



# UNIVERSITY OF MARYLAND

OFFICE OF THE PRESIDENT

Main Administration Building  
College Park, Maryland 20742  
301.405.5803 TEL 301.314.9560 FAX

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

By Facsimile to: 703-602-0350

RE: DFARS Case 2004-D010

Dear Ladies and Gentlemen:

I write on behalf of the University of Maryland in response to the request for comments on the proposed Department of Defense rulemaking on export controls. The Rulemaking is DoD's response to the audit report issued in March 2004 by the Office of the Inspector General for the Department.

Issues regarding export control laws and regulations have taken on increased importance in the last few years, most recently in connection with the Department of Commerce proposed recommendations of new interpretations of deemed exports.<sup>1</sup> I and others have voiced concerns about the impact that these new interpretations will have on university research, science and technology, and our national security. The DoD Rulemaking raises the same basic concerns but raises two even more basic questions:

Why is DoD focusing on contract acquisition clauses when it does not have policies and practices in place to specify to contractors the information they are receiving from DoD that is export-controlled?

Why is DoD proposing changes now, before Commerce has had time to consider fully the volumes of comments it received in response to its proposed rulemaking?

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<sup>1</sup> My remarks to the National Academy of Sciences Workshop on Export Controls and to the National Science and Technology Council Task Force on Export Controls and other papers and comments on export controls issues are available on the American Association of Universities web site, <http://www.aau.edu/research/traffic.cfm>. The comments received by Commerce on its proposed rulemaking are posted on its Freedom of Information Act page at <http://www.bxa.doc.gov/foia/Default.htm>.

DFARS Case 2004-D010  
Comments of the University of Maryland  
October 12, 2005  
Page 2 of 7

I can discern no reasonable answer to either question. Therefore, I urge DoD to delay this rulemaking until:

- DoD implements effective internal procedures for identifying and handling DoD unclassified, export-controlled technology and technical data, and
- DoD develops effective internal procedures for identifying and handling contracts to conduct fundamental research, and
- Commerce resolves the questions about deemed exports, equipment use technology, and the fundamental research exclusion with business, academia, and other government agencies, including DoD.

If the Rulemaking is postponed until these actions are completed, I believe DoD will propose a simpler and more narrowly tailored clause, along with specific instructions to contract officers on its use.

#### **DoD Should Implement an Internal Export Control Compliance Program Before Proceeding with This Rulemaking**

The stated goal of the DoD Audit Report was to "evaluate the adequacy of DoD policies and procedures regarding export-controlled technology to prevent the transfer of technologies and technical information with potential military application to countries and entities of concern." The Audit concluded that DoD's policies are "inadequate" and DoD should establish a compliance program that includes policies and procedures to identify export-controlled technology and information. This is key.

In reaching that conclusion, the DoD OIG compared DoD policies and practices regarding classified information to those for unclassified export-controlled technology and information. With respect to classified information, the DoD OIG cited the National Security Program, the National Industrial Security Program Manual, and the 5000 series in DoD's acquisition guidance. These documents establish a program to protect classified information and assign responsibility to specific persons to develop and implement appropriate procedures to protect such information. The 5000 series assigns responsibility to DoD program managers to identify classified information early in the research process and develop appropriate plans to protect against unauthorized access to and disclosure of such information in cooperation with security, intelligence and foreign disclosure personnel. This is very good common sense.

In contrast, the DoD OIG found DoD has *no* guidance for identifying and protecting unclassified export-controlled technology and information. The Audit Report noted that the DoD Directive "International Transfers of Technology, Goods, Services and Munitions" does not require a plan for identifying export-controlled technology let alone assign responsibility to particular DoD personnel to identify such technology or information, either alone or in cooperation with others. As a result, the Directive also does not require DoD to mark export-

DFARS Case 2004-D010  
Comments of the University of Maryland  
October 12, 2005  
Page 3 of 7

controlled technology or information or specify on what basis the information is controlled before disclosing it to contractors. How can it control technology that it has not identified?

DoD cannot have an export control program if it is not able to identify its own export controlled technologies and data or specify to contractors what specific information and technology DoD furnishes to them is controlled and the specific basis of that control. More importantly, DoD should not require contractors to adopt specific export control measures until DoD can provide such information. While the proposed clauses require DoD contract officers to "ensure that contracts identify any export-controlled information and technology," DoD does not have the capacity to do it. Moreover, the proposed clauses require DoD contract officers to include the proposed solicitation clauses in research and development contracts that "may involve" export-controlled technologies and information. What does that mean? The proposed solicitation clauses do not refer to information or technology DoD has identified as controlled but rather advises contractors "[i]n performing this contract, [you] may gain access to export-controlled information." Whose responsibility is it to identify export-controlled technology? Until DoD has a process in place to identify controlled information and technology and unless the clauses are modified to identify specific export-controlled information and technology that contractors *will* receive from DoD, contractors would be responsible for deciding if they have received export-controlled technology or information from DoD. Realistically, how can contractors be given this responsibility if DoD itself cannot identify controlled technologies? This is not responsible policy.

