

North Carolina State University is a land-grant university and a constituent institution of The University of North Carolina

Office of Research
and Graduate Studies

NC STATE UNIVERSITY

October 12, 2005

Defense Acquisition Regulations Council
Attn: Ms. Amy Williams
OUSD (AT&L) DPAP (DAR)
IMD 3C132
30621 Defense Pentagon
Washington, D.C. 20301-0350

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Dear Ms. Williams:

Thank you for providing the opportunity to comment 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 follows 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).

NC State is a member of the Council on Governmental Relations (COGR) and we concur with their views of the proposed regulation and have provided a copy of their comments as an attachment. In short, the proposed regulation would have a substantial negative impact on NC State's ability to perform fundamental research for the Department of Defense. Currently we perform more than \$18M in defense supported research and development. A portion of that funding is through direct contracts with the Department of Defense and subcontracts from defense prime contractors to perform fundamental, unclassified research.

We believe the proposed rule should be withdrawn for the following reasons.

- The proposed rule is premature given the Department of Commerce BIS proposed rulemaking and comment process (ANPR; RIN 0694-AD29—Fed. Reg. 3/8/05) now taking place.
- The proposed rule fails to recognize national and DOD policies that are relevant including NSDD 189, reaffirmed in 2001. By failing to explicitly recognize NSDD 189, the proposed rule may subject all contracted research at universities to requirements for controlling information and technology regardless of whether export control requirements actually apply, which would be directly inconsistent with NSDD 189.

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- Implementation of the proposed rule will result in delays and increased costs at NC State in performing contract research. Because the proposed rule would impose export control requirements in all cases and does not explicitly reference applicable exclusions from export controls provided by the EAR and ITAR, it will lead to confusion among contracting officers, lengthy negotiation delays, delays in research and overbroad application of controls.
- DOD application of this requirement will be a significant deterrent to performing Defense-contracted fundamental research at NC State because we would have to preclude the participation of foreign students and researchers in such research or seek licenses for all foreign students and researchers that may have access to areas where such research is performed. 22 percent of NC State graduate students are foreign nationals, with larger percentages concentrated in science and engineering fields. Overall, U. S. science and engineering is critically dependent on the participation of foreign nationals and their contributions to the nation's scientific advances are substantial. DOD contracting officers are likely to default to use of the proposed new clause in most, if not all, university research contracts given the statement in the 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. DOD contracting officers will have little or no incentive not to include the new compliance clause. If the clause is implemented in a contract, the access control requirements may become a matter of contract compliance, regardless of whether the research is fundamental research otherwise excluded from the requirements under the regulations. This will require NC State, in order to undertake DOD contracted fundamental research, to badge all foreign nationals and establish segregated facilities to assure that foreign members of the campus community (unless specifically licensed by the government) do not have access to any information or technology controlled under DOD contracts. NC State will face the difficult choice of substantially altering the normal open campus research environment to comply with the requirements or "walking away" from the conduct of DOD-contracted research.
- The requirements for an "effective export control compliance program" are overbroad. Any contractual compliance requirements should be limited only to the activities applicable to the DOD contract, not required to include other activities of the contractor such as training and compliance assessments. DOD should defer to the appropriate regulatory agencies to establish requirements for institution compliance programs. DOD does not have the authority or responsibility to determine the "effectiveness" of such programs.

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- The proposed rule does not require sufficient specificity in the identification of export-controlled information and technology. Applying this clause to projects that otherwise would qualify as fundamental research would nullify the fundamental research exclusion and require NC State to apply for licenses when no license ultimately will be required. The end result is extra work for NC State and the government with no resulting value added for national security.
- The proposed rule is overly prescriptive in its requirements for access control plans. The proposed rule prescribes specific processes and mechanisms to restrict export-controlled information and technology. Implementation of the proposed mechanisms would mean that access control for unclassified technology would be more stringent than access to classified materials.
- The requirement to include the proposed rule in all subcontracts for research will have significant adverse impacts on NC State. The proposed rule requires that the clause be "flowed down" from prime contractors to subcontractors like NC State regardless of whether a particular subcontract may involve performing fundamental research related to the work performed under the prime. The proposed clause needs to be modified to carve out exceptions to the flow down requirement when the subcontract involves research subject to the fundamental research exclusion from export controls or other exclusions or license exemptions.
- The proposal does not recognize the extensive government screening process for foreign nationals prior to their admission to NC State for research purposes. Extensive background checks are conducted on foreign students and scholars entering the U.S. to study and conduct research. 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 NC State, nor does the DOD IG Report provide any such evidence.

NC State agrees with the recommendations of COGR with regard to requesting that DOD withdraw the proposed rule. If the Department of Defense plans to proceed with the rule, we ask that it be delayed until after the Commerce Department finishes their proposed rule-making process. If DOD does promulgate this rule, we ask that it be substantially shortened and that a fundamental research exemption be expressly included in the rule.

NC State highly values our relationships with DOD in research activities, and we are proud of our research contribution to our nation's security. We take seriously our long and productive relationship with the Department of Defense and hope we can continue to strengthen it. We strongly agree with the comments of the American Association of Universities, the National Association of State Universities and Land Grant Colleges, American Council on Education (ACE), the Association of American Medical Colleges (AAMC) and we urge that you read their comments carefully as you move forward.

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We appreciate the opportunity to comment.

Sincerely,

A handwritten signature in cursive script, appearing to read "John Gilligan".

John Gilligan
Vice Chancellor for Research and Graduate Studies

JGG/mh

Attachment