

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DoD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology. Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. The DoD policies and procedures described and recommended herein apply equally to transfer and protection of dual-use and defense-related technology. Such data and technology must be treated as a valuable national security resource, to be protected and transferred only in accordance with export control laws and regulations, and national security and foreign policy objectives. This part describes procedures for DoD components and their contractors and grantees in controlling, export of technology, articles, and services that contribute to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** Comments must be received by **[insert date 60 days from date of publication]**.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Audit Matters Office, 9010 Defense Pentagon, Washington, DC 20301-9010.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**EXECUTIVE SUMMARY**

I. Purpose of the regulatory action

a. Purpose. This rule prescribes a course of conduct that must be followed by DoD employees and contractor personnel to ensure that unclassified technical data and technology that discloses technology or information with military or space application in the possession or under the control of a DoD Component that may not be exported lawfully without an approval, authorization, or license is controlled and disseminated consistent with U.S. export control laws and regulations. Export control and technology security policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on the defense industrial base. Criminal and civil penalties for export control violations are severe. For

munitions export control violations, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, munitions violations can result in the imposition of a maximum civil fine of \$500,000 per violation of the ITAR, as well as debarment from exporting defense articles or services. For dual-use export control violations, criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. Dual-use violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges..

b. Succinct statement of legal authority for the regulatory action.

Authority: Legal authority for the regulatory action: In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense.

## II. Summary of the Major Provisions of the Regulatory Action in Question

The major provisions of this regulatory action include describing procedures for the release of technical information; determining procedures for technical data and technology governed by this rule are marked for distribution; and providing an example of the notice to accompany export-controlled technical data and technology.

## III. Costs and Benefits

Cost: \$1,587,589

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data, a contractor provides basic company information, identifies a data custodian and describes need-to-know.

The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and

supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

This rule provides updates regarding the withholding from public disclosure any technical data and technology or information with military or space application in the possession or under the control of the Department of Defense. The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance.

These requirements have been in effect since 1985.

## **REGULATORY PROCEDURES**

### **Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that

maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action,” because the rule does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders.

**Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs. The export control program has no discernible increase in anticipated costs and benefits for State, local, or tribal governments, or the private sector as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis. The export control program has no discernible increase in anticipated costs and benefits for small entities as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB under OMB Control Number 0704-0460. The expiration date for the OMB Control Number is August 31, 2016.

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments. The export control program has no discernible increase in anticipated costs and benefits for State, or local governments, as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).

(2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , and 15 CFR parts 730-774.

(c) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such data and technology does not in itself provide a basis for control of such data and technology under this part.

(d) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other information that is publicly available pursuant to 15 CFR 734.3, 734.7 through 734.9; or

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(e) Does not alter the responsibilities of the DoD Components to protect proprietary data of a private party, including:

(1) In which the DoD has less than unlimited (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018; and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

(f) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(g) Does not apply to classified technical data. However, after declassification, dissemination of the data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(h) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, “Controlled Unclassified Information,” as implemented by Volume 4 of DoD Manual 5200.01, “DoD Information Security Program” (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§250.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology

that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment, and inspection and test equipment.

(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

(2) With respect to dual-use categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology: those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 U.S.C. 110.

(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by the 22 CFR parts 120-130, or a dual-use article, including its underlying technology and software, covered by 15 CFR parts 730-774.

Defense article. Any item or technical data designated in §121.1 of this subchapter. The policy described in §120.3 is applicable to designations of additional items. This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in §121.1 of this subchapter. It also includes forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles. It does not include basic marketing information on function or purpose or general system descriptions.

Defense services. (1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) The furnishing to foreign persons of any technical data controlled under this subchapter (see §120.10), whether in the United States or abroad; or

(3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice. (See also 22 CFR 124.1.)

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

(1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through a licensed direct foreign military sale).

(2) Bidding, or preparing to bid, on a sale of surplus property.

(3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.

(4) Engaging in scientific research in a professional capacity.

(5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

Qualified contractor. A qualified U.S. contractor or a Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. (a) Technical data means:

(1) Information, other than software as defined in 22 CFR 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.

(2) Classified information relating to defense articles and defense services on the U.S. Munitions List and 600-series items controlled by the Commerce Control List;

(3) Information covered by an invention secrecy order; or


(4) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition in paragraph (a) of this section does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts

730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States. 

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

**§250.4 Policy.**

It is DoD policy that:

(a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data with military or space application in the possession or under the control of the DoD, if such data may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance with U.S. export control laws and regulations (22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such data pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such data relate to a legitimate business purpose for which the contractor is certified; or

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that

requires the data and technology for regulatory or other official government purposes.

Dissemination of the data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, "International Transfers of

Technology, Articles, and Services” (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, “Clearance of DoD Information for Public Release” (available at <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, “Security and Policy Review of DoD Information for Public Release” (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, “Cybersecurity” (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, “Information Assurance (IA) and Support to Computer Network Defense (CND),” February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, “DoD Records Management Program” (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

#### **§250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

(1) Administer and monitor compliance with this part.

- (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
  - (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.
  - (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.
  - (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
  - (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
  - (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
  - (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.
  - (9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.
  - (10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.
- (b) The Under Secretary of Defense for Policy (USD(P)):

- (1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.
  - (2) Coordinates with the Departments of State and Commerce when necessary to verify commodity jurisdiction and export controls for technical data and technology covered by this part.
  - (3) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.
- (c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:
- (1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.
  - (2) Provides such other assistance as may be necessary to ensure compliance with this part.
- (d) The GC DoD:
- (1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.
  - (2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.
- (e) The DoD Component heads:
- (1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.
  - (2) Designate a focal point to:
    - (i) Ensure implementation of this part.
    - (ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of §250.6.
    - (iii) Act on appeals relating to case-by-case denials for release of technical data and technology.

- (iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.
  - (v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.
  - (vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.
- (3) Develop, distribute, and effect Component regulations to implement this part.
  - (4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

- (a) Procedures for release of technical information must be made under the following guidelines:
  - (1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.
  - (2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested data currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information

will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

(ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.

(iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.

(iv) A copy of the company’s State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.

(v) The contractor’s business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.

(b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.

(1) The determination will be based on whether

- (i) The information is subject to 22 CFR part 121 or 15 CFR part 774.
  - (ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.
  - (iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.
- (2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State or Commerce.
- (c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.
- (d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:
- (1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;
  - (2) The controlling DoD office judges the requested data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested data and technology and, if

appropriate, request a new certification (see §250.3) describing the intended use of the requested data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the data and technology if the DoD Component focal point determines the release of the data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a "Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology" (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. 2778 the penalty for unlawful export of items or information controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C., Appendix 2410, the penalty for unlawful export of items or information controlled under the EAR is a fine of not more than \$1,000,000, or five times the value of the exports, whichever is greater; or for an individual, imprisonment of not more than 10 years, or a fine of not more than to \$250,000, or both.
4. Under 50 U.S.C. 1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these data and technology that are provided to qualified contractors.

(i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:

(1) To any foreign recipient for which the data are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.

(2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.

(3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.

(4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.

(j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.

(k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to make a

written appeal to a specifically identified appellate authority within the DoD Component. Other appeals will be processed as directed by the USD(AT&L).

(l) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

- (i) There is a valid license covering the export of the data;
- (ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;
- (iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or
- (iv) The export or release qualifies for a general license under 15 CFR parts 730-774.

(2) Second condition:

- (i) The distribution statement applied to the data pursuant to DoD Instruction 5230.24 permits release; or
- (ii) The originator or government controlling office authorizes release.

## UNIFIED AGENDA INFORMATION

The following information is requested to assist the Federal Register Liaison in completing the entries for the Unified Agenda. The Unified Agenda is a consolidated OMB document published in the FR consisting of Agency rulemakings that have a public impact and interest. Consult your General Counsel for assistance and use the following format:

**Part Number:** 32 CFR Part 250

**RIN Number:** 0790-AI73

**Related Agency Issuance Number and Title:** DoD Instruction 5230.25

**Title of the Rule:** Withholding of Unclassified Technical Data and Technology from Public Disclosure

**Agency Point of Contact for the Rule:**

Name: Vakare Valaitis

Phone Number: 703-767-9159

Fax Number: 703-767-8228

Email Address: (b)(6)

**Authority Citation:** Legal authority for the regulatory action: In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense..

**Priority Status of the Rule**

1. Indicate whether or not this rulemaking action will be reported in the Regulatory Plan.

Yes or  No

*NOTE: You should check YES if it is determined that your rule is economically significant.*

2. Indicate the priority of the rulemaking action by selecting one of the following five categories:

**a.  ECONOMICALLY SIGNIFICANT**

*[This refers to a rulemaking action that will have an annual effect on the economy of \$100 million or more or will adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities.]*

**b.  OTHER SIGNIFICANT**

*[This refers to a rulemaking action that is not economically significant but is considered*

*significant by the Agency. This category includes rules that the Agency anticipates will be reviewed under E.O. 12866 or rules that are a priority of the Agency Head.]*

*NOTE: These rules may be included in the Agency's regulatory plan.*

**c.  SUBSTANTIVE, NON-SIGNIFICANT**

*[This refers to a rulemaking action that has substantive impacts but is neither Significant, Routine and Frequent, nor Informational/Administrative.]*

**d.  ROUTINE AND FREQUENT**

*[This refers to a rulemaking action that is a specific case of a multiple-recurring application of a regulatory program in the CFR and that does not alter the body of the regulation.]*

*NOTE: If a rulemaking that normally falls into this category is submitted to OMB for review, the rulemaking must then be classified as Other Significant or Substantive, Non-significant and not as Routine and Frequent.*

**e.  INFORMATIONAL/ADMINISTRATIVE/OTHER**

*[This refers to a rulemaking action that is primarily informational or pertains to Agency matters not central to accomplishing the Agency's regulatory mandate but that the Agency places in the Agenda to Inform the public of the activity.]*

3. Indicate whether the rulemaking action is covered under section 202 of the Unfunded Mandates Reform Act (Pub. L. 104-4) because it includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private section of \$100 million or more in 1 year.

Yes or  No

4. If your answer was YES to item 3, above, indicate who will be affected by the rulemaking action by choosing one of the two above categories.

a.  State, local, or tribal governments

b.  Private sector

5. Indicate whether or not the rulemaking action has an effect on family well-being according to Section 654 of the Treasury and General Government Appropriations Act of 1999, because it strengthens or erodes the stability or safety of the family and, particularly, the marital commitment; strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children; helps the family perform its functions, or substitutes governmental activity for the function; increases or decreases disposable income or poverty of families and children; proposes benefits that justify the financial impact on the family; may be carried out by State or local government or by the family; and establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.

Yes or  No

6. Indicate whether or not the rulemaking action is considered "major" and therefore subject to the 60-day deferral requirement under 5 U.S.C. 801, enacted by Pub. L. 104-121, because it has resulted or is likely to result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Yes or  No

7. Indicate whether or not the rulemaking action has Federalism implications in accordance with E.O. 13132 because it has a substantial direct affect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Yes or  No

8. Indicate whether or not the rulemaking has an impact on the supply, distribution or use of energy and a Statement of Energy Effects has been prepared as required by Executive Order 13211.

Yes or  No

### **Effects on Small Entities and Levels of Government**

1. Indicate whether or not the rulemaking action is expected to have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act (5 U.S.C. 601(6)).

Yes or  No

*NOTE: If the rulemaking action will have a significant economic impact, a Regulatory Flexibility Act analysis is required.*

2. If your answer was YES to item 1, above, indicate who will be affected by the rulemaking action from the following list of categories (check all that apply).

- a.  Businesses
- b.  Government jurisdictions
- c.  Organizations

3. Indicate whether or not the rulemaking action is expected to affect levels of government.

Yes or  No

4. If your answer was YES to item 3, above, indicate who will be affected by the rulemaking action from the following list of categories (check all that apply).

- a.  State
- b.  Local
- c.  Tribal
- d.  Federal

**High Interest Item:**  Yes or  No

With Congress

With OMB

With the Administration

***I understand if my rule (proposed or interim) is not finalized within a year of its entry in the Unified Agenda, I must provide the FRLO with an explanation for not finalizing the rule and an authorization to remove the rule from the Unified Agenda and/or the CFR (if an interim rule).***

\_\_\_\_\_  
Signature and Printed Name of Action Officer

\_\_\_\_\_  
Date

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DOD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology. Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. The Department of Defense (DoD) policies and procedures described and recommended herein apply equally to transfer and protection of dual-use and defense-related technology. Such data and technology must be treated as a valuable national security resource, to be protected and transferred only in accordance with export control laws and regulations, and national security and foreign policy objectives. This part describes procedures for DoD components and their contractors and grantees in controlling, export of technology, articles, and services that contribute to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** Comments must be received by [insert date 60 days from date of publication].

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**EXECUTIVE SUMMARY**

I. Purpose of the regulatory action

a. Purpose. This rule prescribes a course of conduct that must be followed by DoD employees and contractor personnel to ensure that unclassified technical data and technology that discloses technology or information with military or space application in the possession or under the control of a DoD Component that may not be exported lawfully without an approval, authorization, or license is controlled and disseminated consistent with U.S. export control laws and regulations. Export control and technology security policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on the defense industrial base. Criminal and civil penalties for export control violations are severe. For

munitions export control violations, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, munitions violations can result in the imposition of a maximum civil fine of \$500,000 per violation of the “International Traffic in Arms Regulations” (ITAR), as well as debarment from exporting defense articles or services. For dual-use export control violations, criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. Dual-use violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges.

b. Succinct statement of legal authority for the regulatory action.

Authority: Legal authority for the regulatory action: In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense.

## II. Summary of the Major Provisions of the Regulatory Action in Question

The major provisions of this regulatory action include describing procedures for the release of technical information; determining procedures for technical data and technology governed by this rule are marked for distribution; and providing an example of the notice to accompany export-controlled technical data and technology.

## III. Costs and Benefits

Cost: \$1,587,589

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data, a contractor provides basic company information, identifies a data custodian and describes need-to-know.

The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

This rule provides updates regarding the withholding from public disclosure any technical data and technology or information with military or space application in the possession or under the control of the Department of Defense. The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance.

These requirements have been in effect since 1985.

## **REGULATORY PROCEDURES**

**Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action,” because the rule does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders.

**Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs. The export control program has no discernible increase in anticipated costs and benefits for State, local, or tribal governments, or the private sector as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis. The export control program has no discernible increase in anticipated costs and benefits for small entities as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB under OMB Control Number 0704-0207. The expiration date for the OMB Control Number is March 31, 2019.

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments. The export control program has no discernible increase in anticipated costs and benefits for State, or local governments, as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field

Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).

(2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , and 15 CFR parts 730-774.

(c) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such data and technology does not in itself provide a basis for control of such data and technology under this part.

(d) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other information that is publicly available pursuant to 15 CFR 734.3, 734.7 through 734.9; or

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(e) Does not alter the responsibilities of the DoD Components to protect proprietary data of a private party, including:

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018; and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

(f) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(g) Does not apply to classified technical data. However, after declassification, dissemination of the data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(h) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, “Controlled Unclassified Information,” as implemented by Volume 4 of DoD Manual 5200.01, “DoD Information Security Program” (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§250.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment, and inspection and test equipment.

(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

(2) With respect to dual-use categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology: those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 U.S.C. 110.

(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120-130, or a dual-use article, including its underlying technology and software, covered by 15 CFR parts 730-774.

Defense article. Any item or technical data designated in 22 CFR 121.1. The policy described in §120.3 is applicable to designations of additional items. This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in 22 CFR 121.1. It also includes forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles. It does not include basic marketing information on function or purpose or general system descriptions.

Defense services. (1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) The furnishing to foreign persons of any technical data controlled under this subchapter (see §120.10), whether in the United States or abroad; or

(3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice. (See also 22 CFR 124.1.)

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

(1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through a licensed direct foreign military sale).

- (2) Bidding, or preparing to bid, on a sale of surplus property.
- (3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.
- (4) Engaging in scientific research in a professional capacity.
- (5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

Qualified contractor. A qualified U.S. contractor or a Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. (a) Technical data means:

(1) Information, other than software as defined in 22 CFR 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.

(2) Classified information relating to defense articles and defense services on the U.S. Munitions List and 600-series items controlled by the Commerce Control List;

(3) Information covered by an invention secrecy order; or

(4) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition in paragraph (a) of this definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts

730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

**§250.4 Policy.**

It is DoD policy that:

(a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data with military or space application in the possession or under the control of the DoD, if such data may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance with U.S. export control laws and regulations (22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such data pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such data relate to a legitimate business purpose for which the contractor is certified; or

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that requires the data and technology for regulatory or other official government purposes.

Dissemination of the data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at

<http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, “International Transfers of Technology, Articles, and Services” (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, “Clearance of DoD Information for Public Release” (available at <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, “Security and Policy Review of DoD Information for Public Release” (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, “Cybersecurity” (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, “Information Assurance (IA) and Support to Computer Network Defense (CND),” February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, “DoD Records Management Program” (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

#### **§250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

- (1) Administer and monitor compliance with this part.
  - (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
  - (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.
  - (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.
  - (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
  - (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
  - (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
  - (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.
  - (9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.
  - (10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.
- (b) The Under Secretary of Defense for Policy (USD(P)):

(1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.

(2) Coordinates with the Departments of State and Commerce when necessary to verify commodity jurisdiction and export controls for technical data and technology covered by this part.

(3) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.

(c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:

(1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.

(2) Provides such other assistance as may be necessary to ensure compliance with this part.

(d) The GC DoD:

(1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.

(2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.

(e) The DoD Component heads:

(1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.

(2) Designate a focal point to:

(i) Ensure implementation of this part.

(ii) Identify classes of technical data and technology whose release are governed by paragraph

(d)(3) of §250.6.

(iii) Act on appeals relating to case-by-case denials for release of technical data and technology.

- (iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.
  - (v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.
  - (vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.
- (3) Develop, distribute, and effect Component regulations to implement this part.
- (4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

- (a) Procedures for release of technical information must be made under the following guidelines:
- (1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.
  - (2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested data currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information

will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

(ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.

(iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.

(iv) A copy of the company’s State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.

(v) The contractor’s business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.

(b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.

(1) The determination will be based on whether

- (i) The information is subject to 22 CFR part 121 or 15 CFR part 774.
  - (ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.
  - (iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.
- (2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State or Commerce.
- (c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.
- (d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:
- (1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;
  - (2) The controlling DoD office judges the requested data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested data and technology and, if

appropriate, request a new certification (see §250.3) describing the intended use of the requested data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the data and technology if the DoD Component focal point determines the release of the data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a "Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology" (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of items or information controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C., Appendix §2410, the penalty for unlawful export of items or information controlled under the EAR is a fine of not more than \$1,000,000, or five times the value of the exports, whichever is greater; or for an individual, imprisonment of not more than 10 years, or a fine of not more than to \$250,000, or both.
4. Under 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these data and technology that are provided to qualified contractors.

(i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:

(1) To any foreign recipient for which the data are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.

(2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.

(3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.

(4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.

(j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.

(k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to make a

written appeal to a specifically identified appellate authority within the DoD Component. Other appeals will be processed as directed by the USD(AT&L).

(1) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

(i) There is a valid license covering the export of the data;

(ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;

(iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or

(iv) The export or release qualifies for a general license under 15 CFR parts 730-774.

(2) Second condition:

(i) The distribution statement applied to the data pursuant to DoD Instruction 5230.24 permits release; or

(ii) The originator or government controlling office authorizes release.

(b)(6); (b)(5)

(b)(6); (b)(5)

## RULE DATA

**TITLE:** Withholding of Unclassified Technical Data and Technology from Public Disclosure

**RIN:** 0790-AI73

**STATEMENT OF NEED:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology. Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. The Department of Defense (DoD) policies and procedures described and recommended herein apply equally to transfer and protection of dual-use and defense-related technology. Such data and technology must be treated as a valuable national security resource, to be protected and transferred only in accordance with export control laws and regulations, and national security and foreign policy objectives. This part describes procedures for DoD components and their contractors and grantees in controlling, export of technology, articles, and services that contribute to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**SUMMARY OF THE LEGAL BASIS:** In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense.

**ALTERNATIVES:** There is no alternative to this part.

**ANTICIPATED COST AND BENEFITS:**

Cost: \$1,587,589

**Cost to the public**

In exchange for Government-owned unclassified export controlled technical data, a contractor provides basic company information, identifies a data custodian and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor's degree \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

This rule provides updates regarding the withholding from public disclosure any technical data and technology or information with military or space application in the possession or under the control of the Department of Defense. The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**RISKS:** Criminal and civil penalties for export control violations are severe. For munitions export control violations, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, munitions violations can result in the imposition of a maximum civil fine of \$500,000 per violation of the “International Traffic in Arms Regulations” (ITAR), as well as debarment from exporting defense articles or services. For dual-use export control violations, criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. Dual-use violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges.

**EFFECTS ON ECONOMY:** This rule is issued to support the DoD and Federal Government export-control system which provides for national security by limiting access to the most sensitive U.S. technology and weapons while facilitating the transfer of technology to U.S. allies and ensuring that U.S. industry remains competitive internationally.



OFFICE OF THE DEPUTY CHIEF MANAGEMENT OFFICER
9010 DEFENSE PENTAGON
WASHINGTON, DC 20301-9010

OVERSIGHT AND COMPLIANCE

ACTION MEMO

July 19, 2016

FOR: ASSISTANT DEPUTY CHIEF MANAGEMENT OFFICER

THROUGH: Joo Y. Chung, Director of Oversight and Compliance

CHUNG.JOO.Y. Digitally signed by CHUNG.JOO.Y. DN: cn=US, o=U.S. Government, ou=OSD, ou=PR, ou=OSD, email=CHUNG.JOO.Y, Date: 2016.07.19 10:17:18 -0400 (b)(6)

FROM: Patricia L. Toppings, OSD Federal Register Liaison Officer

TOPPINGS.PATRICIA.L. Digitally signed by TOPPINGS.PATRICIA.L. DN: cn=US, o=U.S. Government, ou=OSD, ou=PR, ou=OSD, email=TOPPINGS.PATRICIA.L, Date: 2016.07.14 09:23:58 -0400 (b)(6)

SUBJECT: Approval of Proposed Rule, "Withholding of Unclassified Technical Data and Technology from Public Disclosure," 32 Code of Federal Regulations (CFR) Part 250

- This rulemaking is forwarded to you for review and approval in your capacity as the Department of Defense (DoD) Regulatory Policy Officer. TAB A is the text of the proposed rule that proposes to revise Title 32 of the CFR by replacing an existing part.
Pursuant to 10 U.S.C. 133 part (b)(2), this rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology. Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.
TAB B is a summary of the rule's intent and it addresses required information consistent with the regulatory principles of Executive Order 12866, "Regulatory Planning and Review." TAB C is the memorandum from the functional proponent, the Under Secretary of Defense for Acquisition, Technology, and Logistics, with coordination from the Office of the General Counsel certifying compliance with executive and legislative requirements, including meeting the criteria for following informal rulemaking procedures under the Administrative Procedures Act. TAB D is the formal coordination from the Office of the Deputy General Counsel (Legal Counsel) and the coordination summary.
Following approval, this rule will be submitted to the Office of Management and Budget for review prior to publication in the Federal Register.

RECOMMENDATION: ADCMO approve the rulemaking at TAB A by signing below.

Approve [Signature: TILLOTSON.DAVI] Disapprove [Signature: (b)(6)] Other [Signature: (b)(6)]

COORDINATION: TAB D

Attachments: As stated

Prepared by: Morgan Park, R&AMO/DO&C/ODCMO/OSD, (b)(6)

**From:** [Park, Morgan E CIV OSD ODCMO \(US\)](#)  
**To:** (b)(6)  
**Cc:** [Toppings, Patricia L CIV OSD ODCMO \(US\)](#); [Siegel, Aaron T CIV OSD ODCMO \(US\)](#)  
**Subject:** DoD Proposed Rule, "Withholding of Unclassified Technical Data and Technology from Public Disclosure"  
**Date:** Tuesday, July 19, 2016 11:34:00 AM  
**Attachments:** [TAB A Rule Text 0790-AI73 PRv2.docx](#)

---

Ms. Seehra,

Respectfully request a significance determination of the attached proposed rule, "Withholding of Unclassified Technical Data and Technology from Public Disclosure."

