

October 12, 2005

Defense Acquisition Regulations Council
OUSD (AT&L) DPDP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington DC 20301-3062

Re: **DFARS Case 2004-D010—Export-Controlled Information and Technology
(70 Fed. Reg. 39976, July 12, 2005)**

Gentlemen/Ladies:

Carnegie Mellon University (“CMU”) appreciates the opportunity to comment on the above-captioned proposed rule (“Proposed Rule”). CMU is an internationally recognized institution with a distinctive mix of world-class educational and research programs in computer science, supercomputing, robotics, engineering, the sciences, business, public policy, fine arts, and the humanities. More than 8000 undergraduate and graduate students at CMU receive an education characterized by its focus on creating and implementing solutions to solve real problems, interdisciplinary collaboration, and innovation.

A recently issued group of Inspector General reports has questioned the effectiveness of existing United States export controls. Such controls are administered by the Department of State (International Traffic in Arms Regulations) and the Department of Commerce (Export Administration Regulations). The Department of Defense advises the administering agencies on issues of what items should be subject to controls and what export transactions should receive government approval. In performing the latter role, DOD has the right to review any export license application. In practice, DOD reviews almost all the applications filed with the Commerce Department and many of those filed with the State Department. Thus DOD does not lack for a voice or involvement in the crucial aspects of the existing export control system.

The Proposed Rule is said to constitute a response to the IG reports. Unfortunately, the Proposed Rule would impose additional burdens, many of them inconsistent with the voluminous and complex export control regulations that already exist, that would weaken national security rather than strengthening it. Existing export controls—and the severe penalties that can be imposed for violations of those controls—already apply to DOD contractors and subcontractors. For this reason, CMU sees no need for the Proposed Rule. If DOD nevertheless feels impelled to promulgate a contract clause addressing the issue, CMU proposes language below that would make contractors’ export control responsibilities contractual as well as regulatory but would not impose new, confusing, and potentially destructive requirements.

Our comments on the specifics of the Proposed Rule are as follows:

Proposed Section 204.7302 states in pertinent part that “[a]ny access to export-controlled information or technology by a foreign national or a foreign person anywhere in the world, including the United States, is considered an export to the home country of the foreign national or foreign person.” First, where restrictions do exist, they are on *transfer or release* of information and technology to foreign persons, not *access to* information and technology. This is not a semantic difference and we propose (if any rule is to be adopted at all), that the phrase “transfer of” be substituted for “access to.” Second, the term of art employed in the EAR and the ITAR is “foreign person,” not foreign national. Using the latter term, whether or not in conjunction with the former, probably would expand export control coverage to tens of thousands of individuals who are not now covered, namely green card holders and those admitted to the United States under various asylum programs. Third, the quoted phrase, which attempts to state the deemed export rule, is likely to confuse readers into believing that such actions as the physical transfer of technology to a foreign country are *not* subject to export controls. Finally, and perhaps most important, not all transfers of technology to foreign persons are controlled. The quoted phrase thus is inconsistent in many respects with the EAR and ITAR and its promulgation would be a fertile ground for confusion, mischief, and overly burdensome regulation of those doing business with DOD.

Proposed Section 204.7303 requires contracting officers to “identify any export-controlled information and technology, as determined by the requiring activity,” that will or may be involved in the contract. For one thing, it is unlikely that many contracting officers possess the training or the ability to determine what data are controlled and which are not, let alone the specific control classifications into which data may fall, whether they are exempt from the EAR or ITAR, and whether they are eligible for license exceptions.¹ The “requiring activity” may know more generally about their data than the contracting officer but probably not when it comes to determining the classification of the data under the export control regulations. Thus listing errors inevitably will occur—probably with great frequency. Some may see the proposed listing requirement as helping contractors understand which data are controlled but each error on the part of a contracting officer effectively will create export control requirements inconsistent with those under the EAR and ITAR. Moreover, if particular data are controlled under the EAR or the ITAR, a contracting officer’s failure to list them probably will not protect the contractor from liability if the contractor exports controlled data that do not appear on the contract’s list.

The definition of “export-controlled information and technology” in proposed Section 252.204—70XX is confusing and overbroad. It is confusing because it likely will be read as including data that are exempt from the EAR and ITAR. There are many exemptions, including publicly available information, fundamental research, catalog courses in institutions of higher learning, and the like. It is overbroad because even if the exemptions are addressed (and the substitute proposal set out below would do this), it includes considerable volumes of technology

¹ By way of example, the EAR has about twenty license exemptions. See 15 C.F.R. pt. 740 (2005).

that are eligible for license exemptions. This means that the contract clause would be applied in many instances where there are *no* data involved that ultimately would require a license because the data are eligible for such broad exemptions as License Exemption TSR, which permits export of much technology to a group of 170 countries.

Most DOD contractors and subcontractors, including CMU and other academic institutions, already have robust export control compliance programs. Many have been modeled on the samples provided by the Department of State and the Department of Commerce, though those samples are illustrative, not mandatory. Prescriptive program requirements, such as those set out in proposed Section 252.204—70XX(d) and (e), take a one-size-fits-all approach that will be inappropriate for many contractors and subcontractors. Moreover, the provision's focus on "access" is broader than the restrictions of the ITAR and EAR and hence will create an overlay of additional requirements that are inconsistent with those already existing under those regulatory regimes. Further, the provision will require such program elements as badging, segregated work areas, and the like even where the data in question do not require an export license (e.g., because they are eligible for license exceptions).

Further, we note that the EAR and the ITAR change frequently. Absent a DOD mechanism for making conforming changes in DFARS requirements—and making such changes applicable, like many changes in the EAR and ITAR—to existing as well as future contracts, the existence of DFARS rules that do more than incorporate the ITAR and EAR requirements by reference perpetually will be inconsistent with those two voluminous, complex, and long standing bodies of law.