It is not enough for DoD to develop a policy and practices for identifying controlled technology and information. An effective DoD export control compliance plan should also include practices for identifying fundamental research and ensuring such research contracts do not contain restrictive contract clauses that impede its conduct. It is particularly important to implement such practices given DoD's commitment to fundamental research.

Last month, DoD issued DoDI 3210.1, "Administration and Support of Basic Research by the Department of Defense." That instruction defines basic research as "[s]ystematic study directed toward greater knowledge or understanding of the fundamental aspects of phenomena and of observable facts without specific application towards processes or products in mind." The Instruction goes on to pronounce basic research is, as a matter of DoD policy, "essential to [DoD's] ability to carry out its missions" because basic research is:

- A "source of new knowledge and understanding that supports DoD acquisition and *leads to superior technological capabilities* for this military and
- An *integral part of the education and training of scientists and engineers* critical to meeting future needs of the Nation's defense workforce."

I agree with this policy. However, the proposed DoD acquisition policies and practices do not support that basic research policy because they do not acknowledge the basic research mission.

DFARS Case 2004-D010  
Comments of the University of Maryland  
October 12, 2005  
Page 4 of 7

As noted in the DoD report, DoD contracts often include clauses forbidding the participation of foreign nationals, restricting publication of research results, or requiring contractors to provide documentation on the citizenship and employment eligibility of every participant in a research project. These clauses violate university policy on openness in research, violate DoD's own policy on basic research, and ignore the fundamental research exclusion.

In our experience, these restrictive clauses are often included without considering the nature of the research or their effect on export controls. Two weeks ago, we received a DoD contract for a proposed research project that fell within the DoD definition of basic research and the EAR and ITAR definitions of fundamental research but that contained a clause giving the contract officer a right of prior approval of scholarly publications. Members of our research office discussed this with the contract officers. The primary justification given for the restrictive publication clause was a need to ensure nothing negative is said about DoD. National security and export control were not considerations behind insertion of the clause requiring prior approval of publication of basic research findings. The clause was inserted without valid basis, and it has not been deleted even though the University will have to reject the contract if it is not.

That case is not an isolated one. Restrictive clauses are frequently included in research contracts and subcontracts that qualify as basic or fundamental research in direct contradiction to DoD's own policies. These restrictive clauses interfere with the capability of universities to educate scientists and engineers and serve the nation's scientific and engineering needs to maintain our strength. DoD understands that basic research is critical to our national security and understands the damage caused by restrictive clauses that work against our national effort, but still they are inserted in basic research agreements.

Foreign nationals have been and continue to be critical to this country's scientific strength, a key element of national security. We cannot rely on American citizens alone to satisfy our needs for scientists and engineers. Numerous reports issued by the National Academies, National Science Board, and the President's Council of Advisors on Science and Technology,<sup>2</sup> among others, document the critical importance of foreign nationals in developing and sustaining this country's national security and its scientific and economic superiority. The reports also demonstrate that this superiority is fragile. Including restrictive

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<sup>2</sup> *Policy Implications of International Graduate Students and Postdoctoral Scholars in the United States*, National Research Council (2005). [http://www7.nationalacademies.org/internationalstudents/Intl\\_news.html](http://www7.nationalacademies.org/internationalstudents/Intl_news.html); *An Emerging and Critical Problem of the Science and Engineering Labor Force, A Companion to Science and Engineering Indicators 2004* (NSB 04-07) (January, 2004) <http://www.nsf.gov/sbe/srs/nsb0407/start.htm>; and *Sustaining the Nation's Innovation Ecosystem: Maintaining the Strength of Our Science Engineering Capabilities* (June 2004). <http://www.ostp.gov/pcast/FINALPCASTSECAPABILITIESPACKAGE.pdf>

DFARS Case 2004-D010  
Comments of the University of Maryland  
October 12, 2005  
Page 5 of 7

clauses in contracts to perform fundamental unclassified research severely limits participation of foreign nationals at a time when we need to identify ways to encourage the best and brightest in fields of science and engineering from all countries to study in the U.S., work in the U.S., and stay in the U.S.

DoD's Proposed Rulemaking, if adopted without change, does not support basic research for DoD. The proposed clauses do not acknowledge the fundamental research exclusion or export control license exceptions. They contain no requirement to identify fundamental research and no guidance for contract officers on designating research as fundamental or instructions on when restrictive clauses are justified. If DoD does not develop processes for identifying fundamental research and ensuring contracts for fundamental research are free of all restrictions on participation, access, publication and related issues, more and more contracts will be converted from contracts for fundamental research to controlled projects. These observations demonstrate conflicts between the proposed changes and longstanding DoD policy and purposes.

