process, foreign students and researchers should be permitted to fully participate in the academic research community. We believe caution is advised in terms of implementing further restrictions on the individual's ability to participate in the conduct of fundamental, unclassified research, that would result from the badging requirements and segregated work areas for foreign nationals and foreign persons as prescribed in the proposed rule.

DOD Proposed rules are premature

Currently, the Department of Commerce Bureau of Industry and security (BIS) is considering hundreds of comments submitted in response to its Advanced Notice of Proposed Rulemaking concerning the correct interpretation of the deemed exports requirements for use and technology in fundamental university research and other contexts.

We recommend that further action on the proposed DOD rule be halted until issues surrounding interpretation of the Department of Commerce initiative is clarified.

In summary, CGS recommends balancing very real national security concerns with maintaining the nation's economic competitiveness and a robust graduate education enterprise. International students and scholars are important contributors to graduate education, research and scholarship. Their contributions should be supported and enhanced.

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Thank you for the opportunity to comment on the proposed rules to amend DFARS.

Sincerely,

A handwritten signature in black ink, appearing to read "Debra W. Stewart". The signature is written in a cursive style with a large, sweeping initial "D".

Debra W. Stewart
President