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Summary of University Concerns with DOD IG Report

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Summary of University Concerns with DOD IG Report

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)*, contains several recommendations that, if implemented by DOD, raise serious issues for research universities. Of greatest concern is the recommendation that an export control compliance clause be incorporated into DOD contracts, without recognizing the fundamental research exclusion that protects fundamental university research from export control licensing requirements. This is likely to result in a significant increase in the number of export control clauses that appear in university contracts, especially in subcontracts coming from industry. Once inserted these clauses will be difficult, if not impossible, to renegotiate. It also will seriously weaken the partnership between defense agencies and U.S. universities.

- The IG report references the fundamental research exclusion in a footnote and only partially, and does not analyze or acknowledge the effect of the recommended compliance clause on fundamental research. NSDD-189, which recognizes the open and public nature of university fundamental research, is not recognized at all.
- The report recommends that DOD expand its guidance to its program managers and contracting officers, instructing them to ensure that contracts identify export-controlled technology and require access control plans including badging requirements for foreign nationals, segregated work areas for controlled technology, training, annual self-assessments, and the securing of export licenses or exemptions. It is unclear how the recommendation to implement security badging systems or change the configuration of open university laboratories and buildings to provide secure work areas would be implemented and who would pay the high costs. Universities are concerned that DOD agencies will incorrectly interpret compliance requirements to require access controls in all cases, even when fundamental research is being performed. There is additional concern that if fundamental research protections are eliminated and such restrictions are required by contract, there will be significant interference with our efforts to foster multi-departmental, multi-institutional and university-industry collaborative work.
- The recommendation to expand the Interim Guidance of Export Controls for Biological Agents to encompass all export-controlled technology fails to recognize that those recommendations were based on a very specific list of controlled biological agents in which the use and potential threat of such agents is obvious. In other technological areas - such as computer science, engineering, and the physical sciences - it can be quite difficult to discern how a particular technology will be used. This problem is further compounded by the fact that many controlled and potentially-controlled electronics and communications technologies, such as computer chips and global positioning technologies, are readily available on the world-wide consumer market further blurring the lines between controlled and freely available technologies.

- The recommendation accepted by DOD management to develop and incorporate an export compliance clause for solicitations, contracts and subcontracts causes particular concern. The DOD IG report calls on DOD program and contracting officers to have a higher level of accountability for export control compliance and a limited ability to drop the clause in contracts and subcontracts to universities despite the fundamental research exclusion. Once inserted, universities are concerned that it also will be very difficult to negotiate export control language out of contracts even for fundamental research. Should the clause require universities to obtain licenses and implement security, this would contractually eliminate the fundamental research exclusion.
- Universities continue to believe the research that is supported by the Department of Defense that is classified as either 6.1 “basic” or 6.2 “applied,” should be considered “fundamental” and therefore excluded from export control restrictions. Universities believe that the DOD should clarify this matter and hope this will be done in the context of the Defense security directive that we understand is currently being considered within DOD.
- The full implications of the implementation of the IG report recommendations remain unclear, particularly since the language of the new compliance clause and the prescription for its use remain to be developed. However, there is an inherent risk of program managers and contracting officers defaulting to overly restrictive contract language in an effort to remove them from any potential liability or culpability. It is important for universities to retain the ability to negotiate the terms of the contract based on the specifics of the technology to be employed and for the work to be done. Should DOD implementation fail to recognize NSDD-189 and the fundamental research exclusion, universities will face the difficult choice of seeking other funding sources or having export controls apply much more broadly to research performed for DOD. The associated increase in licensing and other control requirements will seriously impede research and discourage critical foreign national participation, as well as result in new administrative burdens for universities that will undermine their contribution to the nation’s innovation, research and education enterprises. It will weaken the openness of the university research enterprise, which is the hallmark and strength of our system.

July 22, 2004