

THE  
**GRADUATE**  
**SCHOOL**  
 UNIVERSITY OF WISCONSIN-MADISON

October 7, 2005

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

Re: DFARS Case 2004-D010  
 Proposed Rule Regarding Export-Controlled Information and Technology

Dear Ms. Williams:

Please accept the following comments of the University of Wisconsin-Madison ("UW-Madison") with respect to the above-referenced rule-making proposal and its accompanying proposed new DFARS clause. The proposed rule will require a specific clause to be inserted in solicitations and contracts for research and development, or contract for services or supplies that may involve the use or generation of export-controlled information or technology. The provisions of the clause would require universities, as condition of receiving DoD research and development funding, to implement an export compliance program containing such specific elements as "unique badging requirements for foreign nationals and foreign persons," and "segregated work areas for export-controlled information and technology." While UW-Madison, like its peer institutions, strongly supports the role of the Department of Defense in protecting our nation, and takes export control compliance very seriously such that we are already expending considerable effort and resources to understand and implement the requirements of export control laws, there is no way to sugar-coat the fact that the proposed rule is unwise and unnecessary. It will create new, burdensome and unfunded compliance obligations, with no demonstrable benefit to national security. If anything, the proposed rule will negatively impact national security by further reinforcing the growing perception of universities in the United States as unwelcoming destinations for foreign students and scholars, and thereby depriving universities in the United States of access to the best and brightest foreign researchers, and the new ideas and technological advances that they bring with them from overseas.

As an initial matter, UW-Madison fully endorses and supports the comments to this rule-making proposal submitted by the Council on Governmental Relations ("COGR"). COGR rightly notes that the timing of this proposed rule is premature, considering the on-going regulatory effort by the Department of Commerce to clarify the "deemed export" rule as it pertains to the use of equipment in fundamental research, and the review of national export control policy by the National Science and Technology Council. Additionally, COGR correctly states that the thrust of the proposed rule is contrary to national research and export control policy, as expressed in National Security Decision Directive 189 and incorporated into DoD Instruction 5230.27. Finally, COGR cites compelling data

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regarding the critical role that foreign-born students and scholars perform in advanced research, and identifies the complete lack of evidence that the existing export control mechanisms, supplemented by the comprehensive visa screening procedures now in effect, are insufficient to guard against the release of unclassified information to university students and scholars. Despite its obvious good intentions, this rule-making effort would truly cause more harm than it would prevent.

Please accept the following comments by UW-Madison, above and in addition to those offered by COGR.

1. The requirement that universities establish "segregated work areas" for export-controlled information or technology is simply unworkable in practice for most institutions, and will inevitably prevent many first-rate universities from conducting research for the Department of Defense.

Most campus facilities in which research is conducted are a mixture of classroom space, laboratory space, and office space, that are not readily segregated. Most research universities such as UW-Madison enroll thousands of foreign students and attract many foreign scholars, particularly in advanced fields of science and technology. Classroom instruction and laboratory research are inseparable. If export control laws applied to only a discrete set of information or technology, it might be a manageable proposition to create segregated work areas for this information or technology, such as is the case with research involving HHS/USDA "select agents." However, export control laws, and particularly the Export Administration Regulations ("EAR") with its catch-all "EAR 99" category, cover a vast array of information and commodities that are commonly available in the United States, most of which can be exported without a license to all but the few foreign nations subject to embargoes or similar sanctions.

A good example of the broad coverage of the EAR is laptop computers, which are ubiquitous on university campuses, but which are export-controlled with respect to countries such as Iran. Another example is technology for the disposal of certain microbiological materials (ECCN# 1E351), which is indistinguishable from technology for the disposal of garden-variety microbiological materials, and thus would be present in virtually any laboratory in the biological sciences. As a practical matter, all university research in fields of science and technology is likely to involve information or technology that is export-controlled in some fashion (even though much of this information or technology is controlled only for the embargoed or sanctioned countries). It is just not possible for universities to segregate all work spaces in which export-controlled information or technology may be present, because this would mean segregating many of the classrooms and laboratories on campus.

