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

Subject: DFARS Proposed Rule with Request for Comments (Case 2004-D010 July 12, 2005)

Dear Ms. Williams:

I am writing to provide comments on the proposed rulemaking "Defense Acquisition Regulation Supplement; Export Controlled Information and Technology," published in the July 12, 2005 Federal Register (70 Fed. Reg. 39976). This proposed rule contains a new DFARS Subpart 204.73, "Export-Controlled Information and Technology at Contractor, University, and Federally Funded Research and Development Center Facilities," and an associated contract clause (DFARS Part 252.204—70XX) and is DoD's response to concerns raised by the Office of the Inspector General [OIG] for the Department of Defense in its 2004 report "Export Controls: Export-Controlled Technology at Contractor, University and Federally Funded Research and Development Center Facilities" [hereafter the "DoD Audit Report"].

The proposed rule raises many of the same concerns I raised in my letter responding to the Advance Notice of Proposed Rulemaking (ANPR) by the Department of Commerce Bureau of Industry and Security (DoC) and creates new misgivings regarding the potential impact this rule may have on the ability of universities to conduct fundamental research. Specifically, while the proposed rule characterizes the requirements as clarifications of existing responsibilities, the effect will be to create new and unattainable compliance obligations for DoD and its contractors and to adversely impact the performance of fundamental research by universities for DoD, which, in turn, will be detrimental to the economic and national security interests of the country.

In this proposed rule, DoD is focusing on contract acquisition clauses when it does not itself have policies and practices in place to comply with the requirement to advise contractors what DoD information is export-controlled. It is impossible for DoD to develop an export control compliance program and should not require contractors to adopt specific export control measures if DoD is not able to identify its own export controlled technologies and data or advise contractors on what specific information and technology being disclosed to them is controlled.

An effective DoD export control compliance plan should also include procedures for identifying fundamental research projects and ensuring those research contracts do not contain restrictive contract clauses that impede universities' ability to conduct basic research. It is

particularly important to implement such practices given DoD's stated commitment to basic research. However, in proposing this rule, DoD has failed to even acknowledge existing national and DoD policies that are directly relevant, such as the National Security Decision Directive (NSDD) 189, issued by the Reagan Administration in September 1985 and affirmed in November 2001 by the current Administration.

The NSDD established the federal government's policy for controlling information and technology developed through federally-funded research at universities and research institutions and states that the federal government's mechanism for controlling information generated through federally-funded research (to the extent it is deemed to be sensitive for national security reasons) is the "classification" system. By failing to expressly recognize the fundamental research exclusion from export controls, the proposed rule may subject all DoD- contracted research at universities to requirements for controlling information and technology, regardless of whether export control requirements actually apply. This is directly inconsistent with NSDD 189.

At a minimum, DoD must withdraw or delay this rulemaking until DoD implements effective internal procedures for identifying and handling DoD unclassified export controlled technology and technical data and develops effective internal procedures for identifying and handling contracts to conduct fundamental research.

In addition to imposing requirements that will create significant compliance problems and impediments to the conduct of fundamental research, the implementation of the proposed rule will adversely affect U.S. national security because universities will refuse to perform critical research for DoD. As noted in the DoD Audit Report [at 7-8], DoD contracts often include clauses forbidding the participation of foreign nationals, restricting publication of research results, or requiring contractors to provide documentation on the citizenship and employment eligibility of every participant in a research project. These clauses violate university policy on openness in research and destroy the fundamental research exclusion, and thereby limit the ability of foreign national students to participate in the unclassified research. Time and effort is wasted because the universities are required to debate with contracting officers as to why it is not appropriate to default to the use of these restrictive clauses. Sometimes universities are unable to come to terms and must decline the contract.

Given the statement in the proposed rule's DFARS prescription that contracting officers are to use the clause in solicitations or contracts that *may involve* the use or generation of export-controlled information or technology, it is likely that the new clause will appear in the majority of university research contracts. The ambiguity of the language will make it difficult, if not impossible, for universities to argue for the clause's removal. Universities will, therefore, avoid participating in these important DoD projects of national security interest.

Both the DoD and the DoC proposed rules are contrary to long-standing practices and understandings about deemed exports and fundamental research in the business and academic communities, as evidenced by the more than 300 responses DoC received to its ANPR. Before implementing a regulatory program that will cause significant and permanent damage to both the university research enterprise and the nation's economic and security interests, DoD must carefully review and consider the comments DoC received and coordinate efforts with them to assure consistent statements and regulations. Inconsistencies will not safeguard export controlled information and will further diminish the credibility and clarity of an already misunderstood and confused national export control policy.

After both agencies have had a full opportunity to resolve basic questions about deemed exports, equipment use technology and the fundamental research exclusion in a cooperative fashion with business, academia, and other government agencies, I believe you will find that there is no demonstrated need for a specific DFARS compliance clause. The goal and effect of an export control compliance program is to prevent access and disclosure by unauthorized foreign nationals to controlled technology and technical data and to impose appropriate safety measures in projects requiring access to export controlled technologies and information. The EAR and ITAR require nothing more. The University does not need a DFARS clause that prescribes a one-size fits all security plan. A simple, more narrowly tailored clause that reminds contractors of their responsibility to comply with export control laws and regulations is sufficient.

If DoD decides to proceed with this Rulemaking, it must revise the proposed clauses to make clear the limited circumstances to which they apply; namely, *contracts* that require DoD to disclose export controlled technology or information to contractors. Comments submitted by the Council on Government Relations [COGR] include line-by-line suggestions for modifications to the language of the proposed DFARS Part 204.73 and proposed 252.204—70XX clause. I endorse the COGR suggestions, which, if adopted, will result in more understandable, workable and less ambiguous language that will protect national security while preserving the goal of fundamental research in our nation's research program.

I thank you for this opportunity to provide input.

Sincerely,

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cc: C. D. Mote