



October 12, 2005

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

**Association of
American Medical Colleges**
2450 N Street, N.W., Washington, D.C. 20037-1127
T 202 828 0400 **F** 202 828 1125
www.aamc.org

Jordan J. Cohen, M.D.
President

***By Electronic Mail to dfars@osd.mil
Subject: DFARS Case 2004-D010***

Dear Ms. Williams:

I write on behalf of the Association of American Medical Colleges (AAMC) in response to the request for comments on the Department of Defense's proposed rule "Defense Federal Acquisition Regulation Supplement; Export-Controlled Information and Technology", appearing in the Federal Register on July 12, 2005 (70 FR 39976) [hereinafter proposed rule]. The AAMC is a non-profit organization representing all 125 U.S. accredited allopathic medical schools, some 400 major teaching hospitals, and 94 academic and professional societies representing 109,000 faculty members. The proposed rule invites comments on the Department of Defense's proposal to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to address requirements for preventing unauthorized disclosure of export controlled information and technology under DoD contracts.

The proposed rule, if adopted, will further erode protections vital to the health of the research community in the U.S. These protections, explicitly supported by federal policy up until the present, are essential not only to the vitality of our scientific community and the advancement of science but to the security, health, and welfare of the country.

The proposed rule is characterized as providing "general information on export control law and regulations" (Section 204.7302), yet it fails to include a single reference to the fundamental research exclusion. This ominous omission is the principal focus of our comments.

Since 1985, the federal government has recognized that classification is the only appropriate method of restricting information and technology developed in federally funded fundamental research activities carried on in academic institutions. NSDD 189, initially issued by President Reagan and most recently affirmed by the current Administration in 2001, has been a source of protection and strength for the fundamental research enterprise in the U.S. Current export control regulations, EAR and ITAR, embody this protection of research in the fundamental research exclusion, which exempts from export licensing requirements the fundamental research activities carried on in academic institutions.

DoD Instruction 5230.27 also contains a similar protection: “The mechanism for control of information generated by DoD-funded contracted fundamental research . . . under contract or grant at colleges, universities, and non-government laboratories is security classification. No other type of control is authorized unless required by law.” Thus the sole mechanism for restricting fundamental research carried on pursuant to federal grant or contract is classification, not contract clauses inserted, according to the words of the proposed rule, “in solicitations and contracts for (a) Research and development; or (b) Services or supplies that may involve the use or generation of export controlled information or technology.”

The proposed rule, as written, applies to all solicitations and contracts involving “research and development”, and is not limited only to those that may involve the use or generation of export controlled information or technology”. Even restricting the clause only to those contracts that “may” involve the use or generation of export controlled information or technology would be overly broad. Academic medical centers fear that the clause will be automatically included by contract officers in every DoD research contract and will amount to a contractual obliteration of the fundamental research exemption that is embodied in the allegedly controlling export control regulations. Such clauses will be difficult, if not impossible to negotiate out of DoD contracts. Even if they can be eliminated in a negotiating process, the necessity for doing so adds time and strain on an already strained research process.

The resulting contractual trumping of national policy is not only anomalous; it is destructive of the very scientific activity that the U.S. must encourage in order to maintain scientific and national leadership. No statement of reassurance exists in the proposed clause that asserts if a contract were only for fundamental research, it would not be affected by the proposed clause. Also, the proposed rule misleadingly indicates that it is a “clarification of existing obligations” [Supplementary Information, Section B]. This clearly is not the case, in light of the absence of reference to the fundamental research exclusion. The proposal in fact extends rather than clarifies existing obligations.

Under the Advanced Notice of Proposed Rulemaking issued by the Bureau of Industry and Security of the Department of Commerce, if a research tool is controlled for use technology, its use in fundamental research by a foreign national is a “deemed export” that requires licensure. This ANPR generated hundreds of comments from academic institutions, national education and scientific organizations and societies, and industry. A constructive dialogue between BIS and representatives of academia is taking place in an effort to accommodate compelling concerns and achieve resolution of the interpretation of the deemed exports requirements for equipment use and technology in fundamental university research as well as in other contexts. Because the status of use in fundamental research by foreign nationals (students and scholars) of equipment controlled for use technology remains uncertain, the DoD proposed rule, imposing a related contract clause, is premature, as well as overly broad. If the current dialogue with BIS fails to clarify the deemed export provisions, the impact of the DoD proposed rule will be even more problematic for those very universities and medical schools that are in the best position to accomplish the research.

Defense Acquisition Regulations Council

Attn: Ms. Amy Williams

October 12, 2005

Page 3

At most, the Department of Defense should substitute for this misguided and overreaching proposal a clause that simply notes the contractor's existing responsibilities under applicable export control law and regulations. This is the only appropriate approach to accomplish the stated objective of "clarifications of existing responsibilities".

Failing that, the proposal must be modified as recommended by the comments submitted on the proposed rule by the Council on Governmental Relations. Should the Department proceed with some version of its proposal, it is critical that any export controlled information or technology be identified in advance and noted in the contract by DoD, rather than leaving the institution to make the identifications at its peril.

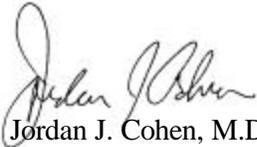
The imposition in the rule of specific elements of "an effective export compliance program", e.g., unique badging requirements and segregated work areas, goes beyond current requirements in the regulations and will result in disruption and distortion of the work environment necessary to conduct fundamental research. This environment is necessarily characterized by openness, collaboration, and interactions in which both U.S. citizens and foreign nationals participate.

The O.I.G. report on which the proposed clause is predicated is wrong in its assertion that universities are unaware of their export control obligations, and it represents a serious misunderstanding of what the effects of the proposed clause would be if it were put into effect as proposed. The collaboration essential to the conduct of science will suffer, and correspondingly, the country will suffer. The consequences for science and for the general health of the research enterprise are such that many universities and academic medical centers will fail to partner with DoD because the costs to the advancement of knowledge, one of the purposes for which they exist, are too high.

We join our colleagues at the Council on Governmental Relations and Association of American Universities, whose comments we support and endorse, in urging the Department to withdraw this proposal in its entirety or to modify it as recommended in the comments of the Council on Government Relations.

Thank you for your consideration.

Sincerely,



Jordan J. Cohen, M.D.