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October 12, 2005

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

REF: DFARS Case 2004-D010

Dear Ms. Williams:

The American Association for the Advancement of Science (AAAS) welcomes the opportunity to comment on the Department of Defense proposed rule published in the *Federal Register* on July 12, 2005, to amend the Defense Federal Acquisition Regulation Supplement (DFARS). Founded in 1848, AAAS is the world's largest general science society. Since the early days of the Cold War, AAAS has upheld the standard that "freedom and national security are best preserved by adherence to the principles of openness that are a fundamental tenet of both American society and of the scientific process."¹

The Department of Defense's (DOD) Office of the Inspector General (OIG) report, *Export-Controlled Technology at Contractor, University, and Federally Funded Research* (March 25, 2004), upon which the proposed DFARS rule is based, concludes that DOD "does not have adequate processes to identify unclassified export-controlled technology and to prevent unauthorized disclosure to foreign nationals." While AAAS recognizes DOD's interest in protecting the unlawful transfer of technologies to certain nations, the Association believes that the OIG recommendations will further restrict the conduct of fundamental research and impede national security interests rather than protect them.

¹ "National Security and Secrecy," AAAS Council Resolution, adopted January 7, 1982 (http://archives.aaas.org/docs/resolutions.php?.doc_id=357).

Our primary concern is that the DOD's proposed change to the DFARS is premature in light of the fact that the Department of Commerce's Bureau of Industry and Security is in the process of finalizing its deemed export rules. An issue that will be addressed in the Commerce ruling is the definition of the term "use" of export-controlled technology. How universities, laboratories, and industries apply the DOD rules will be impacted greatly by the final definition of "use" adopted by Commerce and, we are concerned that it could trigger DOD's export control compliance rules in unanticipated ways. **AAAS recommends that DOD defer further consideration of the proposed rule until Commerce completes the revision of its rules and clarifies the meaning of the term "use" in regard to export controlled technologies.**

Importance of Fundamental Research. In 1985, President Ronald Reagan issued National Security Decision Directive 189 (NSDD-189) that called for "no restrictions... upon the conduct or reporting of federally-funded fundamental research that has not received national security classification."² This principle has been upheld for decades by the Departments of State and Commerce, thereby exempting fundamental research from such control as long as the research findings are made publicly available. More recently, DOD published policy guidance and principles in the *Federal Register* (Vol. 70, No. 184, Pg. 55725-27) on the support of scientific research stating that "[b]asic research is essential to the [DOD's] ability to carry out its mission."

In addition to the use of classification for controlling information and technology, various munitions and control lists, laws and policies, such as the Export Administration Regulation (EAR) and International Traffic in Arms Regulations (ITAR) exist to provide an additional layer of scrutiny that is applied both to foreign nationals entering our country and to the conduct of federally-funded research through individual grants and contracts.

While the DOD proposed rule acknowledges that it is not to "change, supersede, or waive" any other existing federal laws, executive orders, etc. and explicitly lists the EAR and ITAR, it fails to recognize NSDD 189 as a fundamental guiding principle.

AAAS is concerned that the failure to acknowledge the vital role of academic basic research in the military and economic security of the United States in the proposed DFARS rule will result in contracting officers including the DFARS clause in all contracts and grants to universities. Such actions risk creating an environment that unduly restricts the free flow of scientific exchange so important to advancing research and innovation, or leading top-tier universities to reject DOD contracts and grants, thereby limiting DOD's access to first rate scientists and engineers and their potential

² National Security Decision Directive 189, "National Policy on the Transfer of Scientific, Technical, and Engineering Information," September 21, 1985.

contributions to national security. **AAAS recommends that, if a version of the proposed rule is implemented, NSDD 189 be explicitly referenced in it.**

Access Control Plans. The proposed rule requires that access control plans be created that include segregated work areas and unique badging requirements for foreign nationals and foreign persons who may have access to export-controlled information and technology. This requirement fails to take account of the broader mission and goals of institutions of higher learning. These institutions rely on academic freedom, scientific openness, and an unrestricted dialogue between teachers and students, as well as within student cohorts, to nurture the flow of innovative ideas that ultimately lead to the development of critical technologies.

Aside from the obvious issues of the additional costs associated with creating a segregated work environment, the badging requirement would appear to single out and perhaps stigmatize foreign students (even from allied nations). Foreign nationals who apply for student visas must already submit to an extensive examination by State Department consular offices and to Visas Mantis screening before entering the United States. Requiring segregated work environments appears overly burdensome and unnecessary, and could discourage bright foreign scholars and students from attending U.S. universities.

It is unclear what benefits would be gained by such a requirement beyond those which are already available from the current system of visa screening and classification within DFARS. Given the very real possibility that the access control plan requirement could be applied more broadly to encompass unclassified fundamental research, **AAAS strongly recommends that, if a version of the proposed rule is implemented, this provision be excluded from it.**

In conclusion, DOD has not persuasively stated what the real nature and extent of the problem are and why existing export control laws, classification procedures, and contracting language fail to meet the perceived problem. If the goal of the DOD proposed DFARS rule is to inform contractors of their responsibilities, then a clause that states simply that the contractor is responsible for complying with EAR and ITAR rules and any other applicable export control laws would serve this purpose more effectively and in a less onerous and ambiguous manner than the proposed prescriptive rule.

If DOD should nevertheless decide that a more formal rule is needed, **AAAS urges the Department to issue a second proposed rule for additional public comment rather than a final rule, so that the stakeholder communities can assess the extent to which any changes made are responsive to the concerns expressed about the current proposal.**

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Should DOD staff wish to discuss this matter further, please feel free to contact me or Ms. Joanne P. Carney at 202 326 6798.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan I. Leshner", is centered on a light gray rectangular background.

Alan I. Leshner