



**COMMENTS ON PROPOSED DEPARTMENT OF DEFENSE RULE
REGARDING EXPORT-CONTROLLED INFORMATION AND TECHNOLOGY
AT CONTRACTOR, UNIVERSITY, AND FEDERALLY FUNDED RESEARCH
AND DEVELOPMENT CENTER FACILITIES**

[DFARS Case 2004-D010]

U.S. Public Policy Committee of the Association for Computing Machinery (USACM)

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INTRODUCTION

We write as members of the U.S. Public Policy Committee of the Association for Computing Machinery (<http://www.acm.org/usacm>), which is widely recognized as the leading organization for computing professionals, delivering resources that advance computing as a science and a profession, enabling professional development, and promoting policies and research that benefit society. USACM members include leading computer scientists, engineers, and other professionals from industry, academia, and government. We wish to join with others in the computing research community to register our concerns with the proposed rule changes.

The Department of Defense's proposed changes¹ to the Defense Federal Acquisition Regulation Supplement (DFARS) would mandate that department contracts contain a new clause requiring a contractor to:

- 1) Comply with all applicable laws and regulations regarding export-controlled information and technology;
- 2) Maintain an effective export compliance program;
- 3) Conduct initial and periodic training on export compliance controls; and
- 4) Perform periodic assessments (to ensure compliance)

Further, the department's proposal contains details on what "maintaining an effective export compliance program" would entail. To comply contractors would have to:

¹ As described at
<<http://www.acq.osd.mil/dpap/dars/dfars/changenotice/2005/20050712/2004d010.htm>>.

- 1) Create and maintain unique badges for foreign nationals and foreign persons employed by the entity;
- 2) Build segregated work areas for these persons; and,
- 3) Prevent these individuals from gaining any access to export-controlled technology without first obtaining a specific license, authorization or exemption, even if these individuals may be working under the long-standing fundamental research exemption.

This change responds to an Inspector General's report that claims current policies are not adequate to prevent foreign nationals from gaining access to sensitive, but otherwise unclassified, technology.

The Department claims that its amendment is only a clarification of current policy to address the Inspector General's concerns; however, the current proposal is not consistent with that claim. The first requirement of the new contract clause is that contractors comply with all applicable laws. Considering that contractors are already bound to follow existing law it is not clear why this needs to be restated. The proposal then outlines entirely new burdens (i.e., unique badging and segregated work spaces) on contracting universities and companies that may have foreign nationals working in their facilities. This goes beyond clarification to place a costly new burden on institutions employing foreign nationals.

When conducting research under Department of Defense contracts many institutions seek an open and collaborative atmosphere. This is one of the key reasons why the federal government created the long-standing "fundamental research" exemption for export controls. This exemption recognizes that there is little need to restrict access to research that will be widely distributed or published. The Department's proposal seemingly does not recognize this exemption.

Further, the Department's proposal does not take into account the potential impact of another related, restrictive proposal² by the Department of Commerce, which would expand the definition of export-controlled technologies and place even more burden on research facilities.

Lastly, this proposal sends a signal to foreign researchers they are no longer welcome in U.S. university and industrial research facilities. Our research enterprise has always attracted the best and brightest from around the world. This has helped the U.S. become a world leader in science and technology, in fundamental research, and in education. Many other countries, seeking to attract and bolster their own high-technology industries in competition with the United States, are actively recruiting and welcoming these same researchers. *Policies that exacerbate an already hostile atmosphere³ for foreign nationals*

² See <See <<http://frwebgate1.access.gpo.gov/cgi-bin/waisgate.cgi?WAIISdocID=991531282419+3+0+0&WAIISaction=retrieve>>.

³ Restrictive visa requirements instituted in the wake of the attacks of September 11, 2001, increased classification of research, and new restrictive identification policies such

coming to the United States hamper our ability to attract these researchers and, in turn, damages U.S. high-technology research.

