

July 11, 2013

U.S. Department of Energy
Office of Acquisition and Project Management
MA-611
1000 Independence Avenue SW
Washington D.C. 20885

Re: DEAR: Export Control (RIN 1991-AB99)

Dear Mr. Butler:

We are responding on behalf of the Council on Governmental Relations (COGR) and the Association of American Universities (AAU) to the June 12, 2013 Federal Register Notice (78 FR 35195) which proposes to amend the Department of Energy Acquisition Regulations (DEAR) to add export control compliance requirements. COGR is an association of 189 U.S. research universities and their affiliated academic medical centers and research institutes that concerns itself with the impact of federal regulations, policies, and practices on the performance of research and other sponsored activities conducted at its member institutions. AAU is an association of 60 U.S. and two Canadian preeminent research universities organized to develop and implement effective national and institutional policies supporting research and scholarship, graduate and undergraduate education, and public service in research universities.

Our member institutions take very seriously their obligations for compliance with export control rules. Over the past decade many universities have hired export control compliance officers, developed extensive training materials on export controls on their websites, and hosted and participated in many meetings and conferences focused on export control compliance. Those institutions that deal with export controlled technologies are familiar with the requirements for Technology Control Plans and the need to obtain licenses from the appropriate regulatory authorities. Most of our institutions, however prefer primarily to perform fundamental research excluded from export controls under the Export Administration Regulations (EAR) 734.8 or the International Traffic in Arms Regulations (ITAR) 120.11(a)(8), consistent with National Security Decision Directive (NSDD) 189 Policy on the Transfer of Scientific, Technical and Engineering Information.

The recently proposed DEAR policy requirement (925.7101) states the need for DOE contractors to comply with all applicable export control laws, regulations and directives. It includes a list of these authorities and advises contractors to contact the responsible administering agencies for guidance. As stated in the proposed rule, these compliance responsibilities exist independent of and are not established or limited by the proposed DEAR rule. The requirement merely confirms existing obligations and reminds DOE contractors of their export control compliance responsibilities.

However, we are concerned about one aspect of the proposed DEAR contract clause 952.225-XX. The clause provides (Section (c)) that an Export Restriction Notice “shall be included in all transfers, sales or other offerings of unclassified information, materials, technology, equipment or software pursuant to a DOE contract.” The Notice states that the “use, disposition, export, and re-export of this property are subject to export control laws, regulations and directives....” Similar provisions are included in the proposed clause (970.2571—3) for DOE management and operating contracts.

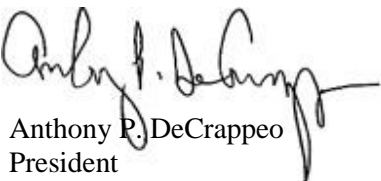
We are unclear as to the scope of the Notice requirement. The proposed rule states that it implements DOE requirements for management of high risk Government-owned personal property (41 CFR 109—1.5303). However, the proposed clause is not limited to such property, but applies to any “offerings” of unclassified information, material, technology, equipment or software. It also is not limited to contracts involving export controlled information or technology, but appears to apply to all DOE contracts. This broad scope potentially could have serious implications for DOE university research contracts, particularly as applied to unclassified information. As currently worded, the Notice requirement could adversely impact the publication of research results, the sharing of information among researchers, and any dissemination of information about the project.

Such restrictions go considerably beyond the scope of existing export control requirements and are inconsistent with national policy as set forth in NSDD 189 and the exclusion of fundamental research from export controls in the EAR and ITAR provisions as stated above in the letter. It also goes beyond DOE policy as stated in 41 CFR 109-1.5301, which applies only to Government-owned personal property. Moreover, the Notice requirement is unlikely to be acceptable to our member institutions, if applied so broadly. It may lead to the need for extensive negotiations over the contract terms, or even cause them to decline to participate in DOE-funded research subject to these requirements.

We strongly urge DOE to reconsider and clarify that the Notice requirement is not intended to apply to the publication or dissemination of the results of fundamental research conducted under DOE contracts not otherwise subject to export controls, or to the transfer of information about the research. We suspect that DOE did not intend for the requirement to apply so broadly, and hope that is the case. Our member institutions value their relationships with DOE, and it is in the interest of DOE, our universities and the nation to ensure that this new requirement not adversely affect these relationships.

We appreciate the opportunity to comment, and would welcome the opportunity for further discussions on this issue.

Sincerely yours,



Anthony P. DeCrappeo
President
Council on Governmental Relations



Hunter R. Rawlings III
President
Association of American Universities