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The foregoing problem is greatly exacerbated by the fact that the requirements of the proposed DFARS clause would extend beyond DoD-funded activities. As COGR points out, the language in the proposed DFAR clause regarding "segregated work areas," etc., would for all practical purposes become a campus-wide requirement for all research facilities, or at a minimum those in which any DoD-funded research might be performed. That is because universities that receive DoD funding to which the proposed clause applies would be required to maintain an "effective export compliance program," that includes an "access control plan." The "segregated work areas" and "unique badging requirements for foreign nationals and foreign persons" are required elements of the "access control plan."

Most university facilities engage in research funded by a variety of sponsors, governmental as well as private. It is simply unworkable for universities to establish an access control plan for a laboratory or facility, containing the specific elements required by the proposed DFARS clause, which only applies to DoD-funded research. Thus, in order to accept DoD funding, universities must be prepared to construct "segregated work areas" and implement "unique badging requirements" for any facility or laboratory in which the research might be performed, regardless of what other research is conducted in that facility or laboratory. Even if universities would be willing to sacrifice their free and open environment in order to accept DoD funding, which many are not, the type of physical controls required by the clause would be extremely expensive to construct. Many universities, UW-Madison included, are suffering through an extended period of budget reductions, particularly with respect to administrative functions. If this rule-making effort proceeds without significant revision, the inevitable result is that there will be fewer and fewer institutions willing or able to participate in DoD-funded research activities.

2. "Segregated work areas" and "unique badging requirements for foreign nationals and foreign persons" are incompatible with the values of a free and open society, and as such should be limited to only the most sensitive information and technology.

Even if it would be physically and financially possible to establish "segregated work areas" and "unique badging requirements" within an open university environment, such restrictions are such a drastic departure from the established concept of the role universities are expected to perform in a free and open society that they should be reserved for only the most sensitive activities such as classified research. Academic freedom, freedom of association, freedom of speech, and the free exchange of ideas are among the core values and traditions that have enabled our nation's universities to be engines of scientific advancement to the envy of the rest of the world. "Segregated work areas" would inevitably isolate their inhabitants from the rest of the university community. "Unique badging requirements for foreign nationals and foreign persons" would serve as a scarlet letter to brand foreign students and scholars as untrustworthy and unable to contribute to the basic scientific principles of certain fields. Again, we are not talking about classified

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information here, and as NSDD 189 makes clear, the federal government always retains that option with respect to especially sensitive information or technology that may be used in university research activities. It would be most regrettable if our nation's response to external threats to national security is to sacrifice the very values and traditions that set the United States apart from those who would threaten us, all in the name of protecting information that is not even sensitive enough to merit security classification.

3. The proposed DFARS contract clause is likely to be misapplied because the instructions for when a contracting officer is to insert the clause in a solicitation or contract are extremely vague.

The instructions to the proposed DFARS clause state that Contracting Officers must include the clause in every solicitation or contract for research and development, regardless of the nature of the activity. Thus, if adopted, this clause will certainly be inserted in solicitations or contracts that do not in fact involve export-controlled information or technology beyond that controlled by the "EAR 99" category. Due to its highly intrusive and burdensome nature, application of this proposed clause should be limited to at most only those activities involving highly-sensitive information or technology, and Contracting Officers should be given explicit guidance as to when the clause is appropriate for a given activity, and when it is not.

Export control laws cover many varieties of information and technology, of varying degrees of sensitivity, and thus the "one-size-fits-all" approach of the proposed rule is inappropriate. For example, the "unique badging requirements for foreign nationals and foreign persons" and "segregated work areas" are grossly excessive for much of the information or technology covered by export control laws. As noted previously, "export controlled information or technology" encompasses such things as a laptop computer or hand-held personal data assistant ("PDA") that can be purchased off the shelf at an electronics store in a shopping mall, and obviously it would be absurd if an educational institution receiving a DoD contract would have to maintain all laptops and PDAs in segregated, access-controlled facilities. While the requirements of this clause may perhaps be appropriate for a few of the most sensitive military items that are covered by the ITAR, such as technology specific to a nuclear submarine propulsion system, they are completely inappropriate for the "dual-use" items covered by the EAR, most of which can be exported without a license to many countries. A good measure of the unreasonableness of the proposed rule is that, as COGR points out, these controls go beyond even the provisions of the National Industrial Security Program Operating Manual that apply to the handling and safeguarding of classified information.