COSTLY NEW BURDENS ON RESEARCH

The proposed rule change would result in additional costly and unwarranted burdens on academia and industry with respect to DOD-funded technological research and development. For example, segregating work environments for foreign researchers, mandatory badge requirements for researchers, adding new security measures/personnel, creating new physical access systems and procedures, and the added administrative processes needed to manage these new elements would prove costly to institutions already making do with decreasing research budgets and resources. Indeed, the increased costs for researchers and their organizations could even be prohibitive, going so far as stopping worthwhile research and development from ever getting started. Investing in these new procedures seems particularly onerous considering that the foreign researchers in question will likely already have gone through a detailed screening program through the “Visa Mantis” program, which is itself having a negative effect on U.S. research and education.⁴

USACM is also deeply concerned that the proposed rule change makes no mention of an exemption for fundamental research. As you know, National Security Decision Directive 189 (NSDD-189)⁵ states that:

... to the maximum extent possible, the products of fundamental research remain unrestricted. It is also the policy of this Administration that, where the national security requires control, the mechanism for control of information generated during federally-funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification.

During a recent workshop⁶ at the National Academies, DOD’s Defense Procurement and Acquisition Policy Office stated⁷ that its proposal would not impact contracts where there was no access to export-controlled technology, including contracts that only required “fundamental research.” However, the proposed rule does not explicitly mention the fundamental research exemption. If the Department intends that this exemption be continued, it would be prudent to reference NSDD-189 in the new contract clause. Such

as the recently enacted “Real ID Act” (P.L. 109-13) all contribute to a hostile atmosphere for foreign nationals coming and staying in the United States.

⁴ See GAO report 04-371, “Border Security.”

⁵ See <<http://www.fas.org/irp/offdocs/nsdd/nsdd-189.htm>>.

⁶ "A Workshop on Export Controls: Amending DFARS," sponsored by the National Academies, September 16, 2005, Washington, D.C. For more information, see <<http://www7.nationalacademies.org/rscans/>>.

⁷ Page five of Ms. Barbara Glotfelty and Ms. Debra Overstreet’s September 16, 2005, presentation.

a reference will ensure that contracting officers and institutions have a clear understanding as to whether or not the work to be done could be exempted.

CUMULATIVE IMPACT OF PROPOSAL NOT TAKEN INTO ACCOUNT

To define its scope of proposed rule-making, the Department's proposal references the underlying Export Administration Regulations⁸ (EAR) and International Traffic in Arms Regulations⁹ (ITAR). However, the proposed rule does not mention the Bureau of Industry and Security's (BIS) recent advanced notice of proposed rulemaking to redefine the "use" of technology.

In responding to a similar report by the Department of Commerce's Inspector General, BIS proposed restrictions on so-called "deemed exports," which are defined as when controlled equipment or technology (such as manuals, software, etc.) is released to or used by a foreign national within the United States. USACM has already commented¹⁰ that this proposal would further confuse what technology falls under deemed export controls. While BIS's proposal would make a seemingly minor technical change to the current definition of what it means to "use" equipment and technology, the discussion of this change would complicate already opaque rules by confusing the use of controlled technology with "use" technology (i.e. manuals) that may be publicly available (and therefore not subject to existing rules). For example, a manual or software to operate controlled equipment might be publicly available, meaning there would be no government restrictions on a foreign national's access. BIS's proposal implies that all technology involved in the use of equipment could be subject to deemed export rules. This is contrary to long-standing exemption guidelines, which state that publicly available technology includes the following:

- information that is or will be published;
- information that arises during, or results from, fundamental research; and
- educational information.

USACM concluded that the BIS proposal puts the fundamental research exemption in jeopardy and drastically expands the amount of technology subject to deemed export rules. As the Department of Defense's proposal makes clear, the existing EAR cannot be viewed as separate from the department's policy. Therefore, should BIS's proposed rule be adopted and its definition of controlled technology adopted by reference in Department of Defense contracts, the amount of technology subject to control could substantially increase to include technology that is non-proprietary or that is used in fundamental research. The cumulative impact of these two proposals could dramatically expand the burden on universities and companies that struggle to determine what exactly

⁸ 15 CFR parts 730-744

⁹ 22 CFR parts 120-130

¹⁰ To view USACM's comments on BIS's proposed rule see
<http://www.acm.org/usacm/PDF/deemed_export_comments.pdf>.

is subject to export controls and to comply with the regulations. The end result could be incredibly negative for the U.S. research community.

