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

Dear Ms. Williams:

Please find below my comments on the Notice of Proposed Rulemaking to amend the Defense Federal Acquisition Regulation Supplement (DFARS) published on July 12, 2005, in the Federal Register (DFARS Case 2004-D010). The comments relate to the recommendations made in the U.S. Department of Defense (DoD) Office of Inspector General (OIG) report dated March 25, 2004, entitled "Export-Controlled Technology at Contractor, University, and Federally Funded Research and Development Center Facilities (D-2004-061)." The proposed rule contains a new DFARS Subpart 204.73 and an associated contract clause (DFARS Part 252.204—70XX) that is to be added to DoD contracts where export-controlled information or technologies may be involved. As President of The University of Texas at Austin, I appreciate the opportunity to share my views on issues that are critical to the competitiveness and security of the nation and to the health of academic research institutions.

The University of Texas at Austin is a major research university with membership in the Association of American Universities. It is composed of 16 colleges and schools, and more than 90 research units at the main campus, the J.J. Pickle Research Campus in Austin, the Marine Science Institute at Port Aransas, Texas, and the McDonald Observatory near Fort Davis, Texas. Its enrollment is among the largest for single-campus universities in the United States. Fall 2005 enrollment is 49,800 students coming from all counties in Texas, all 50 states, and more than 100 foreign countries. At any given time, approximately 1,300 undergraduates and 3,000 graduate students attending the University are foreign nationals.

The University's research expenditures in fiscal 2004-2005 exceeded $380 million. As an institution that performs a wide variety of research, including classified research, our faculty, researchers, and administrators are aware of the need to protect sensitive information that can aid the cause of terrorism or industrial espionage. The University supports and actively maintains a security apparatus to protect classified research. At the same time, our ability to nurture and maintain a culture of openness that encourages the free exchange of ideas emerging from fundamental research has been the key to our success and, I believe, to the success of all research universities in the nation. Thus, while I support the implementation of effective strategies aimed at reducing the risk of research being used to support terrorism or industrial espionage, it is vitally important that we also work diligently to protect the ability of our research universities to continue to attract the best minds from around the world. The competitiveness and economic health of our nation depends on it.

The OIG report recommendations and the proposed rule are of great concern to academic research universities. The proposed DoD language will require that an onerous clause be inserted in university based contracts and subcontracts when contracting officers believe that export controlled information or technology may be involved. The clause as currently written could result in significant confusion among DoD contract officers and university grant administrators, protracted contract negotiations, delays in research, and overly broad applications of controls to university based research. The proposed rule could discourage universities from conducting DoD-funded research.

A critical flaw in the OIG report is the failure to recognize the fundamental research exclusion that protects fundamental university research from export control licensing requirements. National Security Decision Directive (NSDD) 189, issued by the Reagan Administration in September 1985, and reaffirmed by the current Administration in November 2001, established the federal government's policy for controlling information and technology developed through federally funded research at universities and research institutions. This policy states that the federal government's mechanism for controlling information generated through federally funded research (to the extent it is deemed to be sensitive for national security reasons) is the "classification" system. By failing to expressly recognize the fundamental research exclusion from export controls, the proposed contract provisions will, at best, create ambiguity, and have the potential to subject all DoD-funded research at universities to export control regulations. This proposed rule could also result in DoD's own contracting officers violating existing policy contained in DoD instruction 5230.27. Section 4.3 states, "The mechanism for control of information generated by DoD funded, contracted fundamental research

in science, technology and engineering performed 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."

Additionally, the proposed rule prescribes very specific processes and mechanisms to control export-controlled information and technology. The proposed rule requires access control plans that include badging requirements and segregated work areas for foreign nationals for access to export-controlled information and technology. This requirement goes beyond the requirements under the National Industrial Security Program Operating Manual for handling of classified materials which provides for unique badging, segregated work areas and other measures as appropriate, rather than imposing a blanket requirement. It is unclear how this recommendation to implement security badging systems or change the configuration of open university laboratories and buildings to provide secure work areas would be implemented and who would pay the high costs. Most importantly, implementation of this proposed rule will predictably lead to a decline in the number of foreign national students and scholars at U.S. research universities, thus depriving the nation of access to the world's "best and brightest." Foreign students and scientists have historically played an important role in the development of U.S. science and engineering. Since 1990, almost half of the U.S. Nobel laureates in science fields have been researchers born in foreign countries. Thus, it is vitally important that any rulemaking or action by the Department of Defense regarding export control take into consideration our nation's broad strategic goals.

Lastly, I would suggest that the proposed rule is premature. As you are most likely aware, the U.S. Department of Commerce Bureau of Industry and Security (BIS) is currently considering hundreds of comments received in response to its Advanced Notice of Proposed Rulemaking (ANPR; RIN 0694-AD29---Fed. Reg. 3/8/05) concerning the correct interpretation of the deemed exports requirements for equipment use technology in fundamental university research and other contexts. The business and university communities are currently engaged in a dialogue with Commerce about these comments and the BIS response. It is also my understanding that the National Science and Technology Council working group on export controls is discussing these issues within the government. The Commerce Department administers the Export Administration Regulations (EAR) and the State Department administers the International Traffic in Arms Regulations (ITAR). The proposed contract clause will bind universities to comply via contract with terms that exceed the requirements of existing export control regulations (e.g., EAR, ITAR). In light of these current on-going conversations, it might be prudent for other federal agencies to await guidance on the correct interpretation of regulatory provisions that are the subject of considerable

controversy prior to attempting to impose related contract provisions. The proposed DoD rule might be substantially impacted by further proposals from BIS in response to the ANPR or other government policy developments.

In closing, I would like to reiterate that The University of Texas at Austin is supportive of the efforts of the Department of Defense to address the issue of export control and national security. However, I am of the opinion that the OIG's recommendations may not be properly aligned with the nation's long term security and economic objectives. Thus, I urge the Department of Defense to carefully review, evaluate, and assess the recommendations and proposed rule in light of the concerns noted above.

Thank you for the opportunity to comment

Sincerely,

Larry R. Faulkner
President

cc: Dr. Juan M. Sanchez