Universities will be unable to accept contracts with restrictions that violate openness in research and/or limit the ability of foreign national students, post docs, and faculty to participate in fundamental research. Last year Maryland declined to accept three government contracts because they contained restrictions that violate fundamental tenets of academic policy, and we will have to continue to do so when unjustifiable restrictions are included. I am confident that other first-class universities will respond similarly.

#### **DoD Should Delay Its Rulemaking In the Light of the BIS Rulemaking**

The Inspector General for Commerce issued its report on deemed exports in March 2004. The report recommended a drastic reduction in the scope of the fundamental research exclusion, the imposition of a license requirement on the disclosure of equipment "use" technology to foreign nationals, and consideration of a foreign national's country of birth in deciding if an export license is required. One year later, Commerce issued a Federal Register notice requesting comments on those recommendations.

The recommendations were sufficiently contrary to long-standing practices and understandings about deemed exports and fundamental research in the business and academic communities that the Bureau of Industry and Security received more than 300 comments, an unprecedented number. The comments contained ample evidence that, if adopted, the recommendations would damage national and economic security and our nation's intellectual strength—the true sources of our security in the world today. Commerce has been reviewing and discussing the comments with interested groups representing industry and academia and working to address and resolve their questions and concerns.

Before proceeding with this Rulemaking, DoD should review the comments Commerce has received. The departments appear to be proceeding unnecessarily down separate tracks. Without adequate coordination and given the complexity and vagaries of

DFARS Case 2004-D010  
Comments of the University of Maryland  
October 12, 2005  
Page 6 of 7

export control regulations, it is likely the two departments will produce regulations and statements that are inconsistent and contradictory in parts on the meaning and application of export control regulations and even on the role of the Departments in identifying and safeguarding export controlled information. These inconsistencies will diminish the credibility and clarity of national export control policy.

In an area as important as national and economic security, it surely behooves us to speak with one voice. DoD should delay its rulemaking to study the Commerce rulemaking process, coordinate efforts with Commerce, and participate in the ongoing discussions occurring between and among Commerce, the National Academies, and interested parties. If policy differences between the Departments are ultimately unavoidable, they should be few, clear, and easily highlighted to ensure a consistent policy.

### **The Proposed Amendments Are Unnecessary and Ambiguous**

A standard export control clause is not necessary unless the project is export-controlled and in those situations the only clauses truly needed are those that expressly identify the specific technology and information that is export-controlled and the basis for that determination.

Prescriptive clauses mandating the badging, branding and segregation of foreign nationals are neither needed nor wise. The University of Maryland, like many American research universities, places a high priority on national security. We have implemented an export control compliance program to protect national security. Our program consists of face-to-face training for academic deans, directors, department heads, business officers, faculty, research officers and selected procurement officers. It includes on-line information, guidance, and protocols about export controls. The program requires all researchers and research officers to assess all University-administered research proposals, technology transfer licenses and nondisclosure agreements for export control issues using a set of "red flags" we have developed. The existence of a single red flag in any agreement triggers a detailed, University export control review.

When our review results in the determination that a research contract includes export-controlled activities and/or is not export-controlled but nonetheless requires restrictions that conflict with University policy or violate the exclusion for fundamental research, the University normally rejects the contract. On rare occasions, the University decides to accept a project that requires a researcher to receive export-controlled technology or technical data but only when the information is provided as background data to the principal researcher and is not required to perform the research. In these situations, University research officers (who receive export control training throughout the year) discuss export control obligations directly with the principal researcher for the project, help devise and implement an export control plan to protect against access to controlled technology or data by unauthorized foreign nationals, and obtain the certification of the principal investigator and of others

DFARS Case 2004-D010  
Comments of the University of Maryland  
October 12, 2005  
Page 7 of 7

working on the project to abide by the plan. These must be exceptional circumstances for the university to complete its education and research missions.

The goal and effect of the University's export control compliance program are to prevent unauthorized access by foreign nationals to controlled technology and technical data and to impose appropriate safety measures in projects requiring access to export controlled technologies and information. The EAR and ITAR require nothing more. The proposed DFARS clause that would prescribe a one-size fits all security plan is unnecessary and disruptive without contribution.

To proceed with this Rulemaking, the DoD must make clear the limited circumstances to which the proposed clauses apply. Specifically, the clauses should be used only in contracts, *not grants*, and only in those contracts that require DoD to disclose export-controlled technology or information to contractors. The University endorses the comments and proposed modifications submitted by the Association of American Universities and the Council on Government Relations. The COGR comments offer line-by-line suggestions for modifications to the language of the proposed DFARS Part 204.73 and proposed 252.204—70XX clause. The University endorses those suggestions, which, if adopted, will result in more understandable and less ambiguous language that will protect national security while preserving the goal of fundamental research in our nation's research program.

We appreciate the opportunity to comment on this important matter and are willing to work with DoD in addressing the concerns raised in the DoD Audit Report.

Sincerely yours,



C. D. Mote, Jr.  
President and  
Glenn L. Martin Institute Professor of  
Engineering  
University of Maryland