As BIS's proposal is in the initial stages of the regulatory process, it is understandable that the Department of Defense would have difficulty accounting for a potentially "moving target." However, considering how deeply connected the two proposals are, USACM strongly recommends that the Department withhold any action on its proposal until it is clear how the BIS intends to proceed.

RESTRICTIONS ON THE WORK OF FOREIGN RESEARCHERS IS DISCRIMINATORY, COUNTERPRODUCTIVE, AND THREATENS INNOVATION

Successful research depends on getting the best people to work on the most difficult problems. Increased restrictions on foreign researchers – researchers who play an absolutely critical and indispensable role in U.S. IT research – puts our open research enterprise at risk by limiting the free flow of information among researchers. USACM's conclusion is that the proposed rule is discriminatory, for it would result in treating foreign researchers differently from others simply because of who they are, in the absence of specific concerns. Presumably, this would be after those foreign researchers have successfully navigated the U.S. visa process.

The new rule would also exacerbate an already hostile atmosphere for talented foreign nationals who may be considering coming to the United States to participate in our R&D. Much of our innovation is fueled by the brightest students in the world wanting to come to the U.S. to study and perform research. Once here, many of those same students and visitors decide to join the workforce and stay, often becoming U.S. citizens. The U.S. has benefited greatly by attracting the brightest people out of hundreds of millions in countries around the world. However, recent heightened fears over foreign nationals in the U.S. have led to actions, such as more restrictive visa rules and this proposed rule, that mean that those visitors are unable or unduly encumbered if they wish to come to this country to study and cooperate in research. Further, they often are not allowed to stay after finishing their degrees and thus contribute to U.S. innovation and creativity. The Department's proposed rule would create an even more hostile atmosphere by segregating foreign researchers, treating them differently, and sending a message to foreign researchers that they may not be allowed to access the most state-of-the-art technologies for their open, unclassified work.

Not only would the proposed rule short-change our research environment and (by extension) our economy, but it means that bright young scientists and engineers will either stay in their present countries or go to countries where they are able to work unencumbered (i.e., with our competition). At a time when America's technological leadership is being challenged as never before by competition from overseas and outsourcing of once-U.S.-based operations, we truly cannot afford to do anything that might undermine the United States' technology leadership edge – an area that has been and is central to U.S. economic vitality now and in the future.

CONCLUSION

The U.S.'s economic strength lies in the innovation that is driven by a robust and open research base. This research enterprise depends upon the free flow of information to stimulate new ideas and new directions for the development of new technologies. However, overall U.S. export control policy at this time is a particularly confusing area of government regulation and one that poses a distinct threat to U.S. innovation and the general health of the U.S. IT research and education enterprise. DOD's current proposed rule change – at a time when the Department of Commerce is also working on similar export policy changes – does little to ease this confusion. USACM strongly recommends:

- 1) The Department specifically include the long-standing fundamental research exemptions in its changes so the scope of the new DFARS regulation is clearer to contracting officers and institutions.
- 2) The current proposal be delayed at least until it is clear how the BIS intends to proceed with its restrictions on deemed exports. Further, should BIS's proposal move forward in any form, that the Department reassess how its proposal would interact with new EAR regulations and seek additional public comment on any new proposal.
- 3) The Department's policy office carefully and thoroughly assess how these new burdens would impact foreign researchers contributing the U.S. innovation enterprise and what impacts it might have on U.S.'s technology leadership in the global economy.

ABOUT USACM

USACM is the U.S. Public Policy Committee of the Association for Computing Machinery, which is widely recognized as the premier organization for computing professionals, delivering resources that advance the computing as a science and a profession, enabling professional development, and promoting policies and research that benefit society. ACM is the world's first educational and scientific computing society with more than 80,000 members worldwide. USACM members include leading computer scientists, engineers, and other professionals from industry, academia, and government. Please contact the ACM Office of Public Policy Office at (202) 659-9711 if you have any questions about this. For more information about USACM and ACM, see <<http://www.acm.org/usacm/about.html>>.