V/r,  
Morgan E. Park  
Regulatory, Audit & Advisory Committee Division  
Directorate for Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Office of the Secretary of Defense  
Department of Defense  
Mark Center Suite 08F25  
Office: (b)(6)  
E-mail: (b)(6)

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DOD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology. Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. The Department of Defense (DoD) policies and procedures described and recommended herein apply equally to transfer and protection of dual-use and defense-related technology. Such data and technology must be treated as a valuable national security resource, to be protected and transferred only in accordance with export control laws and regulations, and national security and foreign policy objectives. This part describes procedures for DoD components and their contractors and grantees in controlling, export of technology, articles, and services that contribute to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** Comments must be received by **[insert date 60 days from date of publication]**.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**EXECUTIVE SUMMARY**

I. Purpose of the regulatory action

a. Purpose. This rule prescribes a course of conduct that must be followed by DoD employees and contractor personnel to ensure that unclassified technical data and technology that discloses technology or information with military or space application in the possession or under the control of a DoD Component that may not be exported lawfully without an approval, authorization, or license is controlled and disseminated consistent with U.S. export control laws and regulations. Export control and technology security policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on the defense industrial base. Criminal and civil penalties for export control violations are severe. For

munitions export control violations, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, munitions violations can result in the imposition of a maximum civil fine of \$500,000 per violation of the “International Traffic in Arms Regulations” (ITAR), as well as debarment from exporting defense articles or services. For dual-use export control violations, criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. Dual-use violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges.

b. Succinct statement of legal authority for the regulatory action.

Authority: Legal authority for the regulatory action: In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense.

## II. Summary of the Major Provisions of the Regulatory Action in Question

The major provisions of this regulatory action include describing procedures for the release of technical information; determining procedures for technical data and technology governed by this rule are marked for distribution; and providing an example of the notice to accompany export-controlled technical data and technology.

## III. Costs and Benefits

Cost: \$1,587,589

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data, a contractor provides basic company information, identifies a data custodian and describes need-to-know.

The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

This rule provides updates regarding the withholding from public disclosure any technical data and technology or information with military or space application in the possession or under the control of the Department of Defense. The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance.

These requirements have been in effect since 1985.

## **REGULATORY PROCEDURES**

**Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action,” because the rule does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders.

**Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs. The export control program has no discernible increase in anticipated costs and benefits for State, local, or tribal governments, or the private sector as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis. The export control program has no discernible increase in anticipated costs and benefits for small entities as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB under OMB Control Number 0704-0207. The expiration date for the OMB Control Number is March 31, 2019.

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments. The export control program has no discernible increase in anticipated costs and benefits for State, or local governments, as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field

Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).

(2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , and 15 CFR parts 730-774.

(c) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such data and technology does not in itself provide a basis for control of such data and technology under this part.

(d) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other information that is publicly available pursuant to 15 CFR 734.3, 734.7 through 734.9; or

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(e) Does not alter the responsibilities of the DoD Components to protect proprietary data of a private party, including:

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018; and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

(f) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(g) Does not apply to classified technical data. However, after declassification, dissemination of the data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(h) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, “Controlled Unclassified Information,” as implemented by Volume 4 of DoD Manual 5200.01, “DoD Information Security Program” (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§250.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment, and inspection and test equipment.

(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

(2) With respect to dual-use categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology: those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 U.S.C. 110.

(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120-130, or a dual-use article, including its underlying technology and software, covered by 15 CFR parts 730-774.

Defense article. Any item or technical data designated in 22 CFR 121.1. The policy described in §120.3 is applicable to designations of additional items. This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in 22 CFR 121.1. It also includes forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles. It does not include basic marketing information on function or purpose or general system descriptions.

Defense services. (1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) The furnishing to foreign persons of any technical data controlled under this subchapter (see §120.10), whether in the United States or abroad; or

(3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice. (See also 22 CFR 124.1.)

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

(1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through a licensed direct foreign military sale).

- (2) Bidding, or preparing to bid, on a sale of surplus property.
- (3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.
- (4) Engaging in scientific research in a professional capacity.
- (5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

Qualified contractor. A qualified U.S. contractor or a Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. (a) Technical data means:

(1) Information, other than software as defined in 22 CFR 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.

(2) Classified information relating to defense articles and defense services on the U.S. Munitions List and 600-series items controlled by the Commerce Control List;

(3) Information covered by an invention secrecy order; or

(4) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition in paragraph (a) of this definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts

730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

**§250.4 Policy.**

It is DoD policy that:

(a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data with military or space application in the possession or under the control of the DoD, if such data may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance with U.S. export control laws and regulations (22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such data pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such data relate to a legitimate business purpose for which the contractor is certified; or

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that requires the data and technology for regulatory or other official government purposes.

Dissemination of the data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at

<http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, “International Transfers of Technology, Articles, and Services” (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, “Clearance of DoD Information for Public Release” (available at <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, “Security and Policy Review of DoD Information for Public Release” (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, “Cybersecurity” (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, “Information Assurance (IA) and Support to Computer Network Defense (CND),” February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, “DoD Records Management Program” (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

#### **§250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

- (1) Administer and monitor compliance with this part.
  - (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
  - (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.
  - (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.
  - (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
  - (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
  - (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
  - (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.
  - (9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.
  - (10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.
- (b) The Under Secretary of Defense for Policy (USD(P)):

- (1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.
  - (2) Coordinates with the Departments of State and Commerce when necessary to verify commodity jurisdiction and export controls for technical data and technology covered by this part.
  - (3) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.
- (c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:
- (1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.
  - (2) Provides such other assistance as may be necessary to ensure compliance with this part.
- (d) The GC DoD:
- (1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.
  - (2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.
- (e) The DoD Component heads:
- (1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.
  - (2) Designate a focal point to:
    - (i) Ensure implementation of this part.
    - (ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of §250.6.
    - (iii) Act on appeals relating to case-by-case denials for release of technical data and technology.

- (iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.
  - (v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.
  - (vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.
- (3) Develop, distribute, and effect Component regulations to implement this part.
- (4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

- (a) Procedures for release of technical information must be made under the following guidelines:
- (1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.
  - (2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested data currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information

will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

(ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.

(iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.

(iv) A copy of the company’s State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.

(v) The contractor’s business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.

(b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.

(1) The determination will be based on whether

- (i) The information is subject to 22 CFR part 121 or 15 CFR part 774.
  - (ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.
  - (iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.
- (2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State or Commerce.
- (c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.
- (d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:
- (1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;
  - (2) The controlling DoD office judges the requested data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested data and technology and, if

appropriate, request a new certification (see §250.3) describing the intended use of the requested data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the data and technology if the DoD Component focal point determines the release of the data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a "Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology" (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of items or information controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C., Appendix §2410, the penalty for unlawful export of items or information controlled under the EAR is a fine of not more than \$1,000,000, or five times the value of the exports, whichever is greater; or for an individual, imprisonment of not more than 10 years, or a fine of not more than to \$250,000, or both.
4. Under 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these data and technology that are provided to qualified contractors.

(i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:

(1) To any foreign recipient for which the data are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.

(2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.

(3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.

(4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.

(j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.

(k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to make a

written appeal to a specifically identified appellate authority within the DoD Component. Other appeals will be processed as directed by the USD(AT&L).

(l) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

- (i) There is a valid license covering the export of the data;
- (ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;
- (iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or
- (iv) The export or release qualifies for a general license under 15 CFR parts 730-774.

(2) Second condition:

- (i) The distribution statement applied to the data pursuant to DoD Instruction 5230.24 permits release; or
- (ii) The originator or government controlling office authorizes release.

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DOD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology. Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. The Department of Defense (DoD) policies and procedures described and recommended herein apply equally to transfer and protection of dual-use and defense-related technology. Such technical data and technology must be treated as a valuable national security resource, to be protected and transferred only in accordance with export control laws and regulations, and national security and foreign policy objectives. This part describes procedures for DoD components and their contractors and grantees in controlling, export of technology, defense articles, and defense services that contribute to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** Comments must be received by **[insert date 60 days from date of publication]**.

**Commented [MTC01]:** Consider clarifying by adding: "controlled under the International Traffic in Arms Regulations and Export Administration Regulations," respectively after "technology."

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**EXECUTIVE SUMMARY**

I. Purpose of the regulatory action

a. Purpose. This rule prescribes a course of conduct that must be followed by DoD employees and contractor personnel to ensure that unclassified technical data and technology that discloses technology or information with military or space application in the possession or under the control of a DoD Component that may not be exported lawfully without an approval, authorization, or license is controlled and disseminated consistent with U.S. export control laws and regulations. Export control and technology security policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on the defense industrial base. Criminal and civil penalties for export control violations are severe. For

munitions export control violations, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, munitions violations can result in the imposition of a maximum civil fine of \$500,000 per violation of the “International Traffic in Arms Regulations” (ITAR), as well as debarment from exporting defense articles or services. For dual-use export control violations subject to the EAR, criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. Dual-use Export Administration Regulation violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges.

b. Succinct statement of legal authority for the regulatory action.

Authority: Legal authority for the regulatory action: In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense.

## II. Summary of the Major Provisions of the Regulatory Action in Question

The major provisions of this regulatory action include describing procedures for the release of technical information; determining procedures for technical data and technology governed by this rule are marked for distribution; and providing an example of the notice to accompany export-controlled technical data and technology.

## III. Costs and Benefits

Cost: \$1,587,589

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and

**Commented [MTCO2]:** May be able to abbreviate with "ITAR" if you reference this regulation as recommended on page 1.

**Commented [MTCO3]:** Introduce the full spelling of EAR on page 1.

technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

This rule provides updates regarding the withholding from public disclosure any technical data and technology or information with military or space application in the possession or under the control of the Department of Defense. The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance.

These requirements have been in effect since 1985.

**REGULATORY PROCEDURES**

**Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action,” because the rule does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders.

**Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs. The export control program has no discernible increase in anticipated costs and benefits for State, local, or tribal governments, or the private sector as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis. The export control program has no discernible increase in anticipated costs and benefits for small entities as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB under OMB Control Number 0704-0207. The expiration date for the OMB Control Number is March 31, 2019.

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments. The export control program has no discernible increase in anticipated costs and benefits for State, or local governments, as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part -establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field

Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).

(2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , and 15 CFR parts 730-774.

(c) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

(d) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other information that is publicly available pursuant to 15 CFR 734.3, 734.7 through 734.9; or

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(e) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018; and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

(f) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(g) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(h) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, “Controlled Unclassified Information,” as implemented by Volume 4 of DoD Manual 5200.01, “DoD Information Security Program” (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### §250.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

**Commented [TED4]:** To the extent that some of these definitions are being repeated word for word from the ITAR and the EAR, it may be preferable to refer to the governing regulation rather than repeating the definition. Utherwise, if the definition is changed in the ITAR or the EAR this text will no longer be accurate. (e.g., Defense Article, Defense Service, Technical Data, Technology, etc.)

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment, and inspection and test equipment.

Commented [MTC05]: What is "keystone equipment?"

(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

(2) With respect to dual-use categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology: those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 U.S.C. 110.

(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120-130, or a dual-use article, including its underlying technology and software, covered by 15 CFR parts 730-774.

Defense article. Any item or technical data designated in 22 CFR 121.1. The policy described in §120.3 is applicable to designations of additional items. This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in 22 CFR 121.1. It also includes forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles. It does not include basic marketing information on function or purpose or general system descriptions.

Defense services. (1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) The furnishing to foreign persons of any technical data controlled under this subchapter (see [22 CFR, §120.10](#)), whether in the United States or abroad; or

Commented [DSCO6]: Editorial correction

(3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice. (See also 22 CFR 124.1.)

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

(1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through a licensed direct foreign military sale).

- (2) Bidding, or preparing to bid, on a sale of surplus property.
- (3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.
- (4) Engaging in scientific research in a professional capacity.
- (5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

Qualified contractor. A qualified U.S. contractor or a Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. (a) Technical data means:

(1) Information, other than software as defined in 22 CFR 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.

(2) Classified ~~information-data~~ relating to defense articles and defense services on the U.S.

~~Munitions List and 600-series items controlled by the Commerce Control List;~~

(3) Information covered by an invention secrecy order; or

(4) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition in paragraph (a) of this definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts

**Commented [MTC07]:** Editorial change related to classified data. Also, classified data would be ITAR controlled.

730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

**§250.4 Policy.**

It is DoD policy that:

(a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance with U.S. export control laws and regulations (22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data and technology may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

- (1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or
- (2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes. Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at

<http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, "International Transfers of Technology, Articles, and Services" (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, "Clearance of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, "Cybersecurity" (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, "Information Assurance (IA) and Support to Computer Network Defense (CND)," February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, "DoD Records Management Program" (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

**§250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

- (1) Administer and monitor compliance with this part.
  - (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
  - (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.
  - (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.
  - (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
  - (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
  - (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
  - (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.
  - (9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.
  - (10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.
- (b) The Under Secretary of Defense for Policy (USD(P)):

(1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.

(2) ~~Coordinates with~~ Adjudicates Commodity Jurisdiction (CJ) requests in coordination with the military departments and other DoD agencies regarding CJ referrals received from the Departments of State and Commerce when necessary to verify commodity jurisdiction and export controls for technical data and technology covered by this part.

(3) Provides consultation to DoD offices on export control and ~~commodity jurisdiction~~ CJ determinations.

**Commented [MTC08]:** DoS refers CJ applications to both DoD and DoC for jurisdiction recommendations.

**Commented [MTC09]:** Recommend deleting this paragraph. Seems too far into the weeds because it references just one of many USD/P export control responsibilities, and I would not recommend expanding to cover all of the other export control-related activities.

(c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:

(1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.

(2) Provides such other assistance as may be necessary to ensure compliance with this part.

(d) The GC DoD:

(1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.

(2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.

(e) The DoD Component heads:

(1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.

(2) Designate a focal point to:

(i) Ensure implementation of this part.

(ii) Identify classes of technical data and technology whose release are governed by paragraph

(d)(3) of §250.6.

- (iii) Act on appeals relating to case-by-case denials for release of technical data and technology.
  - (iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.
  - (v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.
  - (vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.
- (3) Develop, distribute, and effect Component regulations to implement this part.
- (4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

- (a) Procedures for release of technical information must be made under the following guidelines:
- (1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.
  - (2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested technical data and technology currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA

appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

(ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.

(iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.

(iv) A copy of the company’s State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.

(v) The contractor’s business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.

(b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.

(1) The determination will be based on whether

- (i) The information is subject to 22 CFR part 121 or 15 CFR part 774.
  - (ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.
  - (iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.
- (2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State or Commerce.
- (c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.
  - (d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:
    - (1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;
    - (2) The controlling DoD office judges the requested technical data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested technical data and

technology and, if appropriate, request a new certification (see §250.3) describing the intended use of the requested [technical](#) data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the [technical](#) data and technology if the DoD Component focal point determines the release of the [technical](#) data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a "Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology" (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of ~~items or information~~defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C., Appendix §2410, the penalty for unlawful export of items or information controlled under the EAR is a fine of not more than \$1,000,000, or five times the value of the exports, whichever is greater; or for an individual, imprisonment of not more than 10 years, or a fine of not more than to \$250,000, or both.
4. Under 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

Commented [TED10]: Does not match the information in page 2

(i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that technical data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:

- (1) To any foreign recipient for which the technical data and technology are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.
- (2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.
- (3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.
- (4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.

(j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.

(k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to

make a written appeal to a specifically identified appellate authority within the DoD Component.

Other appeals will be processed as directed by the USD(AT&L).

(l) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

- (i) There is a valid license covering the export of the [technical data](#) [and technology](#);
- (ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;
- (iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or
- (iv) The export or release qualifies for a general license under 15 CFR parts 730-774.

(2) Second condition:

- (i) The distribution statement applied to the [technical data](#) [and technology](#) pursuant to DoD Instruction 5230.24 permits release; or
- (ii) The originator or government controlling office authorizes release.

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DOD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology. Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. The Department of Defense (DoD) policies and procedures described and recommended herein apply equally to transfer and protection of dual-use and defense-related technology. Such technical data and technology must be treated as a valuable national security resource, to be protected and transferred only in accordance with export control laws and regulations, and national security and foreign policy objectives. This part describes procedures for DoD components and their contractors and grantees in controlling, export of technology, defense articles, and defense services that contribute to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** Comments must be received by **[insert date 60 days from date of publication]**.

**Commented [MTC01]:** Consider clarifying by adding: "controlled under the International Traffic in Arms Regulations and Export Administration Regulations," respectively after "technology."

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**EXECUTIVE SUMMARY**

I. Purpose of the regulatory action

a. Purpose. This rule prescribes a course of conduct that must be followed by DoD employees and contractor personnel to ensure that unclassified technical data and technology that discloses technology or information with military or space application in the possession or under the control of a DoD Component that may not be exported lawfully without an approval, authorization, or license is controlled and disseminated consistent with U.S. export control laws and regulations. Export control and technology security policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on the defense industrial base. Criminal and civil penalties for export control violations are severe. For

munitions export control violations, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, munitions violations can result in the imposition of a maximum civil fine of \$500,000 per violation of the “International Traffic in Arms Regulations” (ITAR), as well as debarment from exporting defense articles or services. For dual-use export control violations subject to the EAR, criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. Dual-use Export Administration Regulation violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges.

b. Succinct statement of legal authority for the regulatory action.

Authority: Legal authority for the regulatory action: In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense.

## II. Summary of the Major Provisions of the Regulatory Action in Question

The major provisions of this regulatory action include describing procedures for the release of technical information; determining procedures for technical data and technology governed by this rule are marked for distribution; and providing an example of the notice to accompany export-controlled technical data and technology.

## III. Costs and Benefits

Cost: \$1,587,589

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and

**Commented [MTCO2]:** May be able to abbreviate with "ITAR" if you reference this regulation as recommended on page 1.

**Commented [MTCO3]:** Introduce the full spelling of EAR on page 1.

technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

This rule provides updates regarding the withholding from public disclosure any technical data and technology or information with military or space application in the possession or under the control of the Department of Defense. The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance.

These requirements have been in effect since 1985.

## **REGULATORY PROCEDURES**

**Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Although, this rule is not “economically significant” because it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, it has been deemed “other significant” for raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB). This rule has not been designated a “significant regulatory action,” because the rule does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders.

**Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014,

that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs. The export control program has no discernible increase in anticipated costs and benefits for State, local, or tribal governments, or the private sector as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis. The export control program has no discernible increase in anticipated costs and benefits for small entities as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB under OMB Control Number 0704-0207. The expiration date for the OMB Control Number is March 31, 2019.

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local

governments. The export control program has no discernible increase in anticipated costs and benefits for State, or local governments, as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part -establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).

(2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , and 15 CFR parts 730-774.

(c) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

(d) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other information that is publicly available pursuant to 15 CFR 734.3, 734.7 through 734.9; or

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(e) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018; and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

(f) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(g) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(h) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, “Controlled Unclassified Information,” as implemented by Volume 4 of DoD

Manual 5200.01, "DoD Information Security Program" (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§250.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment, and inspection and test equipment.

**Commented [TED4]:** To the extent that some of these definitions are being repeated word for word from the ITAR and the EAR, it may be preferable to refer to the governing regulation rather than repeating the definition. Utherwise, if the definition is changed in the ITAR or the EAR this text will no longer be accurate. (e.g., Defense Article, Defense Service, Technical Data, Technology, etc.)

**Commented [MTC05]:** What is "keystone equipment?"

(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

(2) With respect to dual-use categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology: those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 U.S.C. 110.

(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120-130, or a dual-use article, including its underlying technology and software, covered by 15 CFR parts 730-774.

Defense article. Any item or technical data designated in 22 CFR 121.1. The policy described in §120.3 is applicable to designations of additional items. This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in 22 CFR 121.1. It also includes forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles. It does not include basic marketing information on function or purpose or general system descriptions.

Defense services. (1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) The furnishing to foreign persons of any technical data controlled under this subchapter (see [22 CFR, §120.10](#)), whether in the United States or abroad; or

(3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice. (See also 22 CFR 124.1.)

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Commented [DSCO6]: Editorial correction

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

- (1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through a licensed direct foreign military sale).
- (2) Bidding, or preparing to bid, on a sale of surplus property.
- (3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.
- (4) Engaging in scientific research in a professional capacity.
- (5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

Qualified contractor. A qualified U.S. contractor or a Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. (a) Technical data means:

(1) Information, other than software as defined in 22 CFR 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.

(2) Classified ~~information-data~~ relating to defense articles and defense services on the U.S.

~~Munitions List and 600-series items controlled by the Commerce Control List;~~

(3) Information covered by an invention secrecy order; or

(4) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition in paragraph (a) of this definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry

**Commented [MTC07]:** Editorial change related to classified data. Also, classified data would be ITAR controlled.

data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts 730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

**§250.4 Policy.**

It is DoD policy that:

(a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance with U.S. export control laws and regulations (22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data and technology may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

- (1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or
- (2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at

<http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes. Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of

technical data and technology currently determined to be subject to the provisions of this part.

The technical data will be withheld under the authority of 10 U.S.C.130.

- (i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, "International Transfers of Technology, Articles, and Services" (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, "Clearance of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.
- (j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, "Cybersecurity" (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, "Information Assurance (IA) and Support to Computer Network Defense (CND)," February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).
- (k) In accordance with DoD Instruction 5015.02, "DoD Records Management Program" (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National

Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

**§250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

- (1) Administer and monitor compliance with this part.
- (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
- (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.
- (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.
- (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
- (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
- (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
- (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.

(9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.

(10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.

(b) The Under Secretary of Defense for Policy (USD(P)):

(1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.

(2) ~~Coordinates with~~ Adjudicates Commodity Jurisdiction (CJ) requests in coordination with the military departments and other DoD agencies regarding CJ referrals received from the Departments of State and Commerce when necessary to verify commodity jurisdiction and export controls for technical data and technology covered by this part.

(3) Provides consultation to DoD offices on export control and ~~commodity jurisdiction~~ CJ determinations.

(c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:

(1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.

(2) Provides such other assistance as may be necessary to ensure compliance with this part.

(d) The GC DoD:

(1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.

(2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.

(e) The DoD Component heads:

**Commented [MTC08]:** DoS refers CJ applications to both DoD and DoC for jurisdiction recommendations.

**Commented [MTC09]:** Recommend deleting this paragraph. Seems too far into the weeds because it references just one of many USD/P export control responsibilities, and I would not recommend expanding to cover all of the other export control-related activities.

- (1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.
- (2) Designate a focal point to:
  - (i) Ensure implementation of this part.
  - (ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of §250.6.
  - (iii) Act on appeals relating to case-by-case denials for release of technical data and technology.
  - (iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.
  - (v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.
  - (vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.
- (3) Develop, distribute, and effect Component regulations to implement this part.
- (4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

- (a) Procedures for release of technical information must be made under the following guidelines:
  - (1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD

Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.

(2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested [technical data](#) and [technology](#) currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

(ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.

(iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.

(iv) A copy of the company’s State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.

(v) The contractor’s business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be

sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.

(b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.

(1) The determination will be based on whether

(i) The information is subject to 22 CFR part 121 or 15 CFR part 774.

(ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.

(iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.

(2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State or Commerce.

(c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.

(d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:

(1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;

(2) The controlling DoD office judges the requested [technical](#) data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested [technical](#) data and technology and, if appropriate, request a new certification (see §250.3) describing the intended use of the requested [technical](#) data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the [technical](#) data and technology if the DoD Component focal point determines the release of the [technical](#) data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a "Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology" (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of ~~items or information~~defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C., Appendix §2410, the penalty for unlawful export of items or information controlled under the EAR is a fine of not more than \$1,000,000, or five times the value of the exports, whichever is greater; or for an individual, imprisonment of not more than 10 years, or a fine of not more than to \$250,000, or both.
4. Under 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

Commented [TED10]: Does not match the information in page 2

(i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that technical data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:

- (1) To any foreign recipient for which the technical data and technology are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.
- (2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.
- (3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.
- (4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.

(j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.

(k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to

make a written appeal to a specifically identified appellate authority within the DoD Component.

Other appeals will be processed as directed by the USD(AT&L).

