

United States Senate

WASHINGTON, DC 20510

October 12, 2005

The Honorable Kenneth J. Kreig
Undersecretary for Acquisition, Technology and Logistics
U.S. Department of Defense
1300 Defense Pentagon
Washington, DC 20301-1300

DFARS Case 2004-D010

Dear Undersecretary Kreig:

We are writing to provide comments to your proposed rulemaking found under DFARS Case 2004-D010 entitled "Export Controlled Information and Technology." We recognize that your proposal addresses the need to ensure that sensitive technology is not inadvertently transferred to nations or organizations that may be hostile to the United States. However, we are concerned that the rule, as it appears to be envisioned, could have wide-ranging unintended and detrimental consequences.

As co-chairs of the U.S. Senate's Science and Technology Caucus, our concerns revolve around the potential negative impacts your proposed rulemaking could have on the ability of universities to attract the best and brightest foreign nationals in basic research as well as the quality and/or quantity of basic research produced by American universities. We have three specific concerns:

First, we are concerned by the relationship between this rulemaking and that by the Department of Commerce entitled "Revision and Clarification of Deemed Export Related Regulatory Requirements"; RIN 0694-AD29 dated March 28, 2005." It is our understanding that your proposed rule and the Department of Commerce's proposed rule both stem from Inspector General reports as required by the National Defense Authorization Act for Fiscal Year 2000. The Department of Commerce proposed rule has a far greater reach in administrative scope regarding the use of export controlled equipment and information, which will set precedent for federal policy in this area. To ensure that you collect the best possible information and avoid the perception of acting in an arbitrary or capricious manner under the Administrative Procedures Act, we ask that you not enact any final rule until the Department of Commerce has finalized and published its related export control rule.

DFARS Case 2004-D010, Senators Bingaman and Alexander

Second, while your proposed rulemaking purports to apply only to research funded through a contract, we are concerned by the effect that this rule will have on those researchers who perform fundamental research funded by a Department of Defense (DOD) grant that produces information that may become export controlled even though its funding is not through a contract. We ask that in Section 204.7303, under the heading "Policy," that you add a second paragraph clarifying that information produced and equipment used under a grant for fundamental research shall for the duration of the grant not be considered export controlled. In this way your regulation will not hinder researchers in the midst of innovation and discovery.

Third, we are concerned with how this rule will be enforced and who will be subject to such enforcement. In this case the reach of the rule will potentially encompass thousands of university laboratories that receive contracts and grants from the DOD. Please clarify if this is indeed the case. It is also important to consider the potential cost to DOD of enforcing this rule, including the expected increase in overhead that a university will charge DOD for ensuring its facilities comply with the proposed rule. We respectfully request that you publish an estimate of such costs with your revised and final rulemaking.

Our points of contact for this effort are Dr. Jonathan S. Epstein of Senator Bingaman's office, 202-224-5521, and Mr. Jeff Muhs of Senator Alexander's office, 202-224-4944.

Sincerely,



Jeff Bingaman
U.S. Senator



Lamar Alexander
U.S. Senator