ICOTT **INDUSTRY COALITION ON TECHNOLOGY TRANSFER**
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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:

The Industry Coalition on Technology Transfer (ICOTT) appreciates the opportunity to comment on the above-captioned proposed rule ("Proposed Rule"). ICOTT is a nonprofit group of major trade associations (names listed below) whose hundreds of individual member companies export controlled goods and technology from the United States. Many of these companies contract regularly with DOD or with DOD prime contractors. ICOTT's principal purposes are two—to advise U.S. Government officials of industry concerns about export controls and to inform exporters about the U.S. Government's export control and embargo activities and policies.

The Proposed Rule apparently represents a response to recent Inspector General reports that have criticized the government's export enforcement practices. Unfortunately, the proposal would not help contractors comply with the Export Administration Regulations ("EAR") or the International Traffic in Arms Regulations ("ITAR"). It would impose additional burdens, though—many of them inconsistent with the EAR and ITAR—that would confuse and mislead contractors. Existing controls—and the severe penalties that can be imposed for violating them—already apply to DOD contractors and subcontractors. For this reason, there is no need for the Proposed Rule. If DOD nevertheless feels the need to create a DFARS clause that addresses this issue, ICOTT proposes language below that would make export control responsibilities contractual as well as regulatory *without* imposing new, confusing, and inconsistent requirements. This language is similar in substance to that already in use by NASA (48 C.F.R. §§ 1825.1103-70, 1852.1103-70(b)) Neither this nor any other substitute text, however, should be considered for implementation without a new period for public comment.

DOD already plays a major role in the United States export control system. Although the ITAR controls are administered by the Department of State and the EAR controls by the Department of Commerce, DOD is involved deeply in advising those agencies what items should be controlled and what export licenses should be approved. In performing the latter role, DOD can review any export license application it wishes. In practice, DOD reviews almost all the applications filed with the Commerce Department and many of those filed with the State

Department. Thus DOD hardly requires additional regulatory authority to ensure it a prominent place in the export control firmament.

The Proposed Rule also raises a broader issue, for—along with related changes in immigration and export control regulations—it will undo policies that have helped make us a technologically advanced and powerful nation. Those policies have encouraged the best and the brightest of other countries to come here to study, build careers, create families, and become part of the American melting pot. Other countries are delighted at the prospect of being able to outdo the United States in attracting such individuals. By turning our back on this longstanding and successful policy, the Proposed Rule and its regulatory counterparts will cause our country incalculable harm.

ICOTT's comments on individual provisions of the Proposed Rule are as follows:

Proposed Section 204.7302 states 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." The quoted phrase is inconsistent in many respects with the EAR and ITAR. If placed in effect, it would create confusion and impose needlessly burdensome regulations upon DOD contractors and subcontractors.

- First and foremost, many transfers of EAR and ITAR-covered technology to foreign persons do not require licenses. The provision thus covers situations far beyond those covered by the EAR or ITAR. For example, a green card holder's access to information that is controlled under the EAR but that does not require an EAR license to that individual's home country nevertheless would be caught by the DFARS provision.

- Second, the ITAR and EAR restrict the actual *transfer or release* of technology to foreign persons, not the potential transfer that conceivably could result from such individuals' *access to* technology. This is not merely a semantic difference and if any rule is to be adopted at all, the phrase "transfer, release, or disclosure of" should replace "access to."

- Next, the ITAR use the term "foreign person," not "foreign national." Use of the latter term by the DFARS, whether or not in conjunction with the former, would expand export control coverage to hundreds of thousands of individuals who are not now covered, namely green card holders and those who have been admitted to the United States our various asylum programs.

- Finally, the quoted phrase, which appears to describe 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.

Proposed Section 204.7303 would require contracting officers to "identify any export-controlled information and technology, as determined by the requiring activity." Few if any contracting officers have the training or experience to determine which data are subject to export controls and which are not, let alone to draw such essential and often subtle distinctions as whether the EAR or ITAR apply, the specific control classifications into which the data fall, whether the data are exempt from the EAR or ITAR, and whether the data are eligible for license exceptions.[1] The "requiring activity" may know more generally about its data than the contracting officer but it probably will be equally at sea when it comes to making the kinds of determinations noted in the preceding sentence. Errors will occur frequently, and each error either will mislead the contractor or will create export control requirements additional to those under the EAR and ITAR. If data are controlled under the EAR or the ITAR, a contracting officer's failure to list them probably will not protect a contractor from liability for exporting controlled data that are not on the contract's list. Conversely, if data are not controlled or do not require a license, but the contracting officer lists them, the carefully considered decisions of the export control authorities about what should be exportable will be nullified. This in turn will stifle exchanges of technology that knowledgeable U.S. officials have concluded are beneficial or at least not harmful.

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. Different types of data require licenses to different countries; in practice, it is not an all-or-nothing (i.e., "controlled" or "not controlled") system. Also, there are many exemptions, including publicly available information, fundamental research, catalog courses in institutions of higher learning, and the like. Further, even if the *exemptions* somehow are addressed by the DFARS (and the substitute text set out below would do this), the proposal sweeps in a great deal of technology that is eligible for license *exceptions*. This means that the DFARS contract clause would be applied in many instances where there are *no* data that require a license because the data are eligible for such broad exceptions as License Exemption TSR, which permits export of much EAR technology to most of the world's countries.

Most DOD contractors and subcontractors already have robust export control compliance programs. Many are modeled on templates provided by the Department of State and the Department of Commerce, though these published samples are illustrative rather than 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. Further, the provision will require such program elements as badging, segregated work areas, and the like even where the data in question do not

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

require an export license (e.g., because they are exempt from control or are eligible for license exceptions).

Further, the EAR and the ITAR change frequently. In 2004, for example, 243 amendments to the EAR were made.[2] Absent a mechanism for making conforming changes in DFARS requirements—and making such changes applicable to existing as well as future contracts—DFARS rules that do more than incorporate the ITAR and EAR requirements by reference perpetually will be inconsistent with those two voluminous and complex bodies of law.

In summary, the Proposed Rule should not be adopted. Should DOD decide that it must adopt some DFARS clause on export controls, ICOTT believes that the substitute text accompanying these comments—which is similar in substance to the existing NASA FAR provision—would be less damaging than the Proposed Rule. Neither this nor any other substitute text should be promulgated, however, without an opportunity for public comment.

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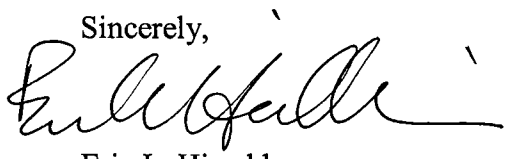
Again, ICOTT appreciates the opportunity to comment on the Notice. We would be happy to meet with appropriate officials of the Department of Defense to discuss this matter further.

Sincerely,



Eric L. Hirschhorn
Executive Secretary

ICOTT Member Associations

American Association of Exporters and Importers
Semiconductor Industry Association
Semiconductor Equipment and Materials International

cc: Hon. Gregory Suchan (State/PM)
Hon. Peter Lichtenbaum (Commerce/BIS)
Hon. Beth McCormick (DOD/DTSA)

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[2] Ofc. of the Federal Register, Nat'l Archives and Records Admin., LIST OF C.F.R. SECTIONS AFFECTED, JAN. 2, 2004 THROUGH DEC. 30, 2004, at 54-57.

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 Transfer, Release, or Disclosure 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 Transfer, Release, or Disclosure of Export-Controlled Information and Technology.

As prescribed in 204.7303, use the following clause:

Requirements Regarding Transfer, Release, or Disclosure 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".