(l) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

- (i) There is a valid license covering the export of the [technical data](#) [and technology](#);
- (ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;
- (iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or
- (iv) The export or release qualifies for a general license under 15 CFR parts 730-774.

(2) Second condition:

- (i) The distribution statement applied to the [technical data](#) [and technology](#) pursuant to DoD Instruction 5230.24 permits release; or
- (ii) The originator or government controlling office authorizes release.

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DOD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology. Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. The Department of Defense (DoD) policies and procedures described and recommended herein apply equally to transfer and protection of dual-use and defense-related technology controlled under the International Traffic in Arms Regulations and Export Administration Regulations. Such technical data and technology must be treated as a valuable national security resource, to be protected and transferred only in accordance with export control laws and regulations, and national security and foreign policy objectives. This part describes procedures for DoD components and their contractors and grantees in controlling, export of technology, defense articles, and defense services technical data and technology that contribute to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or

**Commented [MTC01]:** Consider clarifying by adding: "controlled under the International Traffic in Arms Regulations and Export Administration Regulations," respectively after "technology."

critical interests.

**DATES:** Comments must be received by [insert date 60 days from date of publication].

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**EXECUTIVE SUMMARY**

I. Purpose of the regulatory action

a. Purpose. This rule prescribes a course of conduct that must be followed by DoD employees and contractor personnel to ensure that unclassified technical data and technology that discloses technology or information with military or space application in the possession or under the control of a DoD Component that may not be exported lawfully without an approval, authorization, or license is controlled and disseminated consistent with U.S. export control laws and regulations. Export control and technology security policies preserve the U.S. military's technological superiority, establish and

**Commented [I2]:** Why do we mention articles and services if the rule is about technical data, software, and technology (information). Is this rule about technical data.

**Commented [I3]:** Does the purpose/scope include course of conduct for withholding proprietary information?

**Commented [VVCDB4R3]:** Proprietary information is addressed at 250.2 (e), 250.2 (e) (1) and 250.4 (f)

maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on the defense industrial base. Criminal and civil penalties for export control violations are severe. For munitions export control violations, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, munitions violations can result in the imposition of a maximum civil fine of \$500,000 per violation of the “International Traffic in Arms Regulations” (ITAR), as well as debarment from exporting defense articles or services. For dual-use export control violations subject to the Export Administration Regulation EAR, criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. Dual-use Export Administration Regulation violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges. Under the International Emergency Economic Powers Act, 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both

**Commented [MTC05]:** May be able to abbreviate with "ITAR" if you reference this regulation as recommended on page 1.

**Commented [MTC06]:** Introduce the full spelling of EAR on page 1.

b. Succinct statement of legal authority for the regulatory action.

Authority: Legal authority for the regulatory action: In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense.

## II. Summary of the Major Provisions of the Regulatory Action in Question

The major provisions of this regulatory action include describing procedures for the release of technical information; determining procedures for technical data and technology governed by

this rule are marked for distribution; and providing an example of the notice to accompany export-controlled technical data and technology.

III. Costs and Benefits

Cost: \$1,587,589

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

Commented [VVCD87]: Accept

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

This rule provides updates regarding the withholding from public disclosure any technical data and technology or information with military or space application in the possession or under the control of the Department of Defense. The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance.

These requirements have been in effect since 1985.

### **REGULATORY PROCEDURES**

#### **Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Although, this rule is not “economically significant” because it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, it has been deemed “other significant” for raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB). This rule has not been designated a “significant regulatory action,” because the rule does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another

Agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

Commented [VVCDB8]: Accept

**Sec. 202, Pub. L. 104-4, "Unfunded Mandates Reform Act"**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs. The export control program has no discernible increase in anticipated costs and benefits for State, local, or tribal governments, or the private sector as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis. The export control program has no discernible increase in anticipated costs and benefits for small entities as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB under OMB Control Number 0704-0207. The expiration date for the OMB Control Number is March 31, 2019.

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments. The export control program has no discernible increase in anticipated costs and benefits for State, or local governments, as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part -establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

- (1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).
- (2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , and 15 CFR parts 730-774.

(c) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

Commented [VVCD89]: Accept

(d) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other information that is publicly available pursuant to 15 CFR 734.3, 734.7 through 734.9; or

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(e) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

Commented [VVCD810]: Accept

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018; and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

(f) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the

U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(g) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(h) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, "Controlled Unclassified Information," as implemented by Volume 4 of DoD Manual 5200.01, "DoD Information Security Program" (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§250.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by

Commented [VVCDB11]: Accept

Commented [TED12]: To the extent that some of these definitions are being repeated word for word from the ITAR and the EAR, it may be preferable to refer to the governing regulation rather than repeating the definition. Otherwise, if the definition is changed in the ITAR or the EAR this text will no longer be accurate. (e.g., Defense Article, Defense Service, Technical Data, Technology, etc.)

advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment including manufacturing, inspection, and test equipment that is required for the effective application of technical information and technical know-how, -and inspection and test equipment.

Commented [VVCDB13]: Accept

Commented [MTCO14]: What is "keystone equipment?"

- (1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.
- (2) With respect to dual-use categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology: those technologies specified in 15 CFR part 774.
- (3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 U.S.C. 110.
- (4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.
- (5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120-

130, or a dual-use article, including its underlying technology and software, covered by 15 CFR parts 730-774.

Defense article. Defined at 22 CFR 120.6 Any item or technical data designated in 22 CFR 121.1. The policy described in §120.3 is applicable to designations of additional items. This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in 22 CFR 121.1. It also includes forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles. It does not include basic marketing information on function or purpose or general system descriptions.

Defense services. Defined at 22 CFR 120.9 (1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) The furnishing to foreign persons of any technical data controlled under this subchapter (see 22 CFR, §120.10), whether in the United States or abroad; or

(3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice. (See also 22 CFR 124.1.)

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Commented [DSCO15]: Editorial correction

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

- (1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through a ~~licensed direct~~ foreign military sale).
- (2) Bidding, or preparing to bid, on a sale of surplus property.
- (3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.
- (4) Engaging in scientific research in a professional capacity.
- (5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

**Commented [I16]:** Not sure what a ""licensed direct foreign military sale" is.

Qualified contractor. A qualified U.S. contractor or a qualified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

- (1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.
- (2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

**Commented [117]:**

Question: Shouldn't this say "Qualified Canadian Contractor as defined below? Why wouldn't the definition of Qualified Canadian contractor include the "referred to and governed..." statement in this definition. If you include this statement in the definition of Qual Can Contractor – then Does qualified contractor mean "Qualified U.S. contractor" or "Qualified Canadian contractor" as defined in this regulation?

Question: Since Canadian contractors are not permitted equal access to ALL export controlled data/technology – I would check to make sure that the term "Qualified contractor" is used appropriately in this regulation – What I mean is are there instances where we too broadly state Canadian contractor access where they may be limited by the exceptions/exemptions?

Question (For DLA/Services): Are the Services aware that Canadian contractors have access to all data passed to DLA – some of which may require a license (i.e. doesn't fall under Canadian exceptions/exemptions)? Program offices should be making conscious decision to release such data when it requires a license to Canada .

Question (For JCP): Do they compare the data/technology being requested by contractor to what is permitted under the exemptions/exemptions?

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. Defined at 22 CFR 120.10 (a) ~~Technical data means:~~

~~(1) Information, other than software as defined in 22 CFR 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.~~

(2) Classified ~~information-data~~ relating to defense articles and defense services on the U.S. Munitions List ~~and 600-series items controlled by the Commerce Control List;~~

(3) Information covered by an invention secrecy order; or

(4) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition in paragraph (a) of this definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts 730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists,

**Commented [MTCO18]:** Editorial change related to classified data. Also, classified data would be ITAR controlled.

**Commented [VVCDB19]:** Accept

**Commented [VVCDB20]:** This definition was incorporated per DTSA coordination dated 7 August 2014 (see consolidated SD 818)

**Commented [I21]:** Why doesn't the definition include technical data and software as defined in the ITAR?

specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

**§250.4 Policy.**

It is DoD policy that:

- (a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance with U.S. export control laws and regulations (22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data and technology may not be

**Commented [I22]:** The Canadian exemption allows most but not all export controlled data to be transferred without a license. But this statement implies that Canadian contractors get equal access to ALL export controlled data (i.e. tech data/technology controlled by this part). Does this statement need a qualifier to clearly convey that the Canadians can only have equal access to export controlled tech data/technology that is allowed under the ITAR exemption? I think the same thing may be applicable for certain EAR items. I am not sure about technology/information – but I know for sure there are export controlled articles that Canadians must get EAR (dual use) licenses for.

withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

Commented [VVCDB23]: Accept

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or

Commented [VVCDB24]: Accept

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes.

Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

Commented [VVCDB25]: Accept

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information

does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, "International Transfers of Technology, Articles, and Services" (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, "Clearance of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, "Cybersecurity" (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, "Information Assurance (IA) and Support to Computer Network Defense (CND)," February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, "DoD Records Management Program" (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

**§250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

- (1) Administer and monitor compliance with this part.
- (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
- (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.
- (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.

- (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
  - (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
  - (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
  - (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.
  - (9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.
  - (10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.
- (b) The Under Secretary of Defense for Policy (USD(P)):
- (1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.

~~(2) Coordinates with Adjudicates Commodity Jurisdiction (CJ) requests in coordination with the military departments and other DoD agencies regarding CJ referrals received from the Departments of State and Commerce when necessary to verify commodity jurisdiction and export controls for technical data and technology covered by this part.~~

~~(3) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.~~

**Commented [MTCO26]:** DoS refers CJ applications to both DoD and DoC for jurisdiction recommendations.

**Commented [VVCDB27]:** Accept. Delete (b)(2)

**Commented [MTCO28]:** Recommend deleting this paragraph. Seems too far into the weeds because it references just one of many USD/P export control responsibilities, and I would not recommend expanding to cover all of the other export control-related activities.

- (c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:
  - (1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.
  - (2) Provides such other assistance as may be necessary to ensure compliance with this part.
- (d) The GC DoD:
  - (1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.
  - (2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.
- (e) The DoD Component heads:
  - (1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.
  - (2) Designate a focal point to:
    - (i) Ensure implementation of this part.
    - (ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of §250.6.
    - (iii) Act on appeals relating to case-by-case denials for release of technical data and technology.
    - (iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.
    - (v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.
    - (vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.
  - (3) Develop, distribute, and effect Component regulations to implement this part.

(4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

(a) Procedures for release of technical information must be made under the following guidelines:

(1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.

(2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested technical data and technology currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

Commented [VVADB29]: Accept

- (ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.
  - (iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.
  - (iv) A copy of the company’s State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.
  - (v) The contractor’s business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.
- (b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.
- (1) The determination will be based on whether
    - (i) The information is subject to 22 CFR part 121 or 15 CFR part 774.
    - (ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.
    - (iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.

(2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State or Commerce.

(c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.

(d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:

(1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;

(2) The controlling DoD office judges the requested technical data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested technical data and technology and, if appropriate, request a new certification (see §250.3) describing the intended use of the requested technical data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the technical data and technology if the DoD Component focal point determines the release of the technical data and technology may jeopardize an important technological or operational military advantage of the United States.

Commented [VVCDB30]: Accept

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of

Defense Financial Management Regulations (FMRs)” (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a “Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology” (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of ~~items or information~~ defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C., Appendix §2410, the penalty for unlawful export of items or information controlled under the EAR is a fine of not more than \$1,000,000, or five times the value of the exports, whichever is greater; or for an individual, imprisonment of not more than 10 years, or a fine of not more than to \$250,000, or both.
4. Under 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

Commented [TED31]: Does not match the information in page 2

Commented [VVCDB32]: Cited 50 U.S.C. 1705 at Executive Summary I. Purpose of the regulatory action a. Purpose

Commented [VVCDB33]: Accept

(i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that technical data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:

(1) To any foreign recipient for which the technical data and technology are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.

(2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.

(3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.

(4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.

(j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.

(k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to

Commented [VVCD834]: Accept

Commented [VVCD835]: Accept

make a written appeal to a specifically identified appellate authority within the DoD Component.

Other appeals will be processed as directed by the USD(AT&L).

(l) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

- (i) There is a valid license covering the export of the technical data and technology;
- (ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;
- (iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or
- (iv) The export or release qualifies for a general license under 15 CFR parts 730-774.

Commented [VVCDB36]: Accept

(2) Second condition:

- (i) The distribution statement applied to the technical data and technology pursuant to DoD Instruction 5230.24 permits release; or
- (ii) The originator or government controlling office authorizes release.

Commented [VVCDB37]: Accept

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DOD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology. Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. The Department of Defense (DoD) policies and procedures described and recommended herein apply equally to transfer and protection of dual-use and defense-related technology controlled under the International Traffic in Arms Regulations and Export Administration Regulations. Such technical data and technology must be treated as a valuable national security resource, to be protected and transferred only in accordance with export control laws and regulations, and national security and foreign policy objectives. This part describes procedures for DoD components and their contractors and grantees in controlling export of technical data and technology that contribute to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** Comments must be received by [insert date 60 days from date of publication].

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**EXECUTIVE SUMMARY**

I. Purpose of the regulatory action

a. Purpose. This rule prescribes a course of conduct that must be followed by DoD employees and contractor personnel to ensure that unclassified technical data and technology that discloses technology or information with military or space application in the possession or under the control of a DoD Component that may not be exported lawfully without an approval, authorization, or license is controlled and disseminated consistent with U.S. export control laws and regulations. Export control and technology security policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on

the defense industrial base. Criminal and civil penalties for export control violations are severe. For munitions export control violations, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, munitions violations can result in the imposition of a maximum civil fine of \$500,000 per violation of the “International Traffic in Arms Regulations” (ITAR), as well as debarment from exporting defense articles or services. For dual-use export control violations subject to the Export Administration Regulation, criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. Export Administration Regulation violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges. Under the International Emergency Economic Powers Act, 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both

b. Succinct statement of legal authority for the regulatory action.

Authority: Legal authority for the regulatory action: In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense. This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. section 130. It applies to all unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD

Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations including 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”; 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

## II. Summary of the Major Provisions of the Regulatory Action in Question

The major provisions of this regulatory action include describing procedures for the release of technical information; determining procedures for technical data and technology governed by this rule are marked for distribution; and providing an example of the notice to accompany export-controlled technical data and technology.

## III. Costs and Benefits

Cost: \$1,587,589

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

This rule provides updates regarding the withholding from public disclosure any technical data and technology or information with military or space application in the possession or under the control of the Department of Defense. The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance.

These requirements have been in effect since 1985.

## **REGULATORY PROCEDURES**

### **Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Although, this rule is not “economically significant” because it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the

economy, it has been deemed “other significant” for raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB).

**Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs. The export control program has no discernible increase in anticipated costs and benefits for State, local, or tribal governments, or the private sector as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis. The export control program has no discernible increase in anticipated costs and benefits for small entities as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB

under OMB Control Number 0704-0207. The expiration date for the OMB Control Number is March 31, 2019.

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments. The export control program has no discernible increase in anticipated costs and benefits for State, or local governments, as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

- (1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).
- (2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , and 15 CFR parts 730-774.

(c) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

(d) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other information that is publicly available pursuant to 15 CFR 734.3, 734.7 through 734.9; or

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(e) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018; and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

(f) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the

U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(g) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(h) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, "Controlled Unclassified Information," as implemented by Volume 4 of DoD Manual 5200.01, "DoD Information Security Program" (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§250.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by

advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment including manufacturing, inspection, and test equipment that is required for the effective application of technical information and technical know-how.

(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

(2) With respect to dual-use categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology: those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 U.S.C. 110.

(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120-

130, or a dual-use article, including its underlying technology and software, covered by 15 CFR parts 730-774.

Defense article. Defined at 22 CFR 120.6

Defense services. Defined at 22 CFR 120.9

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

(1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through foreign military sale).

(2) Bidding, or preparing to bid, on a sale of surplus property.

(3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.

(4) Engaging in scientific research in a professional capacity.

(5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

Qualified contractor. A qualified U.S. contractor or a qualified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. Defined at 22 CFR 120.10.

(1) Classified data relating to defense articles and defense services on the U.S. Munitions List;

(2) Information covered by an invention secrecy order; or

(3) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts 730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in

tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

#### **§250.4 Policy.**

It is DoD policy that:

- (a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance

with U.S. export control laws and regulations (22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data and technology may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes. Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, "International Transfers of Technology, Articles, and Services" (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, "Clearance of DoD Information for Public Release" (available at

<http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, “Security and Policy Review of DoD Information for Public Release” (available at

<http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, “Cybersecurity” (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, “Information Assurance (IA) and Support to Computer Network Defense (CND),” February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, “DoD Records Management Program” (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

#### **§250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

- (1) Administer and monitor compliance with this part.
- (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
- (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.

- (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.
  - (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
  - (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
  - (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
  - (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.
  - (9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.
  - (10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.
- (b) The Under Secretary of Defense for Policy (USD(P)):
- (1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.
  - (2) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.
- (c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:

- (1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.
- (2) Provides such other assistance as may be necessary to ensure compliance with this part.
- (d) The GC DoD:
  - (1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.
  - (2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.
- (e) The DoD Component heads:
  - (1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.
  - (2) Designate a focal point to:
    - (i) Ensure implementation of this part.
    - (ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of §250.6.
    - (iii) Act on appeals relating to case-by-case denials for release of technical data and technology.
    - (iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.
    - (v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.
    - (vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.
  - (3) Develop, distribute, and effect Component regulations to implement this part.
  - (4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in

accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

(a) Procedures for release of technical information must be made under the following guidelines:

(1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.

(2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested technical data and technology currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

(ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.

(iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.

(iv) A copy of the company's State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.

(v) The contractor's business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.

(b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.

(1) The determination will be based on whether

(i) The information is subject to 22 CFR part 121 or 15 CFR part 774.

(ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.

(iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.

(2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this

determination from the USD(AT&L), and if necessary, consult the Departments of State or Commerce.

(c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.

(d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:

(1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;

(2) The controlling DoD office judges the requested technical data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested technical data and technology and, if appropriate, request a new certification (see §250.3) describing the intended use of the requested technical data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the technical data and technology if the DoD Component focal point determines the release of the technical data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S.

contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

- (1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.
- (2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).
- (3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.
- (4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.
- (f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.
- (g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.
- (h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to

qualified contractors of controlled technical data and technology governed by this part will be accompanied by a “Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology” (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C., Appendix §2410, the penalty for unlawful export of items or information controlled under the EAR is a fine of not more than \$1,000,000, or five times the value of the exports, whichever is greater; or for an individual, imprisonment of not more than 10 years, or a fine of not more than to \$250,000, or both.
4. Under 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

- (i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that technical data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:
- (1) To any foreign recipient for which the technical data and technology are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.
  - (2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.
  - (3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.
  - (4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.
- (j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.
- (k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to

make a written appeal to a specifically identified appellate authority within the DoD Component. Other appeals will be processed as directed by the USD(AT&L).

(1) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

- (i) There is a valid license covering the export of the technical data and technology;
- (ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;
- (iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or
- (iv) The export or release qualifies for a general license under 15 CFR parts 730-774.

(2) Second condition:

- (i) The distribution statement applied to the technical data and technology pursuant to DoD Instruction 5230.24 permits release; or
- (ii) The originator or government controlling office authorizes release.

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DOD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology subject to the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR). It applies to DoD components, their contractors and grantees and is meant to control the export-transfer of technical data and technology contributing to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests. ~~Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. The Department of Defense (DoD) policies and procedures described and recommended herein apply equally to transfer and protection of dual-use and defense-related technology controlled under the International Traffic in Arms Regulations and Export Administration Regulations. Such technical data and technology must be treated as a valuable national security resource, to be protected and transferred only in accordance with export control~~

~~laws and regulations, and national security and foreign policy objectives. This part describes procedures for DoD components and their contractors and grantees in controlling export of technical data and technology that contribute to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.~~

**DATES:** Comments must be received by **[insert date 60 days from date of publication]**.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND EXECUTIVE SUMMARY**

~~I. Purpose of the regulatory action~~ For the purposes of this regulation, public disclosure of technical data and technology is the same as providing uncontrolled foreign access.

~~a. Purpose. This rule prescribes a course of conduct that must be followed by~~ instructs DoD ~~employees~~ Components and their ~~and contractors and grantees~~ personnel to ensure that unclassified

technical data and technology that discloses technology or information with military or space application in the possession or under the control of a DoD Component that may not be exported lawfully without an approval, authorization, or license is controlled and disseminated consistent with U.S. export control laws and regulations. Export control and technology security policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on the defense industrial base. ~~Criminal and civil~~ There are penalties for export control ~~violations-violations~~ are severe. For ~~munitions~~-export control violations involving items controlled by the United States Department of State under the International Traffic in Arms Regulations (ITAR), including many munitions items, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, ~~munitions-ITAR~~ violations can result in the imposition of a maximum civil fine of \$500,000 per violation ~~of the "International Traffic in Arms Regulations" (ITAR)~~, as well as debarment from exporting defense articles or services. For ~~dual-use export control violations subject to the~~ export control violations involving dual-use and certain munitions items controlled by the United States Department of Commerce under the Export Administration Regulations, ~~criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. Export Administration Regulation violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges.~~ criminal and civil penalties are currently provided by the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §1705, which has continued the Export Administration Regulations (EAR) in effect while the Export Administration Act is in lapse through Executive Order 13222 of August 17, 2001 (3 CFR 2001 Comp. 783 (2002)), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013) and as extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 Fed. Reg. 52587 (Aug. 8, 2016)). Under

the EAR and IEEPA, as adjusted by 15 CFR §5.4(b)~~International Emergency Economic Powers Act, 50 U.S.C. §1705~~, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations includes civil penalties of not more than \$250,000~~284,582~~ per transaction or twice the amount of the transaction, whichever is greater, and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both. Violations of the EAR may also result in the denial of export privileges and other administrative sanctions.

AUTHORITY TO ISSUE THIS REGULATION~~b. Succinct statement of legal authority for the regulatory action.~~

~~Authority: Legal authority for the regulatory action:~~

In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense. In addition, U.S. export control laws, including~~This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. section 130. It applies to all unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations including~~ 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act” (IEEPA)); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)) govern this rule.

SUMMARY OF THE MAJOR PROVISIONS OF THE RULE~~H. Summary of the Major Provisions of the Regulatory Action in Question~~

~~The This rule major provisions of this regulatory action include describing~~ describes procedures for the release of technical information; ~~determining~~ discusses procedures for technical data and technology ~~governed by this rule are to be~~ to be marked for distribution; and ~~providing~~ provides an example of the notice to accompany export-controlled technical data and technology.

~~III. Costs and Benefits~~ COSTS AND BENEFITS

DoD is proposing this regulation to update the CFR and DoD Directive 5230.25. The Department current spends \$571,876 annually on export control certification activities. The costs to DoD contractors and grantee consist primarily of the time needed to organize, format, and submit information to the U.S./Canada Joint Certification Office to qualify for export controlled technical data and technology.

Cost: \$1,587,589

The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance cited in the text in §250.1 through §250.7.

~~Cost to the public:~~

~~In exchange for Government-owned unclassified export-controlled technical data and technology, a contractor provides basic company information, identifies a technical data and technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted~~

~~to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.~~

<del>24,000 responses</del>	<del>\$9.94* per response</del>	<del>\$19.99 postage** per response</del>	<del>\$638,400</del>
-----------------------------	---------------------------------	---	----------------------

~~\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor's degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>~~

~~\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>~~

~~Cost to the government:~~

<del>4 FTE registrars</del>	<del>GS 9 step 5</del>	<del>\$59,036*</del>	<del>\$236,144</del>
<del>1 FTE Team Lead</del>	<del>GS11 step 5</del>	<del>\$71,429*</del>	<del>\$71,429</del>
<del>.5 FTE US Representative</del>	<del>GS13 step 5</del>	<del>\$101,807</del>	<del>\$50,904</del>
<del>.25 FTE Division Chief</del>	<del>GS14 step 5</del>	<del>\$120,303</del>	<del>\$30,075</del>
<del>.25 FTE Director</del>	<del>GS15 step 5</del>	<del>\$35,378*</del>	<del>\$35,378</del>
<del>O&amp;M for IT</del>	<del>SP4701-15-F-0031</del>	<del>\$2,958,915</del>	<del>\$147,946</del>
<del>Total</del>			<del>\$571,876</del>

~~\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>~~

~~This rule provides updates regarding the withholding from public disclosure any technical data and technology or information with military or space application in the possession or under the control of the Department of Defense. The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance.~~

~~These requirements have been in effect since 1985.~~

~~The potential benefits include greater public access and understanding of information about the qualifications needed for access to export controlled technical data and technology. Such information may help potential contractors and grantees to better understand their options for participating in DoD activities; to better enable funders and researchers to determine the need for information and technology; to provide more complete information ~~for~~ of those who use~~

information from DoD research and contracts to inform other decisions; and to better enable the scientific community to examine the overall state of information and technology in this area as a basis for engaging in quality improvement (e.g., with regard to research methods). The rule is also expected to provide greater clarity about what is required for those who are authorized holders of export controlled technical data and technology.

