

**Comments on the Proposed Rule for Defense Acquisition Regarding
Export-Controlled Information and Technology
*DFARS 2004-D010***

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The Computing Research Association (CRA) is an association of more than 200 North American academic departments of computer science, computer engineering, and related fields; laboratories and centers in industry, government, and academia engaging in basic computing research; and affiliated professional societies. CRA's mission is to strengthen research and advanced education in the computing fields, expand opportunities for women and minorities, and improve public and policymaker understanding of the importance of computing and computing research in our society.

We write regarding the proposed rule for Department of Defense research contracts (DFARS case 2004-D010), which seeks to establish specific regulations for DoD contractors whose research involves export-restricted information and technologies. While CRA understands and supports the need for export control and deemed export regulations, we are concerned that the proposed rule as it stands would make fundamental research subject to novel restrictions that could seriously impair the ability of colleges, universities, and industrial and federal research and development centers to conduct fundamental research, which would have significant ramifications for America's economic competitiveness and technological leadership in the world.

It has long been recognized that fundamental research – that research which is conducted to increase the wealth of scientific knowledge rather than with specific applications or development possibilities in mind – is subject to different export control rules than applied research and development. President Ronald Reagan recognized this when he issued National Security Decision Directive (NSDD) 189 in September 1985. The Directive states:

[O]ur leadership position in science and technology is an essential element in our economic and physical security. The strength of American science requires a research environment conducive to creativity, an environment in which the free exchange of ideas is a vital component. ...

It is the policy of this administration 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. . . . No restrictions may be placed upon the conduct or reporting of federally-funded fundamental research that has not received national security classification, except as provided in applicable U.S. Statutes.

This policy has been upheld by successive administrations, most recently by then-National Security Director Condoleezza Rice, who wrote to Association of American Universities co-chair Harold Brown in a letter dated November 1, 2001 that “[t]he policy on the transfer of scientific, technical, and engineering information set forth in NSDD-189 shall remain in effect, and we will ensure that this policy is followed.”

CRA is concerned that the proposed rule as currently written does not explicitly take account of the fundamental research exemption and that the rule could be interpreted as abrogating the provisions of NSDD 189 and the fundamental research exemption. If the rule is passed as it is currently written, program managers at college and university labs conducting fundamental research might interpret the rule as subjecting them to unnecessary restrictions. This might in turn cause many colleges and universities to cease accepting Department of Defense research funding, with serious consequences for colleges and universities as well as DoD.

Therefore, we request that any final copy of this rule include the fundamental research exemption in the list of “Federal laws, Executive orders, and regulations” that the rule does not affect, as found in proposed section 252.204-70XX(f). Including the fundamental research exemption would ensure that the rule is interpreted consistently with the spirit and letter of the fundamental research exemption and that this proposed rule would not fundamentally alter the mutually beneficial relationship between the Department of Defense and higher education researchers.

Such an addition would be consistent with rules in other Executive Branch agencies where research contractors utilize export-controlled information and technologies. For example, contracting rules for the National Aeronautics and Space Administration contractually obligate contractors to “be responsible for obtaining export licenses, *if required*, before utilizing foreign persons in the performance of this contract” and specify that contractors “shall be responsible for all regulatory record keeping requirements associated with the use of licenses *and license exemptions/exceptions*” (48 CFR 1852.225-70(b)-(c), emphasis added). Moreover, NASA contracting rules also allow scientific and technical reports to be released with a fundamental research affidavit (48 CFR 1852.235-73(e)). NASA’s rules, therefore, explicitly allow for research to be conducted and published under the fundamental research exemption.

Department of Energy contracting regulations also recognize the role of the fundamental research exemption in contracted research. The relevant rule states, “For other than

fundamental research as defined in National Security Decision Directive 189, the Contractor is responsible to conduct internal export control reviews and assure that technology is transferred in accordance with applicable law” (48 CFR 970(j)(3)).

Because the Department of Defense claims an exemption from the requirements of the Regulatory Flexibility Act (5 USC 601 et seq.), it is clear that the purpose of this rule is to clarify existing obligations rather than to have any substantial effect on the contractor-department relationship. Therefore, it seems that the authors of the proposed rule in no way intended to impinge upon the fundamental research exemption. In light of this, we believe that including language acknowledging the fundamental research exemption and explicitly exempting fundamental research from the obligations of the proposed rule would help to ensure a consistent interpretation of the rule by the Department of Defense and by lab managers and project administrators, thereby attenuating the possibility for costly and harmful misinterpretations after the rule is implemented.