



Richard L. McCormick, President

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

**RE: DFARS Case 2004—D010**

Dear Ms. Williams:

This letter provides Rutgers University's comments on the proposal to amend the Defense Federal Acquisition Regulation Supplement (DFARS) published in the Federal Register on July 12, 2005 (DFARS Case 2004—D010). The 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). It closely reflects the recommendations in the March 25, 2004 report of the Department of Defense (DoD) Inspector General (IG), *Export-Controlled Technology at Contractor, University, and Federally Funded Research and Development Center Facilities* (D-2004-061).

Rutgers University is engaged in substantial federally funded scientific research. Changes to the DFARS may impact the conduct of research at Rutgers.

In matters related to export controls, Rutgers supports the comment letters of the Association of American Universities and the Council on Government Relations on this topic and agrees with the recommendations in those documents. We would like to take this opportunity to highlight our most pressing concerns.

Rutgers recognizes the Department's interest in adequate processes to identify unclassified export-controlled technology and to prevent unauthorized disclosure to foreign nationals. The Inspector General's report, noted above, while not focused on any known problem or national security breach, suggests steps the Department should take to tighten its contracting rules. However, it appears that current negotiations between university contracting officials and Department contracting officers have yielded contract provisions that address national security interests in light of the research and educational missions of our institution.

Research universities, like Rutgers, have always fostered a culture in which the free exchange of ideas and open collaborations are encouraged and welcomed. The proposed rule endangers our internationally recognized research infrastructure, and overreaches in some aspects, to the detriment of a productive university contract relationship. We have seen no

evidence that existing visa and classification processes fail to adequately address concerns about the potential for transfer of any sensitive technologies at universities, nor does the DoD IG Report provide any such evidence. Extensive background checks are conducted on foreign students and scholars entering the U.S. to study and conduct research. The visa screening process has been under ongoing review and improvement to make it more effective and efficient. Once cleared to enter through this process, foreign students and researchers should be permitted to fully participate in the academic research community.

In addition, given the uncertainty surrounding changes that the Department of Commerce may make to the Export Administration Regulations in relation to “deemed exports,” the Department’s rule may be premature. The impact of the proposed rule may vary significantly depending upon how the Commerce Department decides to define “use technology” and its application to equipment required for the conduct of fundamental research.

#### Limit Overextension of the Rule

The proposed rule prescribes very specific processes and mechanisms to control export-controlled information and technology. For example, the proposed clause requires access control plans including badging requirements and segregated work areas for foreign nationals for access to export-controlled information and technology. This requirement goes beyond the requirements under the National Industrial Security Program Operating Manual for the handling of classified material which provides for unique badging, segregated work areas and other measures as appropriate, rather than imposing a blanket requirement. It is not appropriate for controls for unclassified information and technology to be less flexible than for classified information. Control of unclassified export-controlled information should be eligible for at least the same flexibility in application as classified information.

#### Fundamental Research Exemption

Department officials have recently acknowledged (Workshop on the Department of Defense Notice of Proposed Rulemaking to Amend the Defense Federal Acquisition Supplement, September 16, 2005, National Academies of Science, Washington, D.C.) that the proposed amendment does not affect nor supersede the fundamental research exemption established in NSDD-189. Rutgers concurs with this acknowledgement and urges the Department to add wording to the proposed rule to that effect.

#### Badging

In addition, Department officials have acknowledged that the badging component of the proposal should be eliminated from the final rule in favor of allowing the contractor to maintain an effective export compliance program. Rutgers concurs with this acknowledgement and urges the Department to remove the prescriptive language on badging.

#### Segregated facilities

Rutgers urges the Department to further modify the proposed rule to focus on the effective management of an export compliance program, without requiring segregated facilities. While a few universities have separate, controlled facilities on campus, most do not. Institutions are unlikely to establish them because of the substantial costs associated with such facilities. Universities will face the difficult choice of substantially altering the normal open campus

research environment, where innovative and cutting-edge ideas have come to life, to comply with the requirements.

We hope the Department will seriously consider our concerns and recommendations. We appreciate the opportunity to comment.

Sincerely,

A handwritten signature in black ink that reads "Richard L. McCormick". The signature is written in a cursive style with a large, prominent "R" and "M".

Richard L. McCormick