UNIVERSITY OF CALIFORNIA

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

OFFICE OF THE PROVOST AND SENIOR VICE PRESIDENT —
ACADEMIC AFFAIRS

OFFICE OF THE PRESIDENT
1111 Franklin Street, 12th Floor
Oakland, California 94607-5200

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

DFARS Case 2004-D010 – Export-Controlled Information and Technology

The University of California appreciates this opportunity to provide comments on the July 12, 2005 Department of Defense (DOD) proposed amendment of the Defense Federal Acquisition Supplement (DFARS) published at 70 Fed. Reg. 39976. In addition to the comments provided below, the University supports and endorses the comments submitted by the Council on Governmental Relations (COGR), the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land Grant Colleges.

The DOD proposal addresses the recommendations of the DOD Inspector General (IG) in its March 25, 2004 report entitled, "Export-Controlled Technology and Contractor, University, and Federally Funded Research and Development Center Facilities" (D-2004-061). However, as other commenters have observed, because the DOD IG overstated the nature and extent of noncompliance, the IG recommended extra-regulatory actions that would bring more, not less, confusion to this area. The DFARS proposal contributes to the problem by adding definitions that are inconsistent with current regulatory definitions and export control measures that are inconsistent with the control measures imposed by governmental agencies specifically charged with enforcing the export control laws. For these reasons, the University respectfully urges DOD to withdraw the proposed rule or substantially modify it as described below.

Badging Requirements and Segregated Work Areas

Under the proposed contract clause, DOD would add a new requirement for access control plans. These plans would require a contractor to maintain "unique badging requirements for foreign nationals and foreign persons and segregated work areas for export-controlled information and

technology." DFARS 252.204-70XX(d)(1). This segregation of students and work areas cuts against the very nature of open classrooms, libraries, and laboratories that are the hallmark of American universities. The University of California is well aware of the work restrictions that must be applied to classified research and works within these limits on a daily basis at the national laboratories it manages for the Department of Energy. However, the University's campuses do not perform classified research and have declined numerous research awards in the past that would require the University to discriminate among its student body in performing research. Accepting such restrictions would impair the University's ability to participate in and contribute to the open academic research community that has made the United States a leader in scientific and technical innovation.

DOD takes the position that the requirements in the proposed rule "are clarifications of existing responsibilities." 70 Fed. Reg. at 39977. It is true that universities are already subject to the Export Administration Regulations ("EAR") and the International Traffic in Arms Regulations ("ITAR"). However, neither the EAR nor ITAR require badging or segregated work areas for handling non-classified, export-controlled information. Moreover, as others have noted, the proposed rule's access control requirements are inconsistent with existing regulatory definitions. For example, the DFARS proposal would require the badging and segregated work areas for "foreign nationals and foreign persons." However, under 22 CFR section 120.17, "export" is defined in terms of "foreign persons" only. The transfer of information to foreign nationals who are lawful permanent U.S. residents, and therefore not "foreign persons" under ITAR (and similar provisions in the EAR), is not an "export." 22 CFR § 120.16. Thus, the badging of foreign-born permanent U.S. residents is no more justified under ITAR and the EAR than badging U.S. citizens. DOD should not establish a control regime for information under the DFARS that is inconsistent with the way such information is controlled under the EAR and ITAR.

Non-Classified Information Management

It is important to recognize that the information subject to the rule is not classified. The United States Government has been very clear about when information should and should not be classified. The National Security Decision Directive (NSDD) 189, issued by the Reagan Administration in 1985 and reaffirmed by the Bush Administration in November 2001, directly addresses information developed through federally-funded research at universities. According to NSDD 189, it is governmental policy that, "to the maximum extent possible, the products of fundamental research remain unrestricted." Where national security requires control, according to the directive, such information should be classified. This is consistent with DOD's own policy contained in DOD Instruction 5230.27, section 4.3:

> 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-governmental laboratories is security classification. No other type of control is authorized unless required by law.

These policies recognize how important free and open exchanges among scientists are to the research enterprise. When information must be controlled to protect national security interests, it should be classified. However, DOD should not ignore the requirements of NSDD 189 and its own contracting instructions by over-controlling information that is not classified.

Failure to Include Existing Exclusions

One of the major problems with the DFARS proposal as written is its failure to explicitly reference applicable exclusions and exemptions. These include provisions for information that is in the "public domain" under ITAR (22 CFR § 120.11) and information that is not subject to the EAR because it is "publicly available." 15 CFR § 734.3(b)(3). By not explicitly referencing the exclusions in the proposed contract clause and instructions on its use, there is a significant risk that DOD contracting officers will include the clause even for contracts involving exempt information. This is because the clause is prescribed for use in contracts that *may involve* the use or generation of export-controlled information or technology. If included, the clause will create ambiguity as to whether the access control requirements in proposed section 252.204-70XX have added the new requirements as a matter of contract law or whether the exclusions and exemptions are still implicitly reserved by reference to the complete existing EAR and ITAR requirements.

The problem is exacerbated by the requirement that the access control requirements be included in subcontracts from defense prime contractors, whether or not the university is performing fundamental research in the work performed under the prime. DFARS section 252.204-70XX(g). This mandatory "flow down" of the requirement will interfere with existing relationships in which universities are currently able to perform fundamental research under a prime that is subject to more stringent controls.

Requested Actions

As stated above, the University respectfully requests that DOD withdraw its proposal. The proposal, as currently drafted, is inconsistent with the EAR and ITAR and potentially requires universities to "walk away" from award for valuable research that universities are performing for DOD today.

In the event that DOD determines that it cannot withdraw the proposal in its entirety, the University urges DOD to at least delay adopting the DFARS proposal until the Department of Commerce Bureau of Industry and Security has completed its work on its own Advanced Notice of Proposed Rulemaking on the "deemed export" rule, the very rule that covers export-controlled information at issue in the DOD proposal. 70 Fed. Reg. 15607 (March 28, 2005). Finally, should DOD proceed with adopting portions of its proposal, the University would urge DOD to adopt the language proposed by COGR in the revised version of the DFARS clause.

The University appreciates this opportunity to provide comments on the proposed rule and urges DOD to act on the proposal only if necessary after the export control initiatives currently underway at other federal agencies have been completed.

Sincerely,

Lawrence B. Coleman
Vice Provost for Research

Att.

cc: Provost and Senior Vice President Greenwood
General Counsel Holst
Senior Vice President Darling
Vice Chancellors for Research
Assistant Vice President Sudduth
Executive Director Auriti
Director Mears
Coordinator Yoder