## **REGULATORY PROCEDURES**

### **Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Although, this rule is not “economically significant” because it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, it has been deemed “other significant” for raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB).

### **Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for

State, local, or tribal governments, nor will it affect private sector costs. ~~The export control program has no discernible increase in anticipated costs and benefits for State, local, or tribal governments, or the private sector as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.~~

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis. ~~The export control program has no discernible increase in anticipated costs and benefits for small entities as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.~~

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB under OMB Control Number 0704-0207 titled DD Form 2345 Militarily Critical Technical Data Agreement. ~~The expiration date for the OMB Control Number is March 31, 2019.~~

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted

to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

<u>24,000 responses</u>	<u>\$9.94* per response</u>	<u>\$19.99 postage** per response</u>	<u>\$638,400</u>
-------------------------	-----------------------------	---------------------------------------	------------------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

<u>4 FTE registrars</u>	<u>GS 9 step 5</u>	<u>\$59,036*</u>	<u>\$236,144</u>
<u>1 FTE Team Lead</u>	<u>GS11 step 5</u>	<u>\$71,429*</u>	<u>\$71,429</u>
<u>.5 FTE US Representative</u>	<u>GS13 step 5</u>	<u>\$101,807</u>	<u>\$50,904</u>
<u>.25 FTE Division Chief</u>	<u>GS14 step 5</u>	<u>\$120,303</u>	<u>\$30,075</u>
<u>.25 FTE Director</u>	<u>GS15 step 5</u>	<u>\$35,378*</u>	<u>\$35,378</u>
<u>O&amp;M for IT</u>	<u>SP4701-15-F-0031</u>	<u>\$2,958,915</u>	<u>\$147,946</u>
<u>Total</u>			<u>\$571,876</u>

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments. ~~The export control program has no discernible increase in anticipated costs and benefits for State, or local governments, as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.~~

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field

Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).

(2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , and 15 CFR parts 730-774.

(c) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

(d) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other ~~items~~information that ~~are~~is publicly available~~not subject to the EAR or exclusively controlled for export or reexport by another department or agency~~ pursuant to 15 CFR 734.3, 734.7 through 734.98; or

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(e) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018); and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

(f) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(g) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(h) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, “Controlled Unclassified Information,” as implemented by Volume 4 of DoD Manual 5200.01, “DoD Information Security Program” (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§250.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment including manufacturing, inspection, and test equipment that is required for the effective application of technical information and technical know-how.

(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

(2) With respect to ~~dual-use~~ categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology subject to the EAR: those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 U.S.C. H0810.

(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120-130, or a dual-use article or munitions item, including its underlying technology and software, covered by 15 CFR parts 730-774.

Defense article. Defined at 22 CFR 120.6

Defense services. Defined at 22 CFR 120.9

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose

is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

- (1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through foreign military sale).
- (2) Bidding, or preparing to bid, on a sale of surplus property.
- (3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.
- (4) Engaging in scientific research in a professional capacity.
- (5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

Qualified contractor. A qualified U.S. contractor or a qualified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22

CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to

this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. Defined at 22 CFR 120.10.

(1) Classified data relating to defense articles and defense services on the U.S. Munitions List;

(2) Information covered by an invention secrecy order; or

(3) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts 730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

**§250.4 Policy.**

It is DoD policy that:

(a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance with U.S. export control laws and regulations (including 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data and technology may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes. Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, "International Transfers of Technology, Articles, and Services" (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, "Clearance of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, "Cybersecurity" (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, "Information Assurance (IA) and Support to Computer Network Defense (CND)," February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, "DoD Records Management Program" (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and

technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

**§250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

- (1) Administer and monitor compliance with this part.
- (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
- (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.
- (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.
- (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
- (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
- (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
- (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.

(9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.

(10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.

(b) The Under Secretary of Defense for Policy (USD(P)):

(1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.

(2) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.

(c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:

(1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.

(2) Provides such other assistance as may be necessary to ensure compliance with this part.

(d) The GC DoD:

(1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.

(2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.

(e) The DoD Component heads:

(1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.

(2) Designate a focal point to:

(i) Ensure implementation of this part.

- (ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of §250.6.
  - (iii) Act on appeals relating to case-by-case denials for release of technical data and technology.
  - (iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.
  - (v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.
  - (vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.
- (3) Develop, distribute, and effect Component regulations to implement this part.
- (4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

- (a) Procedures for release of technical information must be made under the following guidelines:
- (1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.
  - (2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested

technical data and technology currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

(ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.

(iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.

(iv) A copy of the company’s State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.

(v) The contractor’s business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.

(b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.

(1) The determination will be based on whether

(i) The information is subject to 22 CFR part 121 or 15 CFR part 774.

(ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.

(iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.

(2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State or Commerce.

(c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.

(d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:

(1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;

(2) The controlling DoD office judges the requested technical data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested technical data and technology and, if appropriate, request a new certification (see §250.3) describing the intended use of the requested technical data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the technical data and technology if the DoD Component focal point determines the release of the technical data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a "Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology" (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.

2. Under 22 U.S.C. §2778 the penalty for unlawful export of defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.

~~3. Under 50 U.S.C., Appendix §2410, the penalty for unlawful export of items or information controlled under the EAR is a fine of not more than \$1,000,000, or five times the value of the exports, whichever is greater; or for an individual, imprisonment of not more than 10 years, or a fine of not more than \$250,000, or both.~~

~~43. Under 50 U.S.C. §1705 and 15 CFR §764.3, as adjusted for inflation by 15 CFR §6.4, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the ~~export control regulations~~EAR, while the EAR is continued in effect by Executive Order under the International Emergency Economic Powers Act, may include civil penalties of not more than ~~\$284,582,250,000~~ per transaction (subject to further adjustment for inflation) or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both. Violations of the EAR may also result in the denial of export privileges.~~

5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.

6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.

7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.

8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.

9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.

10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

- (i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that technical data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:
- (1) To any foreign recipient for which the technical data and technology are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.
  - (2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.
  - (3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.
  - (4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.
- (j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.
- (k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to

make a written appeal to a specifically identified appellate authority within the DoD Component. Other appeals will be processed as directed by the USD(AT&L).

(1) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

- (i) There is a valid license covering the export of the technical data and technology;
- (ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;
- (iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or
- (iv) The export or release qualifies for a license exception~~general license~~ under 15 CFR parts 730-774.

(2) Second condition:

- (i) The distribution statement applied to the technical data and technology pursuant to DoD Instruction 5230.24 permits release; or
- (ii) The originator or government controlling office authorizes release.

**From:** [Valaitis, Vakare K CIV DTIC \(US\)](#)  
**To:** [Park, Morgan E CIV OSD ODCMO \(US\)](#)  
**Cc:** [Siegel, Aaron T CIV OSD ODCMO \(US\)](#); [Toppings, Patricia L CIV OSD ODCMO \(US\)](#)  
**Subject:** RE: Withholding of Unclassified Technical Data  
**Date:** Tuesday, August 9, 2016 11:24:55 AM  
**Attachments:** [TAB A Rule Text 0790-AI73 PRv3 DoDComments DTICcomments.docx](#)  
[TAB A Rule Text 0790-AI73 PRv3 final 9August2016.docx](#)

---

Morgan  
I apologize for the delay  
Attached please find the original marked up version of the rule with my comments.  
I have also attached a clean copy.  
v/r  
Vakare

-----Original Message-----

From: Park, Morgan E CIV OSD ODCMO (US)  
Sent: Tuesday, July 26, 2016 7:13 AM  
To: Valaitis, Vakare K CIV DTIC (US) (b)(6)  
Cc: Siegel, Aaron T CIV OSD ODCMO (US) (b)(6)  
Toppings, Patricia L CIV OSD ODCMO (US) (b)(6)  
Subject: Withholding of Unclassified Technical Data

Vakare,

After the DoD Regulatory Policy Officer approved your proposed rule, "Withholding of Unclassified Technical Data and Technology from Public Disclosure," we sent it to our OMB Desk Officer for a significance determination. She deemed it significant (see the edits on page 5 to the EO 12866/EO 13565 paragraph), and she requested that the rule be coordinated with Defense Technology Security Administration (DTSA) given the connection to the work the Administration is doing on export control reform. Attached are comments from Ms. Susan Daoussi, Special Projects, Team Chief, DTSA/LDM (571-372-2322). They include the following points:

They recommend to clarify some of the language (i.e., add: "controlled under the International Traffic in Arms Regulations and Export Administration Regulations," respectively after "technology" and in parts that reference dual use items added Export Administration Regulations (EAR)).

They recommend adding technology and technical data throughout the rule as the ITAR and EAR regulations have different definitions for the terms.

Page 9 Definitions Section: To the extent that some of the reference ITAR and EAR definitions are being repeated word for word, it may be preferable to refer to the governing regulation rather than repeating the definition. Otherwise, if the definition is changed in the ITAR or the EAR this text will no longer be accurate. (e.g., Defense Article, Defense Service, Technical Data, Technology, etc.).

Page 10: They recommend clarifying the term "keystone equipment."

Page 15: Recommend deletion of reference to 600 series items and classified data, as the classified data would be ITAR controlled.

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DOD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology. Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. The Department of Defense (DoD) policies and procedures described and recommended herein apply equally to transfer and protection of dual-use and defense-related technology controlled under the International Traffic in Arms Regulations and Export Administration Regulations. Such technical data and technology must be treated as a valuable national security resource, to be protected and transferred only in accordance with export control laws and regulations, and national security and foreign policy objectives. This part describes procedures for DoD components and their contractors and grantees in controlling, export of technology, defense articles, and defense service technical data and technology that contribute to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or

**Commented [MTC01]:** Consider clarifying by adding: "controlled under the International Traffic in Arms Regulations and Export Administration Regulations," respectively after "technology."

critical interests.

**DATES:** Comments must be received by [insert date 60 days from date of publication].

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**EXECUTIVE SUMMARY**

I. Purpose of the regulatory action

a. Purpose. This rule prescribes a course of conduct that must be followed by DoD employees and contractor personnel to ensure that unclassified technical data and technology that discloses technology or information with military or space application in the possession or under the control of a DoD Component that may not be exported lawfully without an approval, authorization, or license is controlled and disseminated consistent with U.S. export control laws and regulations. Export control and technology security policies preserve the U.S. military's technological superiority, establish and

**Commented [I2]:** Why do we mention articles and services if the rule is about technical data, software, and technology (information). Is this rule about technical data,

**Commented [I3]:** Does the purpose/scope include course of conduct for withholding proprietary information?

**Commented [VVCDB4R3]:** Proprietary information is addressed at 250.2 (e), 250.2 (e) (1) and 250.4 (f)

maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on the defense industrial base. Criminal and civil penalties for export control violations are severe. For munitions export control violations, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, munitions violations can result in the imposition of a maximum civil fine of \$500,000 per violation of the “International Traffic in Arms Regulations” (ITAR), as well as debarment from exporting defense articles or services. For dual-use export control violations [subject to the Export Administration Regulation](#) ~~EAR~~, criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. [Dual-use Export Administration Regulation](#) violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges. [Under the International Emergency Economic Powers Act, 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \\$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \\$1,000,000, imprisonment of not more than 20 years, or both](#)

**Commented [MTC05]:** May be able to abbreviate with "ITAR" if you reference this regulation as recommended on page 1.

**Commented [MTC06]:** Introduce the full spelling of EAR on page 1.

b. Succinct statement of legal authority for the regulatory action.

Authority: [Legal authority for the regulatory action: In accordance with 10 U.S.C. 133 part \(b\)\(2\), the Under Secretary of Defense for Acquisition, Technology and Logistics \(USD\(AT&L\)\) may exercise powers relating to establishing policies for acquisition \(including procurement of goods and services, research and development, developmental testing, and contract administration\) for all elements of the Department of Defense.](#)

## II. Summary of the Major Provisions of the Regulatory Action in Question

The major provisions of this regulatory action include describing procedures for the release of technical information; determining procedures for technical data and technology governed by

this rule are marked for distribution; and providing an example of the notice to accompany export-controlled technical data and technology.

III. Costs and Benefits

Cost: \$1,587,589

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

Commented [VCDB7]: Accept

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

This rule provides updates regarding the withholding from public disclosure any technical data and technology or information with military or space application in the possession or under the control of the Department of Defense. The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance.

These requirements have been in effect since 1985.

### **REGULATORY PROCEDURES**

#### **Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Although this rule is not “economically significant” because it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, it has been deemed “other significant” for raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB). This rule has not been designated a “significant regulatory action,” because the rule does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity, competition, jobs; the environment; public health or safety; or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another

Agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

Commented [VCDB8]: Accept

**Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs. The export control program has no discernible increase in anticipated costs and benefits for State, local, or tribal governments, or the private sector as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis. The export control program has no discernible increase in anticipated costs and benefits for small entities as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB under OMB Control Number 0704-0207. The expiration date for the OMB Control Number is March 31, 2019.

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments. The export control program has no discernible increase in anticipated costs and benefits for State, or local governments, as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

- (1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).
- (2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , and 15 CFR parts 730-774.

(c) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

Commented [VVADB9]: Accept

(d) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other information that is publicly available pursuant to 15 CFR 734.3, 734.7 through 734.9; or

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(e) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

Commented [VVADB10]: Accept

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018; and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the "Freedom of Information Act (FOIA)."

(f) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the

U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(g) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

Commented [VVADB11]: Accept

(h) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, "Controlled Unclassified Information," as implemented by Volume 4 of DoD Manual 5200.01, "DoD Information Security Program" (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§250.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by

Commented [TED12]: To the extent that some of these definitions are being repeated word for word from the ITAR and the EAR, it may be preferable to refer to the governing regulation rather than repeating the definition. Utherwise, if the definition is changed in the ITAR or the EAR this text will no longer be accurate. (e.g., Defense Article, Defense Service, Technical Data, Technology, etc.)

advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment including manufacturing, inspection, and test equipment that is required for the effective application of technical information and technical know-how, and inspection and test equipment.

Commented [VVCDB13]: Accept

Commented [MTC014]: What is "keystone equipment?"

(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

(2) With respect to dual-use categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology: those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 U.S.C. 110.

(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120-

130, or a dual-use article, including its underlying technology and software, covered by 15 CFR parts 730-774.

**Defense article.** Defined at 22 CFR 120.6 Any item or technical data designated in 22 CFR 121.1. The policy described in §120.3 is applicable to designations of additional items. This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in 22 CFR 121.1. It also includes forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles. It does not include basic marketing information on function or purpose or general system descriptions.

**Defense services.** Defined at 22 CFR 120.9 (1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) The furnishing to foreign persons of any technical data controlled under this subchapter (see 22 CFR, §120.10), whether in the United States or abroad; or

(3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice. (See also 22 CFR 124.1.)

**Formal arrangement.** An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Commented [DSCO15]: Editorial correction

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

- (1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through a ~~licensed direct foreign military sale~~).
- (2) Bidding, or preparing to bid, on a sale of surplus property.
- (3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.
- (4) Engaging in scientific research in a professional capacity.
- (5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

**Commented [116]:** Not sure what a ""licensed direct foreign military sale"" is.

Qualified contractor. A qualified U.S. contractor or a qualified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

- (1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.
- (2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

**Commented [I17]:**

Question: Shouldn't this say "Qualified Canadian Contractor as defined below? Why wouldn't the definition of Qualified Canadian contractor include the "referred to and governed..." statement in this definition. If you include this statement in the definition of Qual Can Contractor – then Does qualified contractor mean "Qualified U.S. contractor" or "Qualified Canadian contractor" as defined in this regulation?

Question: Since Canadian contractors are not permitted equal access to ALL export controlled data/technology – I would check to make sure that the term "Qualified contractor" is used appropriately in this regulation – What I mean is are there instances where we too broadly state Canadian contractor access where they may be limited by the exceptions/exemptions?

Question (For DLA/Services): Are the Services aware that Canadian contractors have access to all data passed to DLA – some of which may require a license (i.e. doesn't fall under Canadian exceptions/exemptions)? Program offices should be making conscious decision to release such data when it requires a license to Canada .

Question (For JCP): Do they compare the data/technology being requested by contractor to what is permitted under the exemptions/exemptions?

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. Defined at 22 CFR 120.10 (a) ~~Technical data means:~~

(1) Information, other than software as defined in 22 CFR 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.

(2) Classified ~~information data~~ relating to defense articles and defense services on the U.S. Munitions List and 600-series items controlled by the Commerce Control List;

(3) Information covered by an invention secrecy order; or

(4) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition in paragraph (a) of this definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts 730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists,

**Commented [MTCO18]:** Editorial change related to classified data. Also, classified data would be ITAR controlled.

**Commented [VVCDB19]:** Accept

**Commented [VVCDB20]:** This definition was incorporated per D TSA coordination dated 7 August 2014 (see consolidated SD 818)

**Commented [I21]:** Why doesn't the definition include technical data and software as defined in the ITAR?

specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

#### **§250.4 Policy.**

It is DoD policy that:

- (a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance with U.S. export control laws and regulations (22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data and technology may not be

**Commented [I22]:** The Canadian exemption allows most but not all export controlled data to be transferred without a license. But this statement implies that Canadian contractors get equal access to ALL export controlled data (i.e. tech data/technology controlled by this part). Does this statement need a qualifier to clearly convey that the Canadians can only have equal access to export controlled tech data/technology that is allowed under the ITAR exemption? I think the same thing may be applicable for certain EAR items. I am not sure about technology/information – but I know for sure there are export controlled articles that Canadians must get EAR (dual use) licenses for.

withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

Commented [VCDB23]: Accept

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or

Commented [VCDB24]: Accept

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes.

Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

Commented [VCDB25]: Accept

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information

does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, "International Transfers of Technology, Articles, and Services" (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, "Clearance of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, "Cybersecurity" (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, "Information Assurance (IA) and Support to Computer Network Defense (CND)," February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, "DoD Records Management Program" (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

**§250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

- (1) Administer and monitor compliance with this part.
- (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
- (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.
- (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.

- (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
  - (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
  - (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
  - (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.
  - (9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.
  - (10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.
- (b) The Under Secretary of Defense for Policy (USD(P)):
- (1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.

~~(2) Coordinates with Adjudicates Commodity Jurisdiction (CJ) requests in coordination with the military departments and other DoD agencies regarding CJ referrals received from the Departments of State and Commerce when necessary to verify commodity jurisdiction and export controls for technical data and technology covered by this part.~~

~~(3) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.~~

**Commented [MTCO26]:** DoS refers CJ applications to both DoD and DoC for jurisdiction recommendations.

**Commented [VVCDB27]:** Accept, Delete (b)(2)

**Commented [MTCO28]:** Recommend deleting this paragraph. Seems too far into the weeds because it references just one of many USD/P export control responsibilities, and I would not recommend expanding to cover all of the other export control-related activities.

- (c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:
  - (1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.
  - (2) Provides such other assistance as may be necessary to ensure compliance with this part.
- (d) The GC DoD:
  - (1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.
  - (2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.
- (e) The DoD Component heads:
  - (1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.
  - (2) Designate a focal point to:
    - (i) Ensure implementation of this part.
    - (ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of §250.6.
    - (iii) Act on appeals relating to case-by-case denials for release of technical data and technology.
    - (iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.
    - (v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.
    - (vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.
  - (3) Develop, distribute, and effect Component regulations to implement this part.

(4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

(a) Procedures for release of technical information must be made under the following guidelines:

(1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.

(2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested technical data and technology currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

Commented [VVADB29]: Accept

- (ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.
- (iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.
- (iv) A copy of the company’s State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.
- (v) The contractor’s business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.
- (b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.
- (1) The determination will be based on whether
- (i) The information is subject to 22 CFR part 121 or 15 CFR part 774.
- (ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.
- (iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.

(2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State or Commerce.

(c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.

(d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:

(1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (c) of this section;

(2) The controlling DoD office judges the requested technical data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested technical data and technology and, if appropriate, request a new certification (see §250.3) describing the intended use of the requested technical data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the technical data and technology if the DoD Component focal point determines the release of the technical data and technology may jeopardize an important technological or operational military advantage of the United States.

Commented [VVADB30]: Accept

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of

Defense Financial Management Regulations (FMRs)” (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a “Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology” (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of ~~items or information~~ defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C., Appendix §2410, the penalty for unlawful export of items or information controlled under the EAR is a fine of not more than \$1,000,000, or five times the value of the exports, whichever is greater; or for an individual, imprisonment of not more than 10 years, or a fine of not more than to \$250,000, or both.
4. Under 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

**Commented [TED31]:** Does not match the information in page 2

**Commented [VVCDB32]:** Cited 50 U.S.C. 1705 at Executive Summary I. Purpose of the regulatory action a. Purpose

**Commented [VVCDB33]:** Accept

(i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that technical data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:

(1) To any foreign recipient for which the technical data and technology are approved,

authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.

(2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.

(3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.

(4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.

(j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.

(k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to

Commented [VVADB34]: Accept

Commented [VVADB35]: Accept

make a written appeal to a specifically identified appellate authority within the DoD Component.

Other appeals will be processed as directed by the USD(AT&L).

(l) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

- (i) There is a valid license covering the export of the **technical data and technology**;
- (ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;
- (iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or
- (iv) The export or release qualifies for a general license under 15 CFR parts 730-774.

Commented [VCDB36]: Accept

(2) Second condition:

- (i) The distribution statement applied to the **technical data and technology** pursuant to DoD Instruction 5230.24 permits release; or
- (ii) The originator or government controlling office authorizes release.

Commented [VCDB37]: Accept

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DOD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology. Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. The Department of Defense (DoD) policies and procedures described and recommended herein apply equally to transfer and protection of dual-use and defense-related technology controlled under the International Traffic in Arms Regulations and Export Administration Regulations. Such technical data and technology must be treated as a valuable national security resource, to be protected and transferred only in accordance with export control laws and regulations, and national security and foreign policy objectives. This part describes procedures for DoD components and their contractors and grantees in controlling export of technical data and technology that contribute to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** Comments must be received by **[insert date 60 days from date of publication]**.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

#### **SUPPLEMENTARY INFORMATION:**

##### **EXECUTIVE SUMMARY**

###### I. Purpose of the regulatory action

a. Purpose. This rule prescribes a course of conduct that must be followed by DoD employees and contractor personnel to ensure that unclassified technical data and technology that discloses technology or information with military or space application in the possession or under the control of a DoD Component that may not be exported lawfully without an approval, authorization, or license is controlled and disseminated consistent with U.S. export control laws and regulations. Export control and technology security policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on

the defense industrial base. Criminal and civil penalties for export control violations are severe. For munitions export control violations, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, munitions violations can result in the imposition of a maximum civil fine of \$500,000 per violation of the “International Traffic in Arms Regulations” (ITAR), as well as debarment from exporting defense articles or services. For dual-use export control violations subject to the Export Administration Regulation, criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. Export Administration Regulation violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges. Under the International Emergency Economic Powers Act, 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both

b. Succinct statement of legal authority for the regulatory action.

Authority: Legal authority for the regulatory action: In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense. This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. section 130. It applies to all unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD

Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations including 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”; 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

II. Summary of the Major Provisions of the Regulatory Action in Question

The major provisions of this regulatory action include describing procedures for the release of technical information; determining procedures for technical data and technology governed by this rule are marked for distribution; and providing an example of the notice to accompany export-controlled technical data and technology.