Finally, we cannot avoid viewing the Proposed Rule as part of a series of changes in United States immigration and export control policy whose effect (if not its intent) can only be to reverse the kinds of policies that have made us a technologically advanced and powerful nation. Those policies, of course, have encouraged the best and the brightest from other countries to come here to study, create careers, have families, and become part of the melting pot that is America. To repeat what I said in commenting on the Commerce Department's recent deemed export notice:

This country's global leadership in technological advancement has been driven largely by the presence here of scientists and engineers who were born elsewhere, and by the relatively free flow of ideas into and out of our borders. Conversely, science in such closed societies as the former Soviet Union has suffered grievously because of those governments' unwillingness to allow scientists and their ideas to flow freely into and out of the country. In the words of Secretary of State Rice, "[f]oreign nationals play an essential role in fundamental research at

universities in the United States, and such research promotes our national economic welfare as well as our national security.”²

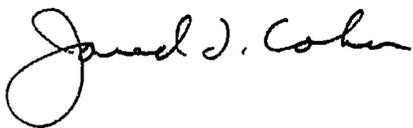
The Proposed Rule and its counterparts in the visa, deemed export, and similar areas would change the United States from a land whose beacon long has welcomed promising scientists and engineers to a closed clubhouse that has its ladder pulled up and bears a “Keep Out” sign. The Proposed Rule and its regulatory counterparts would be a tragic, self-inflicted wound from which our country would not soon recover.

For the reasons set out above and by numerous other commentators, CMU recommends that the Proposed Rule not be adopted. Should this recommendation be rejected, CMU recommends that the Proposed Rule be revised as set out in the attached “Substitute Proposal.”

* * *

Again, CMU appreciates the opportunity to comment on the Notice. Along with the presidents of numerous other research universities, I would be happy to meet with appropriate officials of the Department of Defense to discuss this matter further.

Sincerely,



Jared L. Cohon

cc: Mark S. Kamlet
Susan L. Burkett
Mary Jo Dively
Eric L. Hirschhorn

² Letter from Condoleezza Rice, Ass’t to the President for Nat’l Security Affairs, to Dr. Charles M. Vest, Pres., Mass. Inst. of Technology (Oct. 13, 2004), at 1.

Substitute Proposal

Substitute the following for the Proposed Rule:

1. The authority citation for 48 C.F.R. parts 204, 235, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 C.F.R. Chapter 1.

PART 204—ADMINISTRATIVE MATTERS

2. Subpart 204.73 is added to read as follows:

Subpart 204.73—Export-Controlled Information and Technology at Contractor, University, and Federally Funded Research and Development Center Facilities

Sec.

204.7301 Definition.
204.7302 General.
204.7303 Contract clause.

204.7301 Definition.

Export-controlled information and technology, as used in this subpart, is defined in the clause at 252.204-70XX.

204.7302 General.

Export control laws and regulations restrict certain transfers of designated types of information and technology. These restrictions are set out in the International Traffic in Arms Regulations (22 C.F.R. parts 120-130) (“ITAR”) and the Export Administration Regulations (15 C.F.R. parts 730-774) (“EAR”).

204.7303 Contract clause.

Use the clause at 252.204—70XX, Requirements Regarding Treatment of Export-Controlled Information and Technology, in solicitations and contracts for—

- (a) Research and development; or
- (b) Services or supplies,

that are expected to involve the use or generation of export-controlled information or technology.

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

235.071 [Redesignated]

3. Section 235.071 is redesignated as section 235.072.
4. A new section 235.071 is added to read as follows:

235.071 Export-controlled information and technology at contractor, university, and Federally Funded Research and Development Center facilities.

For requirements relating to restrictions on export-controlled information and technology, see Subpart 204.73.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Section 252.204—70XX is added to read as follows:

252.204—70XX Requirements Regarding Treatment of Export-Controlled Information and Technology.

As prescribed in 204.7303, use the following clause:

Requirements Regarding Treatment of Export-Controlled Information and Technology (XXX 2005)

(a) *Definition.* *Export-controlled information and technology*, as used in this clause, means information and technology that is subject to the Export Administration Regulations (15 C.F.R. parts 730-774) (“EAR”) and the International Traffic in Arms Regulations (22 C.F.R. parts 120-130) (“ITAR”). The term excludes information and technology that are not subject to, or are exempt from, the EAR and the ITAR.

(b) The Contractor acknowledges that in performing this contract, it may come into possession of export-controlled information or technology.

(c) The Contractor will comply with all applicable laws and regulations regarding export-controlled information and technology, and will, if required, register in accordance with the ITAR.

(d) Nothing in the terms of this contract is intended to change, supersede, add to, or waive any of the requirements of applicable Federal laws, Executive orders, and regulations, including but not limited to—

(1) The Export Administration Act of 1979 (50 U.S.C. App. 2401, as extended by Executive Order 13222);

(2) The Arms Export Control Act of 1976 (22 U.S.C. 2751);

(3) The Export Administration Regulations (15 C.F.R. parts 730-774);

(4) The International Traffic in Arms Regulations (22 C.F.R. parts 120-130);

(5) DoD Directive 2040.2, International Transfers of Technology, Goods, Services, and Munitions; and

(6) DoD Industrial Security Regulation (DoD 5220.22-R).

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts for—

(1) Research and development; or

(2) Services or supplies,

that are expected to involve the use or generation of export-controlled information or technology.

(End of clause)

252.235-7002, 252.235-7003, 252.235-7010, and 252.235-7011 [Amended]

6. Sections 252.235-7002, 252.235-7003, 252.235-7010, and 252.235-7011 are amended in the introductory text by removing “235.071” and adding in its place “235.072”.