

Welcome

**Export Control Contract Language,  
Negotiations, and when to contact the  
Office of Research Compliance and  
Security.**

Oct 27, 2020



**MISSISSIPPI STATE**  
UNIVERSITY™

Office of Research Compliance  
and Security

# Presenters

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Submit questions  
or comments in Chat



# Agenda

- Why negotiate?
- What is “controlled”?
- Contract clauses
- Alternate methods



# Why Remove Restrictions?

- Academic principles
- Personnel inclusion
- Support open Dissertation and Thesis
- Computer system flexibility (including stand alone)
- **Reduces compliance risk**



# Export Controls

- Reasons for project control

- Contractual:

Publication Restriction

Network Restriction

Personnel Restriction

- Controlled Technology:

ITAR (U.S. Persons only)

EAR (Country Chart)

Does that include robots?

“Don’t do business with Export-Controlled countries”

- Contact ORC&S when you have any restrictions or questions about who is allowed access to controlled information/ materials



# Publication Restriction

- Is a required review by the sponsor a restriction?
- DFAR 252.204-7000 Disclosure of information
  - Can be removed for subs, the prime must request
- Distro statement
  
- “NASA Publication Guide for Authors”
- NAVAIR 5252.204-9504 Disclosure of contract info



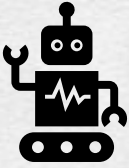
# Network Restriction

- DFARS 252.204-7012 was created Sept 21, 2017 to provide for the safeguarding of **controlled unclassified information** when residing on or transiting through a contractor's internal **information system or network**. Contractors, who **self-attest** to meeting these requirements have until Dec 31, 2017, to implement NIST SP 800-171. There is no single or prescribed manner in which a contractor may choose to implement NIST or to **assess their own compliance**.

What is the "**network**?"



# NIST/ 7012/ SP 800-171

- 110 requirements
- POAM, plan of action and milestones (lack or follow up?)
- SSP, system security plan (adequate?) 
- Very low confidence
- Need for a new system to **assess** compliance and **increase** confidence





# Cybersecurity Maturity Model Certification

- CMMC version 1.0, released Jan 31, 2020. “A new era of visibility and **accountability** for defense contractors.”

*-Here's What You Must Know About CMMC, C3 Integrated Solutions, July 26, 2020*

- Will **assess** NIST claims, add more (NIST is the base)
- Will update DFARS 7012 (**interim rule**)
- Will create additional DFARS clauses
- Will establish third party auditor guidelines (3PAO)



Applies to all DoD contracts



# Interim Rule

[https://www.govinfo.gov/content/pkg/FR-2020-09-29/pdf/2020-21123.pdf?utm\\_campaign=subscription+mailing+list&utm\\_source=federalregister.gov&utm\\_medium=email](https://www.govinfo.gov/content/pkg/FR-2020-09-29/pdf/2020-21123.pdf?utm_campaign=subscription+mailing+list&utm_source=federalregister.gov&utm_medium=email)

- Rule date Sept 29, 2020, Effective date **Nov 30, 2020**
- DoD is implementing a phased rollout of CMMC. Until Sept 30, **2025** the clause 7012 is prescribed for use in solicitations and contracts using FAR part 12, if the requirement document or SOW requires a specific CMMC level. CMMC certification is a **required flow down** to subs based on sensitivity of unclass information flowed down to each sub.
  1. Certification **Level** required, not just “we can accept 7012”
  2. New assessment guidance
  3. 3 new DFARS clauses
  4. Supplier Performance Risk System



# Interim Rule

- Certification level is documented in SPRS prior to contract award (not more than **3 yrs old**)

**Basic** – self assessment. After award, DoD **may choose to conduct:**

**Medium** – provide access, address assessment concerns

**High** – demonstrate security plan

- **252.204-7019** – *Notice of NIST SP 800-171 DoD Assessment Requirements*
- **252.204-7020** – NIST SP 800-171 DoD Assessment Requirements
- **252.204-7021** – CMMC Requirements