III. Costs and Benefits

Cost: \$1,587,589

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

This rule provides updates regarding the withholding from public disclosure any technical data and technology or information with military or space application in the possession or under the control of the Department of Defense. The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance.

These requirements have been in effect since 1985.

## **REGULATORY PROCEDURES**

### **Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Although, this rule is not “economically significant” because it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the

economy, it has been deemed “other significant” for raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB).

**Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs. The export control program has no discernible increase in anticipated costs and benefits for State, local, or tribal governments, or the private sector as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis. The export control program has no discernible increase in anticipated costs and benefits for small entities as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB

under OMB Control Number 0704-0207. The expiration date for the OMB Control Number is March 31, 2019.

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments. The export control program has no discernible increase in anticipated costs and benefits for State, or local governments, as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

- (1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).
- (2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , and 15 CFR parts 730-774.

(c) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

(d) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other information that is publicly available pursuant to 15 CFR 734.3, 734.7 through 734.9; or

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(e) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018; and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

(f) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the

U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(g) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(h) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, "Controlled Unclassified Information," as implemented by Volume 4 of DoD Manual 5200.01, "DoD Information Security Program" (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§250.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by

advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment including manufacturing, inspection, and test equipment that is required for the effective application of technical information and technical know-how.

(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

(2) With respect to dual-use categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology: those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 U.S.C. 110.

(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120-

130, or a dual-use article, including its underlying technology and software, covered by 15 CFR parts 730-774.

Defense article. Defined at 22 CFR 120.6

Defense services. Defined at 22 CFR 120.9

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

(1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through foreign military sale).

(2) Bidding, or preparing to bid, on a sale of surplus property.

(3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.

(4) Engaging in scientific research in a professional capacity.

(5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

Qualified contractor. A qualified U.S. contractor or a qualified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. Defined at 22 CFR 120.10.

(1) Classified data relating to defense articles and defense services on the U.S. Munitions List;

(2) Information covered by an invention secrecy order; or

(3) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts 730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in

tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

#### **§250.4 Policy.**

It is DoD policy that:

- (a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance

with U.S. export control laws and regulations (22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data and technology may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes. Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, "International Transfers of Technology, Articles, and Services" (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, "Clearance of DoD Information for Public Release" (available at

<http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, “Security and Policy Review of DoD Information for Public Release” (available at

<http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, “Cybersecurity” (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, “Information Assurance (IA) and Support to Computer Network Defense (CND),” February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, “DoD Records Management Program” (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

### **§250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

- (1) Administer and monitor compliance with this part.
- (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
- (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.

- (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.
  - (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
  - (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
  - (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
  - (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.
  - (9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.
  - (10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.
- (b) The Under Secretary of Defense for Policy (USD(P)):
- (1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.
  - (2) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.
- (c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:

(1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.

(2) Provides such other assistance as may be necessary to ensure compliance with this part.

(d) The GC DoD:

(1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.

(2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.

(e) The DoD Component heads:

(1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.

(2) Designate a focal point to:

(i) Ensure implementation of this part.

(ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of §250.6.

(iii) Act on appeals relating to case-by-case denials for release of technical data and technology.

(iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.

(v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.

(vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.

(3) Develop, distribute, and effect Component regulations to implement this part.

(4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in

accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

(a) Procedures for release of technical information must be made under the following guidelines:

(1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.

(2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested technical data and technology currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

(ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.

- (iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.
  - (iv) A copy of the company's State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.
  - (v) The contractor's business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.
- (b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.
- (1) The determination will be based on whether
    - (i) The information is subject to 22 CFR part 121 or 15 CFR part 774.
    - (ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.
    - (iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.
  - (2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this

determination from the USD(AT&L), and if necessary, consult the Departments of State or Commerce.

(c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.

(d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:

(1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;

(2) The controlling DoD office judges the requested technical data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested technical data and technology and, if appropriate, request a new certification (see §250.3) describing the intended use of the requested technical data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the technical data and technology if the DoD Component focal point determines the release of the technical data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S.

contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

- (1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.
- (2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).
- (3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.
- (4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.
- (f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.
- (g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.
- (h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to

qualified contractors of controlled technical data and technology governed by this part will be accompanied by a “Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology” (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C., Appendix §2410, the penalty for unlawful export of items or information controlled under the EAR is a fine of not more than \$1,000,000, or five times the value of the exports, whichever is greater; or for an individual, imprisonment of not more than 10 years, or a fine of not more than to \$250,000, or both.
4. Under 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

- (i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that technical data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:
- (1) To any foreign recipient for which the technical data and technology are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.
  - (2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.
  - (3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.
  - (4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.
- (j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.
- (k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to

make a written appeal to a specifically identified appellate authority within the DoD Component. Other appeals will be processed as directed by the USD(AT&L).

(l) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

- (i) There is a valid license covering the export of the technical data and technology;
- (ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;
- (iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or
- (iv) The export or release qualifies for a general license under 15 CFR parts 730-774.

(2) Second condition:

- (i) The distribution statement applied to the technical data and technology pursuant to DoD Instruction 5230.24 permits release; or
- (ii) The originator or government controlling office authorizes release.

Page 21: Edits made to correct the process for commodity jurisdiction requests.

Page 27: the information in the examples does not seem to match the fines on page 2.

Before OMB will accept the proposed rule for formal review, we must first respond to all internal DoD comments and finalize the proposed rule text. Please review the comments from DTSA, make any necessary edits, and send us a revised rule text. We will need to ensure DTSA agrees with the changes prior to the rule being returned to OMB.

If you have any questions, please let us know.

V/r,  
Morgan E. Park  
Regulatory, Audit & Advisory Committee Division  
Directorate for Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Office of the Secretary of Defense  
Department of Defense  
Mark Center Suite 08F25  
Office: (b)(6)  
E-mail: (b)(6)

**From:** (b)(6)  
**To:** [Park, Morgan E CIV OSD ODCMO \(US\)](#)  
**Cc:** (b)(6); [Laychak, Michael R SES DTSA EO \(US\)](#)  
**Subject:** RE: DoD Proposed Rule, "Withholding of Unclassified Technical Data and Technology from Public Disclosure"  
**Date:** Tuesday, August 9, 2016 4:26:32 PM

---

We have nothing further to add to the rule.

Thank you.

Regards,

(b)(6)

-----Original Message-----

**From:** Park, Morgan E CIV OSD ODCMO (US)

**Sent:** Tuesday, August 09, 2016 11:40 AM

**To:**

**Cc:**

(b)(6)

Laychak, Michael R SES DTSA EO (US)

**Subject:** RE: DoD Proposed Rule, "Withholding of Unclassified Technical Data and Technology from Public Disclosure"

(b)(6)

Attached are responses to your comments. Please let me know if there are any outstanding issues with the regulation.

If not, we will forward the attached clean version of the rule to OMB for formal review.

Thank you.

V/r,

Morgan E. Park

Regulatory, Audit & Advisory Committee Division

Directorate for Oversight and Compliance

Office of the Deputy Chief Management Officer

Office of the Secretary of Defense

Department of Defense

Mark Center Suite 08F25

Office: (b)(6)

E-mail:

-----Original Message-----

**From:** (b)(6)

**Sent:** Monday, July 25, 2016 4:49 PM

**To:** Seehra, Jasmeet

**Cc:** Toppings, Patricia L CIV OSD ODCMO (US); Park, Morgan E CIV OSD ODCMO (US); (b)(6)

(b)(6); Laychak, Michael R SES DTSA EO (US)

Subject: DoD Proposed Rule, "Withholding of Unclassified Technical Data and Technology from Public Disclosure"

Jasmeet, attached are our recommended changes to DoD Proposed Rule, "Withholding of Unclassified Technical Data and Technology from Public Disclosure." Our changes include the following points:

We recommend to

(b)(5)

We recommend

(b)(5)

(b)(5)

Thank you for the opportunity to review the regulation.

Regards,

(b)(6)

(b)(6)



**From:** [Park, Morgan E CIV OSD ODCMO \(US\)](#)  
**To:** (b)(6)  
**Cc:** [Toppings, Patricia L CIV OSD ODCMO \(US\)](#); [Siegel, Aaron T CIV OSD ODCMO \(US\)](#)  
**Subject:** DoD Proposed Rule, "Withholding of Unclassified Technical Data and Technology from Public Disclosure"  
**Date:** Thursday, September 1, 2016 1:38:00 PM  
**Attachments:** [TAB A Rule Text 0790-AI73 PRv4.docx](#)

---

Ms. Seehra,

Respectfully request a significance determination of the attached proposed rule, "Withholding of Unclassified Technical Data and Technology from Public Disclosure." DTSA has coordinated on the rule.

V/r,  
Morgan E. Park  
Regulatory, Audit & Advisory Committee Division  
Directorate for Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Office of the Secretary of Defense  
Department of Defense  
Mark Center Suite 08F25  
Office: (b)(6)  
E-mail: (b)(6)

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DOD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology. Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. The Department of Defense (DoD) policies and procedures described and recommended herein apply equally to transfer and protection of dual-use and defense-related technology controlled under the International Traffic in Arms Regulations and Export Administration Regulations. Such technical data and technology must be treated as a valuable national security resource, to be protected and transferred only in accordance with export control laws and regulations, and national security and foreign policy objectives. This part describes procedures for DoD components and their contractors and grantees in controlling export of technical data and technology that contribute to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** Comments must be received by [insert date 60 days from date of publication].

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**EXECUTIVE SUMMARY**

I. Purpose of the regulatory action

a. Purpose. This rule prescribes a course of conduct that must be followed by DoD employees and contractor personnel to ensure that unclassified technical data and technology that discloses technology or information with military or space application in the possession or under the control of a DoD Component that may not be exported lawfully without an approval, authorization, or license is controlled and disseminated consistent with U.S. export control laws and regulations. Export control and technology security policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on

the defense industrial base. Criminal and civil penalties for export control violations are severe. For munitions export control violations, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, munitions violations can result in the imposition of a maximum civil fine of \$500,000 per violation of the “International Traffic in Arms Regulations” (ITAR), as well as debarment from exporting defense articles or services. For dual-use export control violations subject to the Export Administration Regulation, criminal penalties can reach a maximum of \$500,000 per violation and, for an individual person, up to 10 years imprisonment. Export Administration Regulation violations can also be subject to civil fines up to \$12,000 per violation, as well as denial of export privileges. Under the International Emergency Economic Powers Act, 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both

b. Succinct statement of legal authority for the regulatory action.

Authority: Legal authority for the regulatory action: In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense. This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. section 130. It applies to all unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD

Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations including 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”; 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

## II. Summary of the Major Provisions of the Regulatory Action in Question

The major provisions of this regulatory action include describing procedures for the release of technical information; determining procedures for technical data and technology governed by this rule are marked for distribution; and providing an example of the notice to accompany export-controlled technical data and technology.

## III. Costs and Benefits

Cost: \$1,587,589

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

This rule provides updates regarding the withholding from public disclosure any technical data and technology or information with military or space application in the possession or under the control of the Department of Defense. The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance.

These requirements have been in effect since 1985.

## **REGULATORY PROCEDURES**

### **Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Although, this rule is not “economically significant” because it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the

economy, it has been deemed “other significant” for raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB).

**Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs. The export control program has no discernible increase in anticipated costs and benefits for State, local, or tribal governments, or the private sector as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis. The export control program has no discernible increase in anticipated costs and benefits for small entities as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB

under OMB Control Number 0704-0207. The expiration date for the OMB Control Number is March 31, 2019.

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments. The export control program has no discernible increase in anticipated costs and benefits for State, or local governments, as the program is being updated to conform to national security guidance. These requirements have been in effect since 1985.

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

- (1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).
- (2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , and 15 CFR parts 730-774.

(c) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

(d) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other information that is publicly available pursuant to 15 CFR 734.3, 734.7 through 734.9; or

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(e) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018; and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

(f) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the

U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(g) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(h) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, "Controlled Unclassified Information," as implemented by Volume 4 of DoD Manual 5200.01, "DoD Information Security Program" (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§250.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by

advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment including manufacturing, inspection, and test equipment that is required for the effective application of technical information and technical know-how.

(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

(2) With respect to dual-use categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology: those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 U.S.C. 110.

(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120-

130, or a dual-use article, including its underlying technology and software, covered by 15 CFR parts 730-774.

Defense article. Defined at 22 CFR 120.6

Defense services. Defined at 22 CFR 120.9

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

(1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through foreign military sale).

(2) Bidding, or preparing to bid, on a sale of surplus property.

(3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.

(4) Engaging in scientific research in a professional capacity.

(5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

Qualified contractor. A qualified U.S. contractor or a qualified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. Defined at 22 CFR 120.10.

(1) Classified data relating to defense articles and defense services on the U.S. Munitions List;

(2) Information covered by an invention secrecy order; or

(3) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts 730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in

tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

#### **§250.4 Policy.**

It is DoD policy that:

- (a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance

with U.S. export control laws and regulations (22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data and technology may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes. Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, "International Transfers of Technology, Articles, and Services" (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, "Clearance of DoD Information for Public Release" (available at

<http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, “Security and Policy Review of DoD Information for Public Release” (available at

<http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, “Cybersecurity” (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, “Information Assurance (IA) and Support to Computer Network Defense (CND),” February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, “DoD Records Management Program” (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

#### **§250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

- (1) Administer and monitor compliance with this part.
- (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
- (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.

- (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.
  - (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
  - (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
  - (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
  - (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.
  - (9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.
  - (10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.
- (b) The Under Secretary of Defense for Policy (USD(P)):
- (1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.
  - (2) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.
- (c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:

- (1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.
- (2) Provides such other assistance as may be necessary to ensure compliance with this part.
- (d) The GC DoD:
  - (1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.
  - (2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.
- (e) The DoD Component heads:
  - (1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.
  - (2) Designate a focal point to:
    - (i) Ensure implementation of this part.
    - (ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of §250.6.
    - (iii) Act on appeals relating to case-by-case denials for release of technical data and technology.
    - (iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.
    - (v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.
    - (vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.
  - (3) Develop, distribute, and effect Component regulations to implement this part.
  - (4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in

accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

(a) Procedures for release of technical information must be made under the following guidelines:

(1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.

(2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested technical data and technology currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

(ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.

(iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.

(iv) A copy of the company's State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.

(v) The contractor's business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.

(b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.

(1) The determination will be based on whether

(i) The information is subject to 22 CFR part 121 or 15 CFR part 774.

(ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.

(iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.

(2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this

determination from the USD(AT&L), and if necessary, consult the Departments of State or Commerce.

(c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.

(d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:

(1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;

(2) The controlling DoD office judges the requested technical data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested technical data and technology and, if appropriate, request a new certification (see §250.3) describing the intended use of the requested technical data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the technical data and technology if the DoD Component focal point determines the release of the technical data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S.

contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

- (1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.
- (2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).
- (3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.
- (4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.
- (f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.
- (g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.
- (h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to

qualified contractors of controlled technical data and technology governed by this part will be accompanied by a “Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology” (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C., Appendix §2410, the penalty for unlawful export of items or information controlled under the EAR is a fine of not more than \$1,000,000, or five times the value of the exports, whichever is greater; or for an individual, imprisonment of not more than 10 years, or a fine of not more than to \$250,000, or both.
4. Under 50 U.S.C. §1705, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations include civil penalties of not more than \$250,000 per transaction or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

- (i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that technical data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:
- (1) To any foreign recipient for which the technical data and technology are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.
  - (2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.
  - (3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.
  - (4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.
- (j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.
- (k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to

make a written appeal to a specifically identified appellate authority within the DoD Component. Other appeals will be processed as directed by the USD(AT&L).

(1) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

- (i) There is a valid license covering the export of the technical data and technology;
- (ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;
- (iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or
- (iv) The export or release qualifies for a general license under 15 CFR parts 730-774.

(2) Second condition:

- (i) The distribution statement applied to the technical data and technology pursuant to DoD Instruction 5230.24 permits release; or
- (ii) The originator or government controlling office authorizes release.

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DOD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology subject to the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR). It applies to DoD components, their contractors and grantees and is meant to control the transfer of technical data and technology contributing to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** Comments must be received by **[insert date 60 days from date of publication]**.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

For the purposes of this regulation, public disclosure of technical data and technology is the same as providing uncontrolled foreign access. This rule instructs DoD employees, contractors, and grantees to ensure unclassified technical data and technology that discloses technology or information with a military or space application may not be exported without authorization and should be controlled and disseminated consistent with U.S. export control laws and regulations. These policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on defense industrial base. There are penalties for export control violations. For export control violations involving items controlled by the United States Department of State under the International Traffic in Arms Regulations (ITAR), including many munitions items, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, ITAR violations can result in the imposition of a maximum civil fine of \$500,000 per violation, as well as debarment from exporting defense articles or services. For export control violations involving dual-use and certain munitions items controlled by the United States Department of Commerce under the Export Administration Regulations, criminal and civil penalties are currently provided by the International Emergency Economic Powers Act (IEEPA), 50

U.S.C. §1705, which has continued the Export Administration Regulations (EAR) in effect while the Export Administration Act is in lapse through Executive Order 13222 of August 17, 2001 (3 CFR 2001 Comp. 783 (2002)), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013) and as extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52587 (Aug. 8, 2016)). Under the EAR and IEEPA, as adjusted by 15 CFR §5.4(b), the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations includes civil penalties of not more than \$284,582 per transaction or twice the amount of the transaction, whichever is greater, and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both. Violations of the EAR may also result in the denial of export privileges and other administrative sanctions.

#### AUTHORITY TO ISSUE THIS REGULATION

In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense. In addition, U.S. export control laws, including 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act” (IEEPA)); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)) govern this rule.

#### SUMMARY OF THE MAJOR PROVISIONS OF THE RULE

This rule describes procedures for the release of technical information; discusses procedures for technical data and technology to be marked for distribution; and provides an example of the notice to accompany export-controlled technical data and technology.

## COSTS AND BENEFITS

DoD is proposing this regulation to update the CFR and DoD Directive 5230.25 (available at <http://dtic.mil/whs/directives/corres/pdf/523025p.pdf>). The Department currently spends \$571,876 annually on export control certification activities. The costs to DoD contractors and grantees consist primarily of the time needed to organize, format, and submit information to the U.S./Canada Joint Certification Office to qualify for export controlled technical data and technology.

The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance cited in the text in §250.1 through §250.7.

The potential benefits include greater public access and understanding of information about the qualifications needed for access to export controlled technical data and technology. Such information may help potential contractors and grantees to better understand their options for participating in DoD activities; to better enable funders and researchers to determine the need for information and technology; to provide more complete information of those who use information from DoD research and contracts to inform other decisions; and to better enable the scientific community to examine the overall state of information and technology in this area as a basis for engaging in quality improvement (e.g., with regard to research methods). The rule is also expected to provide greater clarity about what is required for those who are authorized holders of export controlled technical data and technology.

This rule is included in DoD's retrospective plan, completed in August 2011, and will be reported in future status updates of DoD's retrospective review in accordance with the

requirements in Executive Order 13563. DoD's full plan can be accessed at:

<http://www.regulations.gov/#!docketDetail;D=DOD-2011-OS-0036>.

## **REGULATORY PROCEDURES**

### **Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Although, this rule is not “economically significant” because it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, it has been deemed “other significant” for raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB).

### **Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

### **Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB under OMB Control Number 0704-0207 titled DD Form 2345, Militarily Critical Technical Data Agreement.

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429

.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages  
<https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

### **Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments.

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

- (1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).
- (2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , 10 CFR 810, and 15 CFR parts 730-774.

(c) Does not apply to technical information under the control of the Department of Energy or the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended.

(ed) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

(de) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other items that are not subject to the EAR or exclusively controlled for export or reexport by another department or agency pursuant to 15 CFR 734.3, 734.7 through 734.8;

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(ef) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018); and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

(fg) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(gh) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(hi) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, “Controlled Unclassified Information,” as implemented by Volume 4 of DoD Manual 5200.01, “DoD Information Security Program” (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§250.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment including manufacturing, inspection, and test equipment that is required for the effective application of technical information and technical know-how.

(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

(2) With respect to categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology subject to the EAR: those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 CFR 810.

(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120-130, or a dual-use or munitions item, including its underlying technology and software, covered by 15 CFR parts 730-774.

Defense article. Defined at 22 CFR 120.6

Defense services. Defined at 22 CFR 120.9

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

- (1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through foreign military sale).
- (2) Bidding, or preparing to bid, on a sale of surplus property.
- (3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.
- (4) Engaging in scientific research in a professional capacity.
- (5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

Qualified contractor. A qualified U.S. contractor or a qualified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics

(USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible

from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. Defined at 22 CFR 120.10.

(1) Classified data relating to defense articles and defense services on the U.S. Munitions List;

(2) Information covered by an invention secrecy order; or

(3) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts 730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods

or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

**§250.4 Policy.**

It is DoD policy that:

- (a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession

or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance with U.S. export control laws and regulations (including 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data and technology may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes.

Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, “Classified National Security Information,” and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part.

The technical data will be withheld under the authority of 10 U.S.C.130. If the information originated or is under the control of a Government Agency outside the DoD, DoD Components will refer to that Government Agency for a release determination.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, “Distribution Statements on Technical Documents” (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual

5200.01 and released in accordance with DoD Instruction 2040.02, “International Transfers of Technology, Articles, and Services” (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, “Clearance of DoD Information for Public Release” (available at <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, “Security and Policy Review of DoD Information for Public Release” (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, “Cybersecurity” (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, “Information Assurance (IA) and Support to Computer Network Defense (CND),” February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, “DoD Records Management Program” (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

#### **§250.5 Responsibilities.**

- (a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:
- (1) Administer and monitor compliance with this part.

- (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
  - (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.
  - (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.
  - (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
  - (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
  - (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
  - (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.
  - (9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.
  - (10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.
- (b) The Under Secretary of Defense for Policy (USD(P)):

- (1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.
  - (2) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.
- (c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:
- (1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.
  - (2) Provides such other assistance as may be necessary to ensure compliance with this part.
- (d) The GC DoD:
- (1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.
  - (2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.
- (e) The DoD Component heads:
- (1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.
  - (2) Designate a focal point to:
    - (i) Ensure implementation of this part.
    - (ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of §250.6.
    - (iii) Act on appeals relating to case-by-case denials for release of technical data and technology.
    - (iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.
    - (v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.

(vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.

(3) Develop, distribute, and effect Component regulations to implement this part.

(4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

(a) Procedures for release of technical information must be made under the following guidelines:

(1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.

(2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested technical data and technology currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

- (i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.
- (ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.
- (iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.
- (iv) A copy of the company’s State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.
- (v) The contractor’s business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.
- (b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.
  - (1) The determination will be based on whether
    - (i) The information is subject to 22 CFR part 121 or 15 CFR part 774.
    - (ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.

(iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.

(2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State, ~~of~~ Commerce, or Energy.

(c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.

(d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:

(1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;

(2) The controlling DoD office judges the requested technical data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested technical data and technology and, if appropriate, request a new certification (see §250.3) describing the intended use of the requested technical data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the technical data and technology if the DoD Component

focal point determines the release of the technical data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a "Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology" (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C. §1705 and 15 CFR §764.3, as adjusted for inflation by 15 CFR §6.4, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the EAR, while the EAR is continued in effect by Executive Order under the International Emergency Economic Powers Act, may include civil penalties of not more than \$284,582 per transaction (subject to further adjustment for inflation) or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both. Violations of the EAR may also result in the denial of export privileges.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

- (i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that technical data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:
- (1) To any foreign recipient for which the technical data and technology are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.
  - (2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.
  - (3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.
  - (4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.
- (j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.
- (k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to

make a written appeal to a specifically identified appellate authority within the DoD Component. Other appeals will be processed as directed by the USD(AT&L).

(1) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

- (i) There is a valid license covering the export of the technical data and technology;
- (ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;
- (iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or
- (iv) The export or release qualifies for a license exception under 15 CFR parts 730-774.

(2) Second condition:

- (i) The distribution statement applied to the technical data and technology pursuant to DoD Instruction 5230.24 permits release; or
- (ii) The originator or government controlling office authorizes release.

BILLING CODE: 5001-06

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 250

[Docket ID: DOD-2015-OS-0126]

RIN 0790-AI73

Withholding of Unclassified Technical Data and Technology from Public Disclosure

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rule establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology subject to the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR). It applies to DoD components, their contractors and grantees and is meant to control the transfer of technical data and technology contributing to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** Comments must be received by **[insert date 60 days from date of publication]**.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

For the purposes of this regulation, public disclosure of technical data and technology is the same as providing uncontrolled foreign access. This rule instructs DoD employees, contractors, and grantees to ensure unclassified technical data and technology that discloses technology or information with a military or space application may not be exported without authorization and should be controlled and disseminated consistent with U.S. export control laws and regulations. These policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on defense industrial base. There are penalties for export control violations. For export control violations involving items controlled by the United States Department of State under the International Traffic in Arms Regulations (ITAR), including many munitions items, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, ITAR violations can result in the imposition of a maximum civil fine of \$500,000 per violation, as well as debarment from exporting defense articles or services. For export control violations involving dual-use and certain munitions items controlled by the United States Department of Commerce under the Export Administration Regulations, criminal and civil penalties are currently provided by the International Emergency Economic Powers Act (IEEPA), 50

U.S.C. §1705, which has continued the Export Administration Regulations (EAR) in effect while the Export Administration Act is in lapse through Executive Order 13222 of August 17, 2001 (3 CFR 2001 Comp. 783 (2002)), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013) and as extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52587 (Aug. 8, 2016)). Under the EAR and IEEPA, as adjusted by 15 CFR §5.4(b), the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations includes civil penalties of not more than \$284,582 per transaction or twice the amount of the transaction, whichever is greater, and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both. Violations of the EAR may also result in the denial of export privileges and other administrative sanctions.

#### AUTHORITY TO ISSUE THIS REGULATION

In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense. In addition, U.S. export control laws, including 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act” (IEEPA)); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)) govern this rule.

#### SUMMARY OF THE MAJOR PROVISIONS OF THE RULE

This rule describes procedures for the release of technical information; discusses procedures for technical data and technology to be marked for distribution; and provides an example of the notice to accompany export-controlled technical data and technology.

## COSTS AND BENEFITS

DoD is proposing this regulation to update the CFR and DoD Directive 5230.25 (available at <http://dtic.mil/whs/directives/corres/pdf/523025p.pdf>). The Department currently spends \$571,876 annually on export control certification activities. The costs to DoD contractors and grantees consist primarily of the time needed to organize, format, and submit information to the U.S./Canada Joint Certification Office to qualify for export controlled technical data and technology.

The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance cited in the text in §250.1 through §250.7.

The potential benefits include greater public access and understanding of information about the qualifications needed for access to export controlled technical data and technology. Such information may help potential contractors and grantees to better understand their options for participating in DoD activities; to better enable funders and researchers to determine the need for information and technology; to provide more complete information of those who use information from DoD research and contracts to inform other decisions; and to better enable the scientific community to examine the overall state of information and technology in this area as a basis for engaging in quality improvement (e.g., with regard to research methods). The rule is also expected to provide greater clarity about what is required for those who are authorized holders of export controlled technical data and technology.

This rule is included in DoD's retrospective plan, completed in August 2011, and will be reported in future status updates of DoD's retrospective review in accordance with the

requirements in Executive Order 13563. DoD's full plan can be accessed at:

<http://www.regulations.gov/#!docketDetail;D=DOD-2011-OS-0036>.

## **REGULATORY PROCEDURES**

### **Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Although, this rule is not “economically significant” because it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, it has been deemed “other significant” for raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB).

### **Sec. 202, Pub. L. 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

### **Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB under OMB Control Number 0704-0207 titled DD Form 2345, Militarily Critical Technical Data Agreement.

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US	GS13 step 5	\$101,807	\$50,904

Representative			
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages  
<https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments.

List of Subjects in 32 CFR Part 250

Exports, Science and technology.

Accordingly 32 CFR part 250 is proposed to be revised to read as follows:

Sec.

250.1 Purpose.

250.2 Applicability.

250.3 Definitions.

250.4 Policy.

250.5 Responsibilities.

250.6 Procedures.

250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND  
TECHNOLOGY FROM PUBLIC DISCLOSURE**

**§250.1 Purpose.**

This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

This part:

(a) Applies to:

- (1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).
- (2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730-774 (also known as “Export Administration Regulations” (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130 , 10 CFR 810, and 15 CFR parts 730-774.

(c) Does not apply to technical information under the control of the Department of Energy or the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended.

(d) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of §250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

(e) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other items that are not subject to the EAR or exclusively controlled for export or reexport by another department or agency pursuant to 15 CFR 734.3, 734.7 through 734.8;

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(f) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018); and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

(g) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(h) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(i) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, “Controlled Unclassified Information,” as implemented by Volume 4 of DoD Manual 5200.01, “DoD Information Security Program” (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§250.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment including manufacturing, inspection, and test equipment that is required for the effective application of technical information and technical know-how.

(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

(2) With respect to categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology subject to the EAR: those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 CFR 810.

(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120-130, or a dual-use or munitions item, including its underlying technology and software, covered by 15 CFR parts 730-774.

Defense article. Defined at 22 CFR 120.6

Defense services. Defined at 22 CFR 120.9

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Other legitimate business purposes. Include:

- (1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through foreign military sale).
- (2) Bidding, or preparing to bid, on a sale of surplus property.
- (3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.
- (4) Engaging in scientific research in a professional capacity.
- (5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Public disclosure. Making technical data available without restricting its dissemination or use.

Qualified contractor. A qualified U.S. contractor or a qualified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics

(USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of §250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible

from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Technical data. Defined at 22 CFR 120.10.

(1) Classified data relating to defense articles and defense services on the U.S. Munitions List;

(2) Information covered by an invention secrecy order; or

(3) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b) The definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Technical information. Includes technical data and technology as defined in 15 CFR parts 730-774, as well as technical information that is not subject to 22 CFR parts 120-130 or 15 CFR parts 730-774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods

or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

**§250.4 Policy.**

It is DoD policy that:

- (a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession

or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exception, exemption, or other export authorization, in accordance with U.S. export control laws and regulations (including 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774). However, technical data and technology may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any federal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes.

Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and Volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130. If the information originated or is under the control of a Government Agency outside the DoD, DoD Components will refer to that Government Agency for a release determination.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and Volume 4 of DoD Manual

5200.01 and released in accordance with DoD Instruction 2040.02, “International Transfers of Technology, Articles, and Services” (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, “Clearance of DoD Information for Public Release” (available at <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, “Security and Policy Review of DoD Information for Public Release” (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with Volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, “Cybersecurity” (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, “Information Assurance (IA) and Support to Computer Network Defense (CND),” February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, “DoD Records Management Program” (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

#### **§250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

- (1) Administer and monitor compliance with this part.

- (2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of §250.6.
  - (3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of §250.6, and act as disqualification authority.
  - (4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.
  - (5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of §250.4 of this part.
  - (6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.
  - (7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of §250.6.
  - (8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of §250.6.
  - (9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.
  - (10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.
- (b) The Under Secretary of Defense for Policy (USD(P)):

- (1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.
  - (2) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.
- (c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:
- (1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.
  - (2) Provides such other assistance as may be necessary to ensure compliance with this part.
- (d) The GC DoD:
- (1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.
  - (2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.
- (e) The DoD Component heads:
- (1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.
  - (2) Designate a focal point to:
    - (i) Ensure implementation of this part.
    - (ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of §250.6.
    - (iii) Act on appeals relating to case-by-case denials for release of technical data and technology.
    - (iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of §250.6.
    - (v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §250.6.

(vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §250.6.

(3) Develop, distribute, and effect Component regulations to implement this part.

(4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and Volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§250.6 Procedures.**

(a) Procedures for release of technical information must be made under the following guidelines:

(1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined §250.3 from public disclosure.

(2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested technical data and technology currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

- (i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.
- (ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.
- (iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.
- (iv) A copy of the company’s State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.
- (v) The contractor’s business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.
- (b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.
  - (1) The determination will be based on whether
    - (i) The information is subject to 22 CFR part 121 or 15 CFR part 774.
    - (ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774.

(iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of §250.2.

(2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State, Commerce, or Energy.

(c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and Volume 4 of DoD Manual 5200.01.

(d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in §250.3, unless either:

(1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;

(2) The controlling DoD office judges the requested technical data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested technical data and technology and, if appropriate, request a new certification (see §250.3) describing the intended use of the requested technical data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the technical data and technology if the DoD Component

focal point determines the release of the technical data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of Volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a "Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology" (see Figure).

Figure. Example of the Notice to Accompany Export-Controlled Technical Data and Technology

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C. §1705 and 15 CFR §764.3, as adjusted for inflation by 15 CFR §6.4, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the EAR, while the EAR is continued in effect by Executive Order under the International Emergency Economic Powers Act, may include civil penalties of not more than \$284,582 per transaction (subject to further adjustment for inflation) or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both. Violations of the EAR may also result in the denial of export privileges.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

- (i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that technical data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:
- (1) To any foreign recipient for which the technical data and technology are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730-774.
  - (2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.
  - (3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730-774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.
  - (4) To the Congress or any federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.
- (j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120-130, and 15 CFR parts 730-774 and DoD policies.
- (k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to

make a written appeal to a specifically identified appellate authority within the DoD Component. Other appeals will be processed as directed by the USD(AT&L).

(1) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

- (i) There is a valid license covering the export of the technical data and technology;
- (ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;
- (iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or
- (iv) The export or release qualifies for a license exception under 15 CFR parts 730-774.

(2) Second condition:

- (i) The distribution statement applied to the technical data and technology pursuant to DoD Instruction 5230.24 permits release; or
- (ii) The originator or government controlling office authorizes release.

Dated: October 26, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

**From:** [Seehra, Jasmeet K. EOP/OMB](#)  
**To:** [Siegel, Aaron T CIV OSD ODCMO \(US\)](#); [Park, Morgan E CIV OSD ODCMO \(US\)](#); [Toppings, Patricia L CIV OSD ODCMO \(US\)](#)  
**Cc:** [Seehra, Jasmeet K. EOP/OMB](#)  
**Subject:** Withholding of Unclassified Technical Data From Public Disclosure  
**Date:** Wednesday, October 26, 2016 12:53:57 PM

---

The revised rule has completed review and is back with the agency for processing.

*Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

*Written/Paper Submissions*

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

*Instructions:* All submissions received must include the Docket No. FDA-2010-N-0548 for "Good Laboratory Practice for Nonclinical Laboratory Studies." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential

with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Vernon Toelle, Office of Surveillance and Compliance, Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., MPN4-142, Rockville, MD 20855, 240-402-5637; or Kristin Webster Maloney, Office of Policy and Risk Management, Office of Regulatory Affairs, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 4373, Silver Spring, MD 20993, 240-402-4993.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of August 24, 2016, FDA published a proposed rule with a 90-day comment period to request comments on its proposal to amend the regulations for good laboratory practice for nonclinical studies. Comments on the proposed amendments will inform FDA's rulemaking to establish regulations for good laboratory practice for nonclinical laboratory studies.

The Agency has received requests for a 90-day extension of the comment period for the proposed rule. Each request conveyed concern that the

current 90-day comment period does not allow sufficient time to develop a meaningful or thoughtful response to the proposed rule.

FDA has considered the requests and is extending the comment period for the proposed rule for 60 days, until January 21, 2017. The Agency believes that a 60-day extension allows adequate time for interested persons to submit comments without significantly delaying rulemaking on these important issues.

Dated: October 26, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016-26244 Filed 10-28-16; 8:45 am]

**BILLING CODE 4164-01-P**

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 250**

[Docket ID: DOD-2015-OS-0126]

**RIN 0790-A173**

**Withholding of Unclassified Technical Data and Technology From Public Disclosure**

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rulemaking establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology subject to the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR). It applies to DoD components, their contractors and grantees and is meant to control the transfer of technical data and technology contributing to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** Comments must be received by December 30, 2016.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:**  
Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**Background**

For the purposes of this regulation, public disclosure of technical data and technology is the same as providing uncontrolled foreign access. This rule instructs DoD employees, contractors, and grantees to ensure unclassified technical data and technology that discloses technology or information with a military or space application may not be exported without authorization and should be controlled and disseminated consistent with U.S. export control laws and regulations. These policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on defense industrial base. There are penalties for export control violations. For export control violations involving items controlled by the United States Department of State under the International Traffic in Arms Regulations (ITAR), including many munitions items, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, ITAR violations can result in the imposition of a maximum civil fine of \$500,000 per violation, as well as debarment from exporting defense articles or services. For export control violations involving dual-use and certain munitions items controlled by the United States Department of Commerce under the Export Administration Regulations, criminal and civil penalties are currently provided by the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1705, which has continued the Export Administration Regulations (EAR) in effect while the Export Administration Act is in lapse through Executive Order 13222 of August 17, 2001 (3 CFR 2001 Comp. 783 (2002)), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129

(March 13, 2013) and as extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52587 (Aug. 8, 2016)). Under the EAR and IEEPA, as adjusted by 15 CFR 5.4(b), the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations includes civil penalties of not more than \$284,582 per transaction or twice the amount of the transaction, whichever is greater, and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both. Violations of the EAR may also result in the denial of export privileges and other administrative sanctions.

**Authority To Issue This Regulation**

In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense. In addition, U.S. export control laws, including 22 U.S.C. 2778 (also known as the "Arms Export Control Act"); 50 U.S.C. chapter 35 (also known as the "International Emergency Economic Powers Act" (IEEPA)); 22 CFR parts 120 through 130 (also known as "International Traffic in Arms Regulations" (ITAR)); and 15 CFR parts 730 through 774 (also known as "Export Administration Regulations" (EAR)) govern this rule.

**Summary of the Major Provisions of the Rulemaking**

This proposed rule describes procedures for the release of technical information; discusses procedures for technical data and technology to be marked for distribution; and provides an example of the notice to accompany export-controlled technical data and technology.

**Costs and Benefits**

DoD is proposing this regulation to update the CFR and DoD Directive 5230.25 (available at <http://dtic.mil/whs/directives/corres/pdf/523025p.pdf>). The Department currently spends \$571,876 annually on export control certification activities. The costs to DoD contractors and grantee consist primarily of the time needed to organize, format, and submit information to the U.S./Canada Joint Certification Office to qualify for export controlled technical data and technology.

The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance cited in the text in §§ 250.1 through 250.7.

The potential benefits include greater public access and understanding of information about the qualifications needed for access to export controlled technical data and technology. Such information may help potential contractors and grantees to better understand their options for participating in DoD activities; to better enable funders and researchers to determine the need for information and technology; to provide more complete information of those who use information from DoD research and contracts to inform other decisions; and to better enable the scientific community to examine the overall state of information and technology in this area as a basis for engaging in quality improvement (e.g., with regard to research methods). The proposed rule is also expected to provide greater clarity about what is required for those who are authorized holders of export controlled technical data and technology.

This proposed rule is included in DoD's retrospective plan, completed in August 2011, and will be reported in future status updates of DoD's retrospective review in accordance with the requirements in Executive Order 13563. DoD's full plan can be accessed at: <http://www.regulations.gov/#/docketDetail;D=DOD-2011-OS-0036>.

**Regulatory Procedures**

*Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"*

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Although this rulemaking is not "economically significant" because it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, it has been deemed "other significant" for raising novel legal or policy issues arising out of legal mandates, the President's priorities, or

the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB).

*Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This proposed rule would not mandate any requirements for State, local, or tribal governments, nor would it affect private sector costs.

*Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)*

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

*Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)*

It has been certified that this proposed rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been

approved by OMB under OMB Control Number 0704-0207 titled DD Form 2345, Militarily Critical Technical Data Agreement.

Cost to the Public

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses .....	\$9.94* per response .....	\$19.99 postage** per response .....	\$638,400
------------------------	----------------------------	--------------------------------------	-----------

\* U.S. Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor's degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>.

\*\* Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>.

**COST TO THE GOVERNMENT**

4 FTE registrars .....	GS 9 step 5 .....	\$59,036 *	\$236,144
1 FTE Team Lead .....	GS11 step 5 .....	71,429 *	71,429
.5 FTE US Representative .....	GS13 step 5 .....	101,807	50,904
.25 FTE Division Chief .....	GS14 step 5 .....	120,303	30,075
.25 FTE Director .....	GS15 step 5 .....	35,378 *	35,378
O&M for IT .....	SP4701-15-F-0031 .....	2,958,915	147,946
Total .....			571,876

\* 2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>.

*Executive Order 13132, "Federalism"*

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This proposed rule will not have a substantial effect on State and local governments.

**List of Subjects in 32 CFR Part 250**

Exports, Science and technology.  
Accordingly, 32 CFR part 250 is proposed to be revised to read as follows:

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND TECHNOLOGY FROM PUBLIC DISCLOSURE**

- Sec.
- 250.1 Purpose.
- 250.2 Applicability.
- 250.3 Definitions.
- 250.4 Policy.

- 250.5 Responsibilities.
- 250.6 Procedures.
- 250.7 Directly arranged visits.

**Authority:** 10 U.S.C. 133.

**§ 250.1 Purpose.**

This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§ 250.2 Applicability.**

This part:  
(a) Applies to:  
(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the "DoD Components").

(2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the "Arms Export Control Act"); 50 U.S.C. chapter 35 (also known as the "International Emergency Economic Powers Act"); 22 CFR parts 120-130 (also known as "International Traffic in Arms Regulations" (ITAR)); and 15 CFR parts 730 through 774 (also known as "Export Administration Regulations" (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120 through 130, 10 CFR 810, and 15 CFR parts 730 through 774.

(c) Does not apply to technical information under the control of the Department of Energy or the Nuclear

Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended.

(d) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of § 250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

(e) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other items that are not subject to the EAR or exclusively controlled for export or reexport by another department or agency pursuant to 15 CFR 734.3, 734.7 through 734.8;

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(f) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018); and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the "Freedom of Information Act (FOIA)."

(g) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(h) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(i) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, "Controlled

Unclassified Information," as implemented by volume 4 of DoD Manual 5200.01, "DoD Information Security Program" (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

#### § 250.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

*Certification.* The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

*Controlling DoD office.* The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

*Critical technology.* Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment including manufacturing, inspection, and test equipment that is required for the effective application of technical information and technical know-how.

(1) With respect to defense articles or defense services: Those technologies specified in 22 CFR 121.1.

(2) With respect to categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology subject to the EAR: Those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology:

Those technologies specified in 10 CFR part 810.

(4) With respect to select agents and toxins: Those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: Research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120 through 130, or a dual-use or munitions item, including its underlying technology and software, covered by 15 CFR parts 730 through 774.

*Defense article.* Defined at 22 CFR 120.6.

*Defense services.* Defined at 22 CFR 120.9.

*Formal arrangement.* An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

*Legitimate business relationship.* A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD.

Relationships may be established with an individual or organization in another Federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

*Limited rights.* The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

*Other legitimate business purposes.* Include:

(1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through foreign military sale).

(2) Bidding, or preparing to bid, on a sale of surplus property.

(3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace,

providing that any required export license is obtained.

(4) Engaging in scientific research in a professional capacity.

(5) Acting as a subcontractor to a qualified contractor.

*Potential DoD contractor.* An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

*Public disclosure.* Making technical data available without restricting its dissemination or use.

*Qualified contractor.* A qualified U.S. contractor or a qualified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

*Qualified Canadian contractor.* Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the "Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange".

*Qualified U.S. contractor.* A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of § 250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

*Restricted rights.* The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

*Technical data.* Defined at 22 CFR 120.10.

(1) Classified data relating to defense articles and defense services on the U.S. Munitions List;

(2) Information covered by an invention secrecy order; or

(3) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(4) The definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information

on function or purpose or general system descriptions of defense articles.

*Technical information.* Includes technical data and technology as defined in 15 CFR parts 730 through 774, as well as technical information that is not subject to 22 CFR parts 120 through 130 or 15 CFR parts 730 through 774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

*Technology.* Defined in 15 CFR 772.1.

*United States.* The 50 States, the District of Columbia, and the territories and possessions of the United States.

*United States-Canada Joint Certification Office.* The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

*U.S. DoD contractor.* Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

#### § 250.4 Policy.

It is DoD policy that:

(a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exception, exemption, or other export

authorization, in accordance with U.S. export control laws and regulations (including 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120 through 130, and 15 CFR parts 730 through 774). However, technical data and technology may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any Federal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes. Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be

withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130. If the information originated or is under the control of a Government Agency outside the DoD, DoD Components will refer to that Government Agency for a release determination.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, "International Transfers of Technology, Articles, and Services" (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, "Clearance of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, "Cybersecurity" (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, "Information Assurance (IA) and Support to Computer Network Defense (CND)," February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, "DoD Records Management Program" (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data

and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

#### § 250.5 Responsibilities.

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

(1) Administer and monitor compliance with this part.

(2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of § 250.6.

(3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of § 250.6, and act as disqualification authority.

(4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.

(5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of § 250.4 of this part.

(6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.

(7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of § 250.6.

(8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of § 250.6.

(9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.

(10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.

(b) The Under Secretary of Defense for Policy (USD(P)):

(1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.

(2) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.

(c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:

(1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.

(2) Provides such other assistance as may be necessary to ensure compliance with this part.

(d) The GC DoD:

(1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.

(2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.

(e) The DoD Component heads:

(1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.

(2) Designate a focal point to:

(i) Ensure implementation of this part.

(ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of § 250.6.

(iii) Act on appeals relating to case-by-case denials for release of technical data and technology.

(iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of § 250.6.

(v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of § 250.6.

(vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of § 250.6.

(3) Develop, distribute, and effect Component regulations to implement this part.

(4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

#### § 250.6 Procedures.

(a) Procedures for release of technical information must be made under the following guidelines:

(1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD

Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined in § 250.3 from public disclosure.

(2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested technical data and technology currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

(ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 "Militarily Critical Technical Data Agreement," to the United States-Canada Joint Certification Office.

(iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.

(iv) A copy of the company's State/ Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.

(v) The contractor's business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.

(b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.

(1) The determination will be based on whether

(i) The information is subject to 22 CFR part 121 or 15 CFR part 774.

(ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations

in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120 through 130, and 15 CFR parts 730 through 774.

(iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of § 250.2.

(2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State, Commerce, or Energy.

(c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and volume 4 of DoD Manual 5200.01.

(d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in § 250.3, unless either:

(1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;

(2) The controlling DoD office judges the requested technical data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested technical data and technology and, if appropriate, request a new certification (see § 250.3) describing the intended use of the requested technical data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the technical data and technology if the DoD Component focal point determines the release of the technical data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's

qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a "Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology" (see Figure to § 250.6(h)).

**BILLING CODE 5001-06-P**

**Figure to § 250.6(h)—Example of the Notice to Accompany Export-Controlled Technical Data and Technology**

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C. §1705 and 15 CFR §764.3, as adjusted for inflation by 15 CFR §6.4, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the EAR, while the EAR is continued in effect by Executive Order under the International Emergency Economic Powers Act, may include civil penalties of not more than \$284,582 per transaction (subject to further adjustment for inflation) or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both. Violations of the EAR may also result in the denial of export privileges.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:

(1) To any foreign recipient for which the technical data and technology are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730 through 774.

(2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.

(3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730 through 774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.

(4) To the Congress or any Federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.

(j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120 through 130, and 15 CFR parts 730 through 774 and DoD policies.

(k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to make a written appeal to a specifically identified appellate authority within the DoD Component. Other appeals will be processed as directed by the USD(AT&L).

(l) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

#### **§ 250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification

process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

(i) There is a valid license covering the export of the technical data and technology;

(ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;

(iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or

(iv) The export or release qualifies for a license exception under 15 CFR parts 730 through 774.

(2) Second condition:

(i) The distribution statement applied to the technical data and technology pursuant to DoD Instruction 5230.24 permits release; or

(ii) The originator or government controlling office authorizes release.

Dated: October 26, 2016.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2016-26236 Filed 10-28-16; 8:45 am]

**BILLING CODE 5001-06-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

[EPA-R08-OAR-2016-0620; FRL-9954-67-Region 8]

### **Approval and Promulgation of Air Quality Implementation Plans; State of Utah; Revisions to Nonattainment Permitting Regulations**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to conditionally approve State Implementation Plan (SIP) revisions submitted by the state of Utah on August 20, 2013, with supporting administrative documentation submitted on September 12, 2013. These submittals revise the Utah Administrative Code (UAC) that pertain to the issuance of Utah air quality permits for major sources in nonattainment areas. The EPA proposes a conditional approval because while the submitted revisions to Utah's nonattainment permitting rules do not fully address the deficiencies in the state's program, Utah has committed to address additional remaining deficiencies in the state's nonattainment permitting program no later than a year from the EPA finalizing this conditional approval. If finalized, and upon the EPA finding a timely meeting of this commitment in full, the proposed conditional approval of the SIP revisions would convert to a final approval of Utah's plan. This action is being taken under section 110 of the Clean Air Act (CAA) (Act).

**DATES:** Written comments must be received on or before November 30, 2016.

**ADDRESSES:** Submit your comments, identified by EPA-R08-OAR-2016-0620 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [regulations.gov](http://www.regulations.gov). The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will

**From:** [Park, Morgan E CIV OSD ODCMO \(US\)](#)  
**To:** (b)(6)  
**Cc:** [Toppings, Patricia L CIV OSD ODCMO \(US\)](#); (b)(6) [Siegel, Aaron T CIV OSD ODCMO \(US\)](#)  
**Subject:** RE: DoDD 5230.25 Ch 1 (AATD) (UNCLASSIFIED)  
**Date:** Tuesday, July 11, 2017 12:52:12 PM  
**Attachments:** [2nd Proposed Rule.pdf](#)  
[DOD-2015-OS-0126-0001.pdf](#)

---

CLASSIFICATION: UNCLASSIFIED

(b)(6)

The AATD updates, and the comments of particular concern to AT&L, would not necessarily impact the regulatory text. The comments on 4.1, 4.6, and 5.2.1 ("Statement with multiple references, each containing multiple tasks, makes compliance not feasible.") apply to paragraphs that are different in the published proposed rule due to interagency coordination at OMB.

As to the CFR timeline, AT&L still needs to respond to comments received on the proposed rule, make necessary changes to the rule text, and publish the final rule. As the Action Officer indicates in the attached email thread, the comments received were controversial and could result in significant changes. (b)(6)

(b)(6) (which would extend the Federal Register publication timeline), (b)(5)

These changes to the rule could/should also impact the issuance.

With regard to the administrative edits noted by AATD, some are already captured in the proposed rule. Any other corrections can be made in the next iteration of the rule text (if it is proposed, no explanation is needed; if AT&L goes final, we can say that administrative edits were made).

Short answer -- the AATD updates do not appear to have a negative impact on the Federal Register timeline. Given the outstanding requirements for this regulation, the updates can be worked into the ongoing process.

V/r,  
Morgan E. Park  
Regulatory & Advisory Committee Division  
Directorate for Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Office of the Secretary of Defense  
Department of Defense  
Mark Center Suite 08D09B  
Office: (b)(6)  
E-mail: (b)(6)

-----Original Message-----

From: (b)(6)  
Sent: Tuesday, July 11, 2017 12:11 PM  
To: Park, Morgan E CIV OSD ODCMO (US) (b)(6)  
Cc: Toppings, Patricia L CIV OSD ODCMO (US) (b)(6)  
(b)(6) Siegel, Aaron T CIV OSD ODCMO (US)  
<(b)(6)>  
Subject: RE: DoDD 5230.25 Ch 1 (AATD) (UNCLASSIFIED)

Morgan,

**From:** [Siegel, Aaron T CIV OSD ODCMO \(US\)](#)  
**To:** [Valaitis, Vakare K CIV DTIC US \(US\)](#)  
**Cc:** [Dapper, James H CIV DTIC OOA \(US\)](#); [Toppings, Patricia L CIV OSD ODCMO \(US\)](#); [Park, Morgan E CIV OSD ODCMO \(US\)](#)  
**Subject:** RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork  
**Date:** Friday, April 28, 2017 9:53:00 AM

---

Ms. Valaitis:

Thank you for your e-mail. I spoke to my supervisor and confirmed that it is perfectly fine to publish a second proposed rule.

Sincerely,

Aaron Siegel  
Regulatory and Advisory Committee Division  
Directorate for Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Office of the Secretary of Defense  
Department of Defense  
Mark Center Suite 08F25  
Office: (b)(6)  
E-mail: (b)(6)

-----Original Message-----

**From:** Valaitis, Vakare K CIV DTIC US (US)  
**Sent:** Wednesday, April 19, 2017 10:22 AM  
**To:** Siegel, Aaron T CIV OSD ODCMO (US)  
**Cc:** Dapper, James H CIV DTIC OOA (US)  
**Subject:** RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork

Aaron,

I am still working on the responses. It has taken longer than I had anticipated, the issues are complicated and I need to coordinate across a number of components to arrive at a consensus. Several of the comments are controversial and I have been advised to submit the rule for a second round of public comments after I have completed the adjudications. Would that be possible?

Thanks for all your help.

v/r  
Vakare

-----Original Message-----

**From:** Siegel, Aaron T CIV OSD ODCMO (US)  
**Sent:** Wednesday, April 19, 2017 10:11 AM  
**To:** Valaitis, Vakare K CIV DTIC US (US) (b)(6)  
**Subject:** RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork

Ms. Valaitis:

I hope you are doing well. I am checking on the status of the rule titled "Withholding of Unclassified Technical Data and Technology from Public Disclosure." Have the comments been adjudicated?

A Regulatory Reform Task Force (RRTF) has been formed, as per Executive Order 13777, "Enforcing the Regulatory Reform Agenda." The RRTF will meet regularly starting April 27, 2017 to review and discuss every DoD rule to comply with Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs." For now, the only rules moving forward are rules that have a legal deadline, statutory deadline, or Congressional or White House interest. All rules must be delegated to the Secretary of Defense for approval, and then go to the Office of Management and Budget for clearance to publish.

Please keep working on your rule and e-mail me the files when you are finished. We should keep working on the rule and wait patiently for the RRTF to make its decision. Please let me know if you have any further questions. Thank you.

Sincerely,

Aaron Siegel  
Regulatory and Advisory Committee Division  
Directorate for Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Office of the Secretary of Defense  
Department of Defense  
Mark Center Suite 08F25  
Office: (b)(6)  
E-mail: (b)(6)

-----Original Message-----

From: Valaitis, Vakare K CIV DTIC (US)  
Sent: Monday, March 06, 2017 6:56 AM  
To: Siegel, Aaron T CIV OSD ODCMO (US)  
Subject: RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork

I'm sorry Aaron, I've been on bereavement leave.  
Yes, I've been working on the comments, but it's going to take a lot longer than I expected. I'll have to coordinate with other components before I can submit a formal reply.  
What is the deadline? Also, can you provide any updates on the regulatory freeze?  
Thank you  
v/r  
Vakare

Vakare Valaitis  
User Services (Policy) - DTIC U  
Defense Technical Information Center  
8725 John J. Kingman Rd.  
Fort Belvoir, VA 22060-6218  
(b)(6)  
703-767-9159

-----Original Message-----

From: Siegel, Aaron T CIV OSD ODCMO (US)  
Sent: Thursday, March 02, 2017 11:52 AM  
To: Valaitis, Vakare K CIV DTIC (US) (b)(6)  
Cc: Toppings, Patricia L CIV OSD ODCMO (US)  
(b)(6) Park, Morgan E CIV OSD ODCMO (US)  
Subject: RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork

Ms. Valaitis:

I hope you are doing well. I am checking on the status of the final rule titled "Withholding of Unclassified Technical Data and Technology from Public Disclosure." Have you been adjudicating the public comments received on the proposed rule? I sent you the draft final rule package on January 3, 2017. (I need to make some updates to the rule paperwork.) Thank you.

Sincerely,

Aaron Siegel  
Regulatory and Advisory Committee Division  
Directorate of Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Office of the Secretary of Defense  
Department of Defense  
Mark Center Suite 08F07  
Office: (b)(6)  
E-mail: (b)(6)

-----Original Message-----

From: Park, Morgan E CIV OSD ODCMO (US)  
Sent: Wednesday, January 25, 2017 7:41 AM  
To: Valaitis, Vakare K CIV DTIC (US)  
Cc: Toppings, Patricia L CIV OSD ODCMO (US); Siegel, Aaron T CIV OSD ODCMO (US)  
Subject: RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork

Good morning, Vakare.

Yes, the memo published yesterday will impact our regulatory process, including your regulation. Our leadership will soon be providing additional information about how we expect to implement the regulatory freeze. As soon as we have that, we will pass that along.

In the meantime, please continue to work on your responses to the comments received on the proposed rule.

We will be in touch soon.

V/r,  
Morgan

-----Original Message-----

From: Valaitis, Vakare K CIV DTIC (US)  
Sent: Wednesday, January 25, 2017 7:31 AM

To: Siegel, Aaron T CIV OSD ODCMO (US)  
Cc: Toppings, Patricia L CIV OSD ODCMO (US); Park, Morgan E CIV OSD ODCMO (US)  
Subject: RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork

Good morning,  
I'm writing to inquire whether the OMB notice on regulatory freeze in yesterday's FR applies to this proposed rule.  
What advice can you give regarding the way ahead.  
Thank you very much.  
v/r  
Vakare

Vakare Valaitis  
User Services (Policy) - DTIC U  
Defense Technical Information Center  
8725 John J. Kingman Rd.  
Fort Belvoir, VA 22060-6218  
(b)(6)  
703-767-9159

-----Original Message-----

From: Siegel, Aaron T CIV OSD ODCMO (US)  
Sent: Tuesday, January 03, 2017 4:01 PM  
To: Valaitis, Vakare K CIV DTIC (US) (b)(6)  
Cc: Toppings, Patricia L CIV OSD ODCMO (US)  
(b)(6) Park, Morgan E CIV OSD ODCMO (US)  
Subject: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork  
Importance: High

Ms. Valaitis:

The public comment period for the proposed rule titled "Withholding of Unclassified Technical Data and Technology from Public Disclosure" closed on December 30, 2016. Please see the following web link on regulations.gov to view the public comments received. Note: Please wait a few days to ensure that my office has time to post any last-minute electronic comments to the docket. Also, any mailed comments that are relevant to your rule that are postmarked December 30, 2016 will be posted to the docket and need to be addressed in the preamble of the rule. In the meantime, you have several comments to adjudicate.

<https://www.regulations.gov/document?D=DOD-2015-OS-0126-0001>

Now it is time for you to prepare the final rule for publication in the Federal Register. I have provided the following attachments.

1. The final rule. This is the version of the proposed rule that I sent for publication in the Federal Register. There are a few style-related edits that the Office of the Federal Register (OFR) made. I left these in

track-changes for your viewing convenience, if you would like to see them. I made several edits to the proposed rule file:

- a. I changed "proposed rule" to read "final rule" in all applicable places throughout the preamble.
- b. I changed the DATES section on page 1 and removed the ADDRESSES section entirely. We do not take public comments on the final rule, so the ADDRESSES section is not required.
- c. At the beginning of the SUPPLEMENTARY INFORMATION section, I provided a template for responding to the public comments received. If any edits need to be made to the regulatory text as a result of the responses, those edits should be made by you.
- d. I changed the words of issuance on page 7 from "proposed to be revised" to "revised."

2. The rule data sheet. This latest version is a bit out-of-date. Please review the rule data sheet carefully and ensure that everything on the rule data sheet matches the preamble of the final rule, including those edits made by OMB during the interagency review process for the proposed rule.

3. The Unified Agenda information sheet. Please review carefully to ensure that the information is still accurate and the X's are placed correctly. The X's should match the preamble of the final rule.

4. The certification memorandum template. This will not signed until the very end of the rulemaking process, after OMB has cleared the final rule for publication in the Federal Register. This is a fairly new change in the rulemaking process. I did not include a name and title in the PSA signature block. It is likely that Mr. Kendall will no longer be there by the time the certification memorandum gets signed. Please verify that the language here matches what is in the preamble of the final rule.

When you are finished adjudicating the comments and reviewing the paperwork, please e-mail me the revised rule and paperwork for my review. I look forward to working with you again. Please let me know if you have any further questions. Thank you.

Sincerely,

Aaron Siegel  
Regulatory and Advisory Committee Division  
Directorate of Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Office of the Secretary of Defense  
Department of Defense  
Mark Center Suite 08F07  
Office: (b)(6)  
E-mail: (b)(6)

*Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <http://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

*Written/Paper Submissions*

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

*Instructions:* All submissions received must include the Docket No. FDA-2010-N-0548 for "Good Laboratory Practice for Nonclinical Laboratory Studies." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <http://www.regulations.gov> or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential

with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <http://www.regulations.gov>. Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <http://www.fda.gov/regulatoryinformation/dockets/default.htm>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Vernon Toelle, Office of Surveillance and Compliance, Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., MPN4-142, Rockville, MD 20855, 240-402-5637; or Kristin Webster Maloney, Office of Policy and Risk Management, Office of Regulatory Affairs, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 4373, Silver Spring, MD 20993, 240-402-4993.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of August 24, 2016, FDA published a proposed rule with a 90-day comment period to request comments on its proposal to amend the regulations for good laboratory practice for nonclinical studies. Comments on the proposed amendments will inform FDA's rulemaking to establish regulations for good laboratory practice for nonclinical laboratory studies.

The Agency has received requests for a 90-day extension of the comment period for the proposed rule. Each request conveyed concern that the

current 90-day comment period does not allow sufficient time to develop a meaningful or thoughtful response to the proposed rule.

FDA has considered the requests and is extending the comment period for the proposed rule for 60 days, until January 21, 2017. The Agency believes that a 60-day extension allows adequate time for interested persons to submit comments without significantly delaying rulemaking on these important issues.

Dated: October 26, 2016.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2016-26244 Filed 10-28-16; 8:45 am]

**BILLING CODE 4164-01-P**

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 250**

[Docket ID: DOD-2015-OS-0126]

**RIN 0790-A173**

**Withholding of Unclassified Technical Data and Technology From Public Disclosure**

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** Proposed rule.

**SUMMARY:** This rulemaking establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology subject to the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR). It applies to DoD components, their contractors and grantees and is meant to control the transfer of technical data and technology contributing to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** Comments must be received by December 30, 2016.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:**  
Vakare Valaitis, 703-767-9159.

**SUPPLEMENTARY INFORMATION:**

**Background**

For the purposes of this regulation, public disclosure of technical data and technology is the same as providing uncontrolled foreign access. This rule instructs DoD employees, contractors, and grantees to ensure unclassified technical data and technology that discloses technology or information with a military or space application may not be exported without authorization and should be controlled and disseminated consistent with U.S. export control laws and regulations. These policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on defense industrial base. There are penalties for export control violations. For export control violations involving items controlled by the United States Department of State under the International Traffic in Arms Regulations (ITAR), including many munitions items, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, ITAR violations can result in the imposition of a maximum civil fine of \$500,000 per violation, as well as debarment from exporting defense articles or services. For export control violations involving dual-use and certain munitions items controlled by the United States Department of Commerce under the Export Administration Regulations, criminal and civil penalties are currently provided by the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1705, which has continued the Export Administration Regulations (EAR) in effect while the Export Administration Act is in lapse through Executive Order 13222 of August 17, 2001 (3 CFR 2001 Comp. 783 (2002)), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129

(March 13, 2013) and as extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52587 (Aug. 8, 2016)). Under the EAR and IEEPA, as adjusted by 15 CFR 5.4(b), the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations includes civil penalties of not more than \$284,582 per transaction or twice the amount of the transaction, whichever is greater, and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both. Violations of the EAR may also result in the denial of export privileges and other administrative sanctions.

**Authority To Issue This Regulation**

In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense. In addition, U.S. export control laws, including 22 U.S.C. 2778 (also known as the "Arms Export Control Act"); 50 U.S.C. chapter 35 (also known as the "International Emergency Economic Powers Act" (IEEPA)); 22 CFR parts 120 through 130 (also known as "International Traffic in Arms Regulations" (ITAR)); and 15 CFR parts 730 through 774 (also known as "Export Administration Regulations" (EAR)) govern this rule.

**Summary of the Major Provisions of the Rulemaking**

This proposed rule describes procedures for the release of technical information; discusses procedures for technical data and technology to be marked for distribution; and provides an example of the notice to accompany export-controlled technical data and technology.

**Costs and Benefits**

DoD is proposing this regulation to update the CFR and DoD Directive 5230.25 (available at <http://dtic.mil/whs/directives/corres/pdf/523025p.pdf>). The Department currently spends \$571,876 annually on export control certification activities. The costs to DoD contractors and grantee consist primarily of the time needed to organize, format, and submit information to the U.S./Canada Joint Certification Office to qualify for export controlled technical data and technology.

The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance cited in the text in §§ 250.1 through 250.7.

The potential benefits include greater public access and understanding of information about the qualifications needed for access to export controlled technical data and technology. Such information may help potential contractors and grantees to better understand their options for participating in DoD activities; to better enable funders and researchers to determine the need for information and technology; to provide more complete information of those who use information from DoD research and contracts to inform other decisions; and to better enable the scientific community to examine the overall state of information and technology in this area as a basis for engaging in quality improvement (e.g., with regard to research methods). The proposed rule is also expected to provide greater clarity about what is required for those who are authorized holders of export controlled technical data and technology.

This proposed rule is included in DoD's retrospective plan, completed in August 2011, and will be reported in future status updates of DoD's retrospective review in accordance with the requirements in Executive Order 13563. DoD's full plan can be accessed at: <http://www.regulations.gov/#/docketDetail;D=DOD-2011-OS-0036>.

**Regulatory Procedures**

*Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"*

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Although this rulemaking is not "economically significant" because it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, it has been deemed "other significant" for raising novel legal or policy issues arising out of legal mandates, the President's priorities, or

the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB).

*Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This proposed rule would not mandate any requirements for State, local, or tribal governments, nor would it affect private sector costs.

*Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)*

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

*Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)*

It has been certified that this proposed rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been

approved by OMB under OMB Control Number 0704-0207 titled DD Form 2345, Militarily Critical Technical Data Agreement.

Cost to the Public

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses .....	\$9.94* per response .....	\$19.99 postage** per response .....	\$638,400
------------------------	----------------------------	--------------------------------------	-----------

\* U.S. Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor's degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>.

\*\* Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>.

**COST TO THE GOVERNMENT**

4 FTE registrars .....	GS 9 step 5 .....	\$59,036 *	\$236,144
1 FTE Team Lead .....	GS11 step 5 .....	71,429 *	71,429
.5 FTE US Representative .....	GS13 step 5 .....	101,807	50,904
.25 FTE Division Chief .....	GS14 step 5 .....	120,303	30,075
.25 FTE Director .....	GS15 step 5 .....	35,378 *	35,378
O&M for IT .....	SP4701-15-F-0031 .....	2,958,915	147,946
Total .....			571,876

\* 2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>.

*Executive Order 13132, "Federalism"*

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This proposed rule will not have a substantial effect on State and local governments.

**List of Subjects in 32 CFR Part 250**

Exports, Science and technology.  
Accordingly, 32 CFR part 250 is proposed to be revised to read as follows:

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND TECHNOLOGY FROM PUBLIC DISCLOSURE**

- Sec.
- 250.1 Purpose.
- 250.2 Applicability.
- 250.3 Definitions.
- 250.4 Policy.

- 250.5 Responsibilities.
- 250.6 Procedures.
- 250.7 Directly arranged visits.

**Authority:** 10 U.S.C. 133.

**§ 250.1 Purpose.**

This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§ 250.2 Applicability.**

This part:  
(a) Applies to:  
(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the "DoD Components").

(2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the "Arms Export Control Act"); 50 U.S.C. chapter 35 (also known as the "International Emergency Economic Powers Act"); 22 CFR parts 120-130 (also known as "International Traffic in Arms Regulations" (ITAR)); and 15 CFR parts 730 through 774 (also known as "Export Administration Regulations" (EAR)).

(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120 through 130, 10 CFR 810, and 15 CFR parts 730 through 774.

(c) Does not apply to technical information under the control of the Department of Energy or the Nuclear

Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended.

(d) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of § 250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

(e) Does not introduce any controls on the dissemination of:

(1) Scientific, educational, or other items that are not subject to the EAR or exclusively controlled for export or reexport by another department or agency pursuant to 15 CFR 734.3, 734.7 through 734.8;

(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

(f) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018); and

(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the "Freedom of Information Act (FOIA)."

(g) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

(h) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

(i) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, "Controlled

Unclassified Information," as implemented by volume 4 of DoD Manual 5200.01, "DoD Information Security Program" (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### § 250.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

**Certification.** The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

**Controlling DoD office.** The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

**Critical technology.** Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment including manufacturing, inspection, and test equipment that is required for the effective application of technical information and technical know-how.

(1) With respect to defense articles or defense services: Those technologies specified in 22 CFR 121.1.

(2) With respect to categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology subject to the EAR: Those technologies specified in 15 CFR part 774.

(3) With respect to nuclear equipment, materials, and technology:

Those technologies specified in 10 CFR part 810.

(4) With respect to select agents and toxins: Those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

(5) With respect to emerging critical defense technology: Research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120 through 130, or a dual-use or munitions item, including its underlying technology and software, covered by 15 CFR parts 730 through 774.

**Defense article.** Defined at 22 CFR 120.6.

**Defense services.** Defined at 22 CFR 120.9.

**Formal arrangement.** An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

**Legitimate business relationship.** A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD.

Relationships may be established with an individual or organization in another Federal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

**Limited rights.** The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

**Other legitimate business purposes.** Include:

(1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through foreign military sale).

(2) Bidding, or preparing to bid, on a sale of surplus property.

(3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace,

providing that any required export license is obtained.

(4) Engaging in scientific research in a professional capacity.

(5) Acting as a subcontractor to a qualified contractor.

*Potential DoD contractor.* An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

*Public disclosure.* Making technical data available without restricting its dissemination or use.

*Qualified contractor.* A qualified U.S. contractor or a qualified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

*Qualified Canadian contractor.* Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the "Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange".

*Qualified U.S. contractor.* A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S. contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

(4) Agrees that, unless dissemination is permitted by paragraph (i) of § 250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

*Restricted rights.* The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

*Technical data.* Defined at 22 CFR 120.10.

(1) Classified data relating to defense articles and defense services on the U.S. Munitions List;

(2) Information covered by an invention secrecy order; or

(3) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(4) The definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information

on function or purpose or general system descriptions of defense articles.

*Technical information.* Includes technical data and technology as defined in 15 CFR parts 730 through 774, as well as technical information that is not subject to 22 CFR parts 120 through 130 or 15 CFR parts 730 through 774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

*Technology.* Defined in 15 CFR 772.1.

*United States.* The 50 States, the District of Columbia, and the territories and possessions of the United States.

*United States-Canada Joint Certification Office.* The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

*U.S. DoD contractor.* Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

#### § 250.4 Policy.

It is DoD policy that:

(a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exception, exemption, or other export

authorization, in accordance with U.S. export control laws and regulations (including 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120 through 130, and 15 CFR parts 730 through 774). However, technical data and technology may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778 authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

(1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or

(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any Federal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes. Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be

withheld from public disclosure pursuant to the 5 U.S.C. 552.

(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and volume 1 of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130. If the information originated or is under the control of a Government Agency outside the DoD, DoD Components will refer to that Government Agency for a release determination.

(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and volume 4 of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, "International Transfers of Technology, Articles, and Services" (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, "Clearance of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, "Security and Policy Review of DoD Information for Public Release" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with volume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, "Cybersecurity" (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, "Information Assurance (IA) and Support to Computer Network Defense (CND)," February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, "DoD Records Management Program" (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data

and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

#### **§ 250.5 Responsibilities.**

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

(1) Administer and monitor compliance with this part.

(2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of § 250.6.

(3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of § 250.6, and act as disqualification authority.

(4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.

(5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of § 250.4 of this part.

(6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.

(7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of § 250.6.

(8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of § 250.6.

(9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.

(10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.

(b) The Under Secretary of Defense for Policy (USD(P)):

(1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.

(2) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.

(c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:

(1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.

(2) Provides such other assistance as may be necessary to ensure compliance with this part.

(d) The GC DoD:

(1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.

(2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.

(e) The DoD Component heads:

(1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.

(2) Designate a focal point to:

(i) Ensure implementation of this part.

(ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of § 250.6.

(iii) Act on appeals relating to case-by-case denials for release of technical data and technology.

(iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of § 250.6.

(v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of § 250.6.

(vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of § 250.6.

(3) Develop, distribute, and effect Component regulations to implement this part.

(4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

#### § 250.6 Procedures.

(a) Procedures for release of technical information must be made under the following guidelines:

(1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD

Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined in § 250.3 from public disclosure.

(2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested technical data and technology currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

(ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 "Militarily Critical Technical Data Agreement," to the United States-Canada Joint Certification Office.

(iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.

(iv) A copy of the company's State/ Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.

(v) The contractor's business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.

(b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.

(1) The determination will be based on whether

(i) The information is subject to 22 CFR part 121 or 15 CFR part 774.

(ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations

in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120 through 130, and 15 CFR parts 730 through 774.

(iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of § 250.2.

(2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State, Commerce, or Energy.

(c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and volume 4 of DoD Manual 5200.01.

(d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in § 250.3, unless either:

(1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;

(2) The controlling DoD office judges the requested technical data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested technical data and technology and, if appropriate, request a new certification (see § 250.3) describing the intended use of the requested technical data and technology; or

(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the technical data and technology if the DoD Component focal point determines the release of the technical data and technology may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's

qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of volume 11A of DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)" (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a "Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology" (see Figure to § 250.6(h)).

**BILLING CODE 5001-06-P**

**Figure to § 250.6(h)—Example of the Notice to Accompany Export-Controlled Technical Data and Technology**

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C. §1705 and 15 CFR §764.3, as adjusted for inflation by 15 CFR §6.4, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the EAR, while the EAR is continued in effect by Executive Order under the International Emergency Economic Powers Act, may include civil penalties of not more than \$284,582 per transaction (subject to further adjustment for inflation) or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both. Violations of the EAR may also result in the denial of export privileges.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:

(1) To any foreign recipient for which the technical data and technology are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730 through 774.

(2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.

(3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730 through 774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.

(4) To the Congress or any Federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.

(j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120 through 130, and 15 CFR parts 730 through 774 and DoD policies.

(k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part will be promptly provided with a written statement of reasons for that action, and advised of the right to make a written appeal to a specifically identified appellate authority within the DoD Component. Other appeals will be processed as directed by the USD(AT&L).

(l) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

#### **§ 250.7 Directly arranged visits.**

(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification

process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

(2) Performance of an unclassified contract.

(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

(1) First condition:

(i) There is a valid license covering the export of the technical data and technology;

(ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;

(iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or

(iv) The export or release qualifies for a license exception under 15 CFR parts 730 through 774.

(2) Second condition:

(i) The distribution statement applied to the technical data and technology pursuant to DoD Instruction 5230.24 permits release; or

(ii) The originator or government controlling office authorizes release.

Dated: October 26, 2016.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2016-26236 Filed 10-28-16; 8:45 am]

**BILLING CODE 5001-06-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

[EPA-R08-OAR-2016-0620; FRL-9954-67-Region 8]

### **Approval and Promulgation of Air Quality Implementation Plans; State of Utah; Revisions to Nonattainment Permitting Regulations**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to conditionally approve State Implementation Plan (SIP) revisions submitted by the state of Utah on August 20, 2013, with supporting administrative documentation submitted on September 12, 2013. These submittals revise the Utah Administrative Code (UAC) that pertain to the issuance of Utah air quality permits for major sources in nonattainment areas. The EPA proposes a conditional approval because while the submitted revisions to Utah's nonattainment permitting rules do not fully address the deficiencies in the state's program, Utah has committed to address additional remaining deficiencies in the state's nonattainment permitting program no later than a year from the EPA finalizing this conditional approval. If finalized, and upon the EPA finding a timely meeting of this commitment in full, the proposed conditional approval of the SIP revisions would convert to a final approval of Utah's plan. This action is being taken under section 110 of the Clean Air Act (CAA) (Act).

**DATES:** Written comments must be received on or before November 30, 2016.

**ADDRESSES:** Submit your comments, identified by EPA-R08-OAR-2016-0620 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will

We received the attached from AT&L; they are concerned that the AATD updates would have adverse effects on the CFR. In DOC's opinion would this be the case?

Thank you for your assistance.

V/R,

(b)(6)

(b)(6)

Compliance Branch Team Lead  
WHS ESD Directives Division

(b)(6)

Follow us on Twitter: @DoD\_Directives

-----Original Message-----

From: Park, Morgan E CIV OSD ODCMO (US)

Sent: Tuesday, July 11, 2017 12:05 PM

To: (b)(6)

Cc: Toppings, Patricia L CIV OSD ODCMO (US) (b)(6)

(b)(6) Siegel, Aaron T CIV OSD ODCMO (US)

(b)(6)

Subject: RE: DoDD 5230.25 Ch 1 (AATD) (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

(b)(6)

(b)(5) (the corresponding regulation  
for this issuance)

(b)(5)

V/r,

Morgan E. Park

Regulatory & Advisory Committee Division

Directorate for Oversight and Compliance

Office of the Deputy Chief Management Officer

Office of the Secretary of Defense

Department of Defense

Mark Center Suite 08D09B

Office: (b)(6)

E-mail:

-----Original Message-----

From: (b)(6)

Sent: Tuesday, July 11, 2017 11:45 AM

To: Park, Morgan E CIV OSD ODCMO (US) (b)(6) Siegel, Aaron T CIV OSD ODCMO

(US) (b)(6)

Cc: Toppings, Patricia L CIV OSD ODCMO (US) (b)(6)

(b)(6)

Subject: RE: DoDD 5230.25 Ch 1 (AATD)

Clarification - this is actually Change 2.

Thanks,

(b)(6)

-----Original Message-----

From: (b)(6)

Sent: Tuesday, July 11, 2017 11:44 AM

To: Park, Morgan E CIV OSD ODCMO (US) (b)(6) Siegel, Aaron T CIV OSD ODCMO (US) (b)(6)

Cc: Toppings, Patricia L CIV OSD ODCMO (US) (b)(6) (b)(6)

(b)(6)

Subject: DoDD 5230.25 Ch 1 (AATD)

Importance: High

All,

The subject AATD issuance has been identified as being in the CFR as a rule. Per our agreement, please review the proposed changes by July 18 and let us know if they would require change to the rule in the CFR.

Thank you.

V/R,

(b)(6)

Compliance Branch Team Lead  
WHS ESD Directives Division

(b)(6)

Follow us on Twitter: @DoD\_Directives

CLASSIFICATION: UNCLASSIFIED

CLASSIFICATION: UNCLASSIFIED



DEFENSE TECHNICAL INFORMATION CENTER  
8725 JOHN J. KINGMAN ROAD  
FORT BELVOIR, VIRGINIA 22016-6218

IN REPLY  
REFER TO

MEMORANDUM FOR WASHINGTON HEADQUARTERS SERVICES, EXECUTIVE  
SERVICES DIRECTORATE, DIRECTIVES DIVISION

FROM: Christopher Thomas, Defense Technical Information Center *ct*

SUBJECT: Proposed Revision of DoD Directive 5230.25, *Withholding of Unclassified  
Technical Data and Technology from Public Disclosure*

The Defense Technical Information Center (DTIC) nonconcurrs with the proposed revision of the subject directive. The subject directive implements 10 U.S.C. § 130. Per 10 U.S.C. § 130(b), “[r]egulations under this section shall be published in the Federal Register for a period of no less than 30 days for public comment before promulgation.” We see no indication your office has anticipated this statutory requirement or the rulemaking process required by the Administrative Procedures Act (5 U.S.C. § 551 *et seq*). We believe any revisions made at this time would disrupt and confuse the rulemaking process that is already underway under the Administrative Procedure Act (APA). Further, we believe any revisions made in response to comments made by your office regarding paragraphs 4.1, 4.6, and 5.2.1 would independently trigger the APA rulemaking process (see Atch 1). Finally, we are not confident the remaining revisions suggested by your office would qualify for the “good cause” exception to the APA rulemaking process (see 5 U.S.C. § 553).

This issuance is codified at 32 Code of Federal Regulations Part 250. The Notice of Proposed Rule was published in the Federal Register on 31 October 2016 (Atch 2). In January 2017, DTIC received notice from the OSD Federal Register Liaison Office (FRLO) that the proposed rule is subject to E.O. 13771, "Reducing Regulation and Controlling Regulatory Costs." The proposed rule will be reviewed by the DoD Regulatory Reform Task Force. No action may be taken on DoDD 5230.25 until the task force issues a recommendation.

DTIC began revising the issuance in 2011. Through a series of administrative delays the proposed rule was not approved for publication to satisfy the APA’s notice and public comment requirements until October 2016. Thereafter, the new Administration issued an Executive Order requiring a “2-for-1” review of all regulations impacting the public. A brief timeline can be found at Attachment 3.

I invite further discussion on this matter, if needed. Please direct any questions or concerns to my point of contact for this matter, Ms. Vakare Valaitis, who can be reached at 703-767-9159.

Attachments:

1. DoDD 5230.25 with revisions and comments by WHS/ESD/Directives Division
2. Federal Register Docket ID: DOD-2015-OS-0126
3. DoDD 5230.25 rulemaking timeline

**From:** [Siegel, Aaron T CIV OSD ODCMO \(US\)](#)  
**To:** [Valaitis, Vakare K CIV DTIC US \(US\)](#)  
**Cc:** [Dapper, James H CIV DTIC OOA \(US\)](#); [Toppings, Patricia L CIV OSD ODCMO \(US\)](#); [Park, Morgan E CIV OSD ODCMO \(US\)](#)  
**Subject:** RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork  
**Date:** Friday, April 28, 2017 9:53:00 AM

---

Ms. Valaitis:

Thank you for your e-mail. I spoke to my supervisor and confirmed that it is perfectly fine to publish a second proposed rule.

Sincerely,

Aaron Siegel  
Regulatory and Advisory Committee Division  
Directorate for Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Office of the Secretary of Defense  
Department of Defense  
Mark Center Suite 08F25  
Office: (b)(6)  
E-mail: (b)(6)

-----Original Message-----

**From:** Valaitis, Vakare K CIV DTIC US (US)  
**Sent:** Wednesday, April 19, 2017 10:22 AM  
**To:** Siegel, Aaron T CIV OSD ODCMO (US)  
**Cc:** Dapper, James H CIV DTIC OOA (US)  
**Subject:** RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork

Aaron,

I am still working on the responses. It has taken longer than I had anticipated, the issues are complicated and I need to coordinate across a number of components to arrive at a consensus. Several of the comments are controversial and I have been advised to submit the rule for a second round of public comments after I have completed the adjudications. Would that be possible?

Thanks for all your help.

v/r  
Vakare

-----Original Message-----

**From:** Siegel, Aaron T CIV OSD ODCMO (US)  
**Sent:** Wednesday, April 19, 2017 10:11 AM  
**To:** Valaitis, Vakare K CIV DTIC US (US); (b)(6)  
**Subject:** RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork

Ms. Valaitis:

I hope you are doing well. I am checking on the status of the rule titled "Withholding of Unclassified Technical Data and Technology from Public Disclosure." Have the comments been adjudicated?

A Regulatory Reform Task Force (RRTF) has been formed, as per Executive Order 13777, "Enforcing the Regulatory Reform Agenda." The RRTF will meet regularly starting April 27, 2017 to review and discuss every DoD rule to comply with Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs." For now, the only rules moving forward are rules that have a legal deadline, statutory deadline, or Congressional or White House interest. All rules must be delegated to the Secretary of Defense for approval, and then go to the Office of Management and Budget for clearance to publish.

Please keep working on your rule and e-mail me the files when you are finished. We should keep working on the rule and wait patiently for the RRTF to make its decision. Please let me know if you have any further questions. Thank you.

Sincerely,

Aaron Siegel  
Regulatory and Advisory Committee Division  
Directorate for Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Office of the Secretary of Defense  
Department of Defense  
Mark Center Suite 08F25  
Office: (b)(6)  
E-mail: (b)(6)

-----Original Message-----

From: Valaitis, Vakare K CIV DTIC (US)  
Sent: Monday, March 06, 2017 6:56 AM  
To: Siegel, Aaron T CIV OSD ODCMO (US)  
Subject: RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork

I'm sorry Aaron, I've been on bereavement leave.

Yes, I've been working on the comments, but it's going to take a lot longer than I expected. I'll have to coordinate with other components before I can submit a formal reply.

What is the deadline? Also, can you provide any updates on the regulatory freeze?

Thank you

v/r

Vakare

Vakare Valaitis  
User Services (Policy) - DTIC U  
Defense Technical Information Center  
8725 John J. Kingman Rd.  
Fort Belvoir, VA 22060-6218

(b)(6)

-----Original Message-----

From: Siegel, Aaron T CIV OSD ODCMO (US)  
Sent: Thursday, March 02, 2017 11:52 AM  
To: Valaitis, Vakare K CIV DTIC (US) (b)(6)  
Cc: Toppings, Patricia L CIV OSD ODCMO (US)  
<patricia.l.toppings.civ@mail.mil>; Park, Morgan E CIV OSD ODCMO (US)  
(b)(6)  
Subject: RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork

Ms. Valaitis:

I hope you are doing well. I am checking on the status of the final rule titled "Withholding of Unclassified Technical Data and Technology from Public Disclosure." Have you been adjudicating the public comments received on the proposed rule? I sent you the draft final rule package on January 3, 2017. (I need to make some updates to the rule paperwork.) Thank you.

Sincerely,

Aaron Siegel  
Regulatory and Advisory Committee Division  
Directorate of Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Office of the Secretary of Defense  
Department of Defense  
Mark Center Suite 08F07  
Office: (b)(6)  
E-mail: (b)(6)

-----Original Message-----

From: Park, Morgan E CIV OSD ODCMO (US)  
Sent: Wednesday, January 25, 2017 7:41 AM  
To: Valaitis, Vakare K CIV DTIC (US)  
Cc: Toppings, Patricia L CIV OSD ODCMO (US); Siegel, Aaron T CIV OSD ODCMO (US)  
Subject: RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork

Good morning, Vakare.

Yes, the memo published yesterday will impact our regulatory process, including your regulation. Our leadership will soon be providing additional information about how we expect to implement the regulatory freeze. As soon as we have that, we will pass that along.

In the meantime, please continue to work on your responses to the comments received on the proposed rule.

We will be in touch soon.

V/r,  
Morgan

-----Original Message-----

From: Valaitis, Vakare K CIV DTIC (US)  
Sent: Wednesday, January 25, 2017 7:31 AM

To: Siegel, Aaron T CIV OSD ODCMO (US)  
Cc: Toppings, Patricia L CIV OSD ODCMO (US); Park, Morgan E CIV OSD ODCMO (US)  
Subject: RE: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork

Good morning,  
I'm writing to inquire whether the OMB notice on regulatory freeze in yesterday's FR applies to this proposed rule.  
What advice can you give regarding the way ahead.  
Thank you very much.  
v/r  
Vakare

Vakare Valaitis  
User Services (Policy) - DTIC U  
Defense Technical Information Center  
8725 John J. Kingman Rd.  
Fort Belvoir, VA 22060-6218

(b)(6)

-----Original Message-----

From: Siegel, Aaron T CIV OSD ODCMO (US)  
Sent: Tuesday, January 03, 2017 4:01 PM  
To: Valaitis, Vakare K CIV DTIC (US) (b)(6)  
Cc: Toppings, Patricia L CIV OSD ODCMO (US)  
(b)(6) Park, Morgan E CIV OSD ODCMO (US)  
Subject: "Withholding of Unclassified Technical Data and Technology from Public Disclosure" final rule with paperwork  
Importance: High

Ms. Valaitis:

The public comment period for the proposed rule titled "Withholding of Unclassified Technical Data and Technology from Public Disclosure" closed on December 30, 2016. Please see the following web link on regulations.gov to view the public comments received. Note: Please wait a few days to ensure that my office has time to post any last-minute electronic comments to the docket. Also, any mailed comments that are relevant to your rule that are postmarked December 30, 2016 will be posted to the docket and need to be addressed in the preamble of the rule. In the meantime, you have several comments to adjudicate.

<https://www.regulations.gov/document?D=DOD-2015-OS-0126-0001>

Now it is time for you to prepare the final rule for publication in the Federal Register. I have provided the following attachments.

1. The final rule. This is the version of the proposed rule that I sent for publication in the Federal Register. There are a few style-related edits that the Office of the Federal Register (OFR) made. I left these in

track-changes for your viewing convenience, if you would like to see them. I made several edits to the proposed rule file:

- a. I changed "proposed rule" to read "final rule" in all applicable places throughout the preamble.
- b. I changed the DATES section on page 1 and removed the ADDRESSES section entirely. We do not take public comments on the final rule, so the ADDRESSES section is not required.
- c. At the beginning of the SUPPLEMENTARY INFORMATION section, I provided a template for responding to the public comments received. If any edits need to be made to the regulatory text as a result of the responses, those edits should be made by you.
- d. I changed the words of issuance on page 7 from "proposed to be revised" to "revised."

2. The rule data sheet. This latest version is a bit out-of-date. Please review the rule data sheet carefully and ensure that everything on the rule data sheet matches the preamble of the final rule, including those edits made by OMB during the interagency review process for the proposed rule.

3. The Unified Agenda information sheet. Please review carefully to ensure that the information is still accurate and the X's are placed correctly. The X's should match the preamble of the final rule.

4. The certification memorandum template. This will not signed until the very end of the rulemaking process, after OMB has cleared the final rule for publication in the Federal Register. This is a fairly new change in the rulemaking process. I did not include a name and title in the PSA signature block. It is likely that Mr. Kendall will no longer be there by the time the certification memorandum gets signed. Please verify that the language here matches what is in the preamble of the final rule.

When you are finished adjudicating the comments and reviewing the paperwork, please e-mail me the revised rule and paperwork for my review. I look forward to working with you again. Please let me know if you have any further questions. Thank you.

Sincerely,

Aaron Siegel  
Regulatory and Advisory Committee Division  
Directorate of Oversight and Compliance  
Office of the Deputy Chief Management Officer  
Office of the Secretary of Defense  
Department of Defense  
Mark Center Suite 08F07

Office: (b)(6)

E-mail:

**From:** [Valaitis, Vakare K CIV DTIC US \(US\)](#)  
**To:** [OSD MC-ALEX OCMO Mailbox OSDFederalRegister](#); [Park, Morgan E CIV OSD ODCMO \(US\)](#)  
**Cc:** [Pollack, Don F CIV DTIC OOA \(USA\)](#); [Schoen, Roberta S CIV DTIC US \(US\)](#); [Hicks, William A CIV DTIC OOA \(USA\)](#)  
**Subject:** RE: 32 CFR 250  
**Date:** Monday, March 11, 2019 3:21:39 PM

---

Morgan

At this time DTIC requests that your office place the action for amendments to 32 CFR 250 in "pending status" and remove this action from the OMB Unified Agenda. DTIC and other DoD Agencies, Military Services and OSD staff agencies are evaluating the need for substantial changes to the regulation beyond those currently proposed. These changes are too complex to resolve in the short term. We are engaged in negotiations with other stakeholders but we do not currently have a timeline for resolution of these issues.

Thank you  
Vakare

Vakare Valaitis  
DTIC U - Policy  
Defense Technical Information Center  
8725 John J. Kingman Rd.  
Fort Belvoir, VA 22060-6218

(b)(6)

-----Original Message-----

**From:** Valaitis, Vakare K CIV DTIC US (US)  
**Sent:** Thursday, March 7, 2019 1:54 PM  
**To:** [OSD MC-ALEX OCMO Mailbox OSDFederalRegister](#)  
<[osd.mc-alex.ocmo.mbx.osdfederalregister@mail.mil](mailto:osd.mc-alex.ocmo.mbx.osdfederalregister@mail.mil)>; [Park, Morgan E CIV OSD ODCMO \(US\)](#) (b)(6)  
**Cc:** [Pollack, Don F CIV DTIC OOA \(USA\)](#) (b)(6)  
[Schoen, Roberta S CIV DTIC US \(US\)](#) (b)(6)  
**Subject:** RE: 32 CFR 250

Morgan,

I fully understand the problems this delay will cause, but unfortunately, certain policy issues have caused complexities we did not anticipate at the time of the RRTF hearing.

I will send you our formal reply, after I coordinate with my management and legal counsel.

v/r  
Vakare

-----Original Message-----

**From:** [OSD MC-ALEX OCMO Mailbox OSDFederalRegister](#)  
<[osd.mc-alex.ocmo.mbx.osdfederalregister@mail.mil](mailto:osd.mc-alex.ocmo.mbx.osdfederalregister@mail.mil)>  
**Sent:** Wednesday, March 6, 2019 3:29 PM  
**To:** Valaitis, Vakare K CIV DTIC US (US) (b)(6)

Cc: Pollack, Don F CIV DTIC OOA (USA) (b)(6)

Subject: 32 CFR 250

Vakare,

I appreciate your time on the call yesterday. Per our discussion, I would like to highlight the following timing factors related to your review and potential revision of 32 CFR part 250:

Your recommendation to the Regulatory Reform Task Force was to replace the rule through the finalization of the October 31, 2016 proposed rule. The RRTF finished its review of DOD's 716 existing regulations in December 2018, and has now moved onto monitoring the implementation phase. The RRTF reported to the SecDef that implementation of all recommendations resulting from that review will be completed in 3-5 years. Given that approximately two years will be required to propose new revisions and finalize them, your time to discuss and determine a path forward for part 250 is somewhat limited.

Another consideration is that this rule has been reported in DoD's semi-annual Unified Agenda for the past several years. We need to inform the public of what DoD intends to do next with regard to part 250, and provide an estimated month of publication. As I mentioned on the phone yesterday, it is possible for DoD to move this regulatory entry to a "Pending" status. This will remove it from the Unified Agenda and indicates that we do not plan to take immediate action on the rule, but be aware that OMB makes agencies' pending lists publicly available on RegInfo.gov.

Please let me know how you would like to proceed. We also appreciate your continued communication about the path forward and progress on the revision of part 250.

V/r,

Morgan E. Park

DoD Regulatory Program Team Lead

Regulatory & Advisory Committee Division

Directorate for Oversight and Compliance

Office of the Chief Management Officer

Office of the Secretary of Defense

Department of Defense

Mark Center Suite 08D09

Office: (b)(6)

Mobile: (b)(6)

osd.mc-alex.ocmo.mbx.osdfederalregister@mail.mil

(b)(6)

BILLING CODE: 5001-06

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 250**

**[Docket ID: DOD-2015-OS-0126]**

**RIN 0790-AI73**

**Withholding of Unclassified Technical Data and Technology from Public Disclosure**

**AGENCY:** Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, DoD.

**ACTION:** ~~Proposed~~Final rule.

**SUMMARY:** This rule~~making~~ establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology subject to the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR). It applies to DoD components, their contractors and grantees and is meant to control the transfer of technical data and technology contributing to the military potential of any country or countries, groups, or individuals that could prove detrimental to U.S. national security or critical interests.

**DATES:** ~~Effective Date: This rule is effective on [INSERT DATE 30 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER] Comments must be received by [INSERT DATE 60 DAYS AFTER from DATE OF PUBLICATION IN THE FEDERAL REGISTER]].~~

**ADDRESSES:** ~~You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:~~

~~\*—Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.~~

**Formatted:** Font: Bold

• Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Vakare Valaitis, 703-767-9159.

#### **SUPPLEMENTARY INFORMATION:**

##### Public Comments and Responses

On Monday, October 31, 2016 (81 FR 75352-75361), the Department of Defense published a proposed rule titled “Withholding of Unclassified Technical Data and Technology From Public Disclosure” for a 60-day public comment period. The comment period ended on December 30, 2016. At the end of the public comment period, [insert number of comments received] were received. This section of the preamble responds to the public comments.

Comment: [Insert first comment received; if the comment is too long, you may paraphrase; some people include the whole comment in double-quote marks].

Response: [Insert DoD’s official response to the first comment. Please show each response to your GC for his or her review and approval].

Comment: [Continue doing this as you did with the first comment].

Response: [Continue doing this as you did with the first response].

Formatted: Font: Not Bold

Formatted: Font: Not Bold

Formatted: Font: Not Bold

Formatted: Highlight

Formatted: Highlight

Formatted: Highlight

[