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Additionally, both the EAR and ITAR contain a fundamental research exemption, which exempts from the coverage of the laws information that might otherwise be export-controlled. Moreover, both sets of laws contain various other exemptions and exceptions that are specific to colleges and universities. For example, the ITAR contains an exception to Technical Data licensing requirements for information provided by a university to non-U.S. persons from certain countries, who are full-time employees. Both laws contain exemptions for information released in the course of university instruction. Yet the proposed DFARS clause is silent as to how the applicability of the clause would be limited, if at all, when exemptions apply to all the information or personnel used in a research activity.

If DoD persists with this rule-making, the instructions to the clause need to be modified to provide Contracting Officers with guidance for when it is appropriate to insert the clause, so that it is not reflexively inserted into every DoD solicitation or contract. At a bare minimum, in order to be workable, the proposed rule must provide relief from the requirement for "segregated work areas" and "unique badging requirements" if a university can reasonably establish that the export controlled information or technology used in the particular research and development activity, or the contract for services and supplies, is not in fact covered by export controls, an exemption applies, or the information/technology is controlled at a very low level such as "EAR 99."

4. The requirements of the proposed DFARS clause would appear to constitute a specific access and dissemination control that would negate the fundamental research exemption.

Both the EAR and ITAR contain exemptions for fundamental research conducted by colleges and universities. However, under both laws, fundamental research does not include research that is subject to specific controls on access and dissemination to the results of the research. The requirement for "segregated work areas" would appear to constitute the sort of access control that negates the fundamental research exemption. At a bare minimum, the proposed rule must be clarified to specifically state that any access control plan required by the DFARS clause does not constitute an access or dissemination control for purposes of the fundamental research exemption.

5. The proposed clause should not automatically be inserted in subcontracts unless there has been a separate determination that the subcontracted work is also export-controlled.

The proposed DFARS clause contains a flow-down provision that requires a contractor to insert the clause in all subcontracts for research and development, or for services and supplies that may involve export-controlled information or technology. It is very common for a defense contractor to engage in export-controlled research, and to subcontract a less sensitive portion of the research to a university. A contractor would not have the

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discretion to leave the clause out of a subcontract even if it was evident that the subcontracted work was not export-controlled, and subcontractors are not typically permitted to directly appeal to a Contracting Officer for relief from inappropriate flow-down clauses. At a bare minimum, the proposed DFARS clause should be amended to permit subcontractor universities to directly appeal to the Contracting Officer for removal of this clause when it can be reasonably established that the subcontracted portion does not involve export-controlled information or technology, an exemption or exception is available, or the information or technology is controlled at a low level such as "EAR 99."

6. Summary.

In sum, UW-Madison echoes the perspective of COGR that the requirements of the proposed DFARS clause are unworkable in practice, inappropriate for the majority of export-controlled information or technology, incompatible with our national policy and values, and will only serve to further isolate the United States and weaken our national security. While we very much appreciate the role of the Department of Defense in maintaining the safety and security of our nation, and greatly value our research relationship with DoD, we strongly question whether the requirements of this clause are reasonable and necessary for the unclassified information and technology that are covered by the export control laws. If certain information and technology is so sensitive that segregated work areas and unique badging requirements are absolutely necessary, then this information or technology should simply be subject to an appropriate security classification.

Thank you for the opportunity to provide comments to this proposed rule.

Sincerely,



Martin T. Cadwallader, Ph.D.  
Dean and Vice Chancellor for Research



William S. Mellon, Ph.D.  
Associate Dean for Research Policy