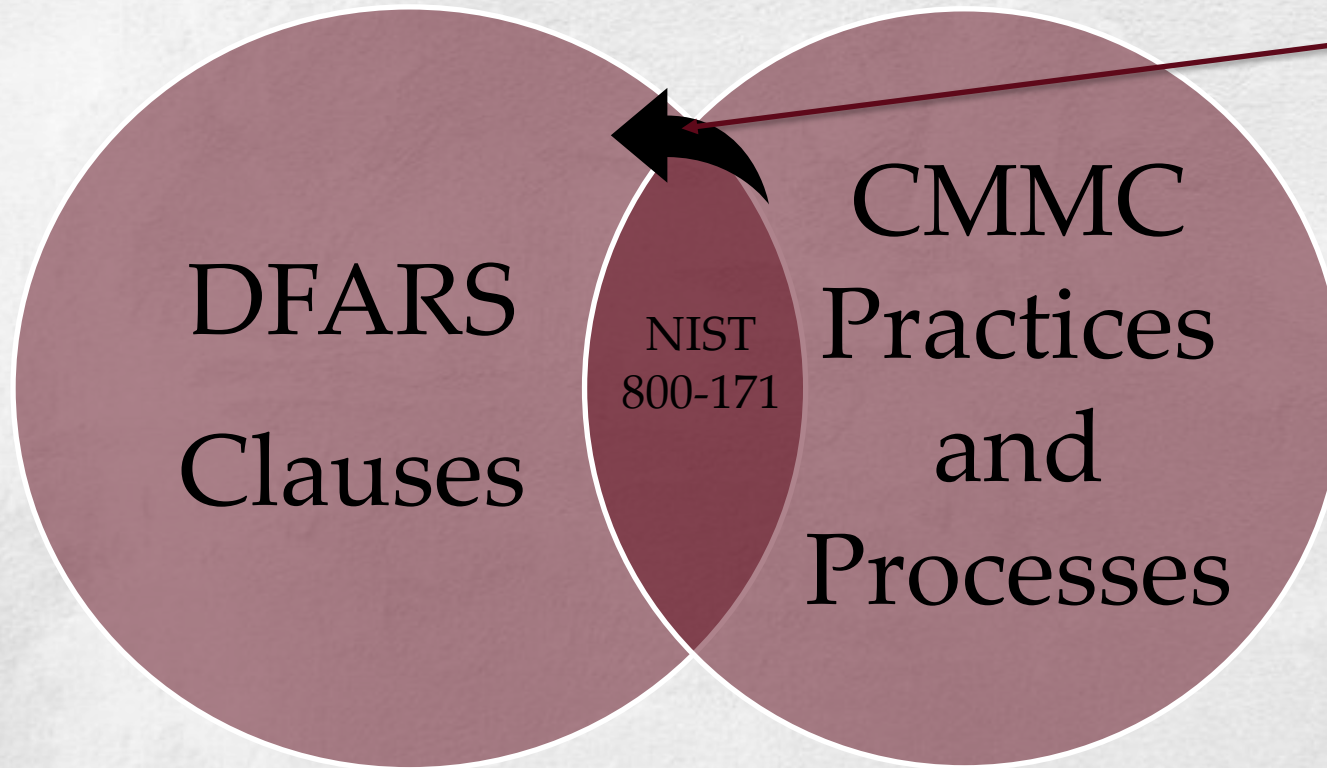
# CMMC Levels

Level	Description	
1	15 safeguarding requirements in FAR 52.204-21	
2	65 requirements from NIST SP 800-171	
3	110 NIST SP 800-171, plus	20 CMMC practices and 3 processes
4	110 NIST SP 800-171, plus	46 CMMC practices and 4 processes
5	110 NIST SP 800-171, plus	61 CMMC practices and 5 processes

Which supporting agencies, like OSP or ECO, need to be compliant?



Implementation so far. DFARS will continue to update to absorb more CMMC requirements.



Expanding 7012  
New DFARS clauses:  
7019, 7020, 7021



# False Claims Act Decision, Aerojet

United States ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.

- Federal District Court, Eastern District of CA, May 2019
- Non-compliance w/ DoD DFARS 7012 and NASA FAR supplement
- “the requirements are complicated and onerous”
- The court acknowledged a letter from a DoD rep to CO noting DoD could award the contract to Aerojet because inability to comply appeared “relatively simple”
- The court reasoned Aerojet disclosed *some* on its noncompliance
- Takeaway – *proper disclosure* and SSPs



# CUI Categories in National Archives

<https://www.archives.gov/cui/registry/category-list>

- Defense
  - **Controlled Technical Information**
  - DoD Critical Infrastructure
  - Naval Nuclear Propulsion
  - Unclass Controlled Nuclear
- Export Control
  - **Export Controlled**
  - **Export Controlled Research**
- 123 additional categories:
  - Tax Information
  - Proprietary Business Information
  - Personnel Records
  - Student Records
  - Health Information
  - Visa Status
  - Electronic Funds Transfer



# Technology Restriction

- ITAR-U.S. Munitions List
- Example: Category VII, Ground Vehicle, Category XI, Military Electronics
- U.S. “Persons” only
- Exemptions (FTEE 22 CFR 125.4 (b)(10))
- EAR-Commercial Control List
- Example: 6A003, High Speed Cameras, 40 approved countries
- Country Chart: AT-Anti Terrorism, NP- Nuclear Nonproliferation, NS-National Security, RS-Regional Stability
- Exceptions

DFAR 252.225-7048 Export Controlled Items (*what are the items?*)





# Technology Restriction

- 252.225-7048 Export-Controlled Items (JUN 2013)
  - (a) Definition. "Export-controlled items," as used in this clause, means items subject to the EAR or ITAR. The term includes –
    - (1) "Defense items," defined in the Arms Export Control Act, as defense articles, defense services, and related technical data, and further defined in the ITAR; and
    - (2) "Items," defined in the EAR as "commodities", "software", and "technology," terms that are also defined in the EAR.
  - (b) The Contractor shall comply with all applicable laws and regulations regarding export-controlled items, including, but not limited to, the requirement for contractors to register with the Department of State in accordance with the ITAR.
  - (e) The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts.

The clause must flow down, did the "item"?



# Distribution Statement

DoDI 5230.24, Change 3, August 23, 2012

- “Policy...promote information sharing to the maximum extent possible...consistent with protection requirements”
- The letter will be in the award.
- A “Secondary” statement for clarification or distribution may be listed.
- Once cleared for public release, if document contains technical info or not, it can be released

Is this consistent with DFARS 7000?

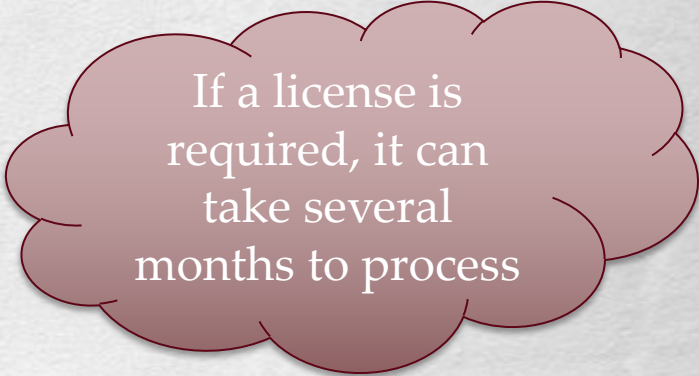
A	Approved for public release
B	Distributin authorized to U.S. Government agencies
C	U.S. Government agencies and their contractors
D	DoD and DoD contractors
E	DoD Components only
F	Further dissemination only as directed by higher DoD authority

Fight for A



# Materials Transfer Agreement

- MTA is for outgoing research materials
- RPS on ship to address and recipient
- Classification of what is to be shipped
- Advise on license requirement, if necessary, and possible exemptions



If a license is required, it can take several months to process



# Fundamental Research Exclusion

- Public Domain (ITAR § 120.11(a)(8)) ...University research will **not** be considered fundamental research if:
  - (i) The university or its researchers accept other **restrictions on publication** of scientific and technical information resulting from the project or activity, or
  - (ii) The research is funded by the US Government and specific access and dissemination **controls protecting information** resulting from the research are applicable
- DFAR 252.204-7000 (a)(3) ...project that involves **no CDI**...scoped and negotiated...**in writing** by contracting officer to be fundamental research

Covered Defense Information (CDI) is used to describe information that requires protection under DFARS Clause 252.204-7012



# FRE Negotiation Differences

## 1. MSU negotiating with the USG

The USG contracting officer can work with you directly.

## 2. MSU is the sub to another university prime

Universities have different tolerance levels for Federal restrictions, they may or may not be FRE friendly or savvy

## 3. MSU is the sub to non-academic prime


The prime may not know what FRE is or the fact they have to negotiate for the sub.

Reference MIT presentation on Federal Contracts, 18 March 2013



# Summary

Fundamental  
Research  
Exemption

- Be concerned about:
  - Publication Restriction → 252.204-7000 (Distribution Statement)
  - Network Restriction → 252.204-7012 
  - Personnel Restriction → ITAR or EAR or other
  - Technology Restriction → 252.225-7048, ITAR or EAR
- Look out for:
  - DFARS changes → 252.204-7019/ 7020
  - CMMC → 252.204-7021, SPRS
- Coming soon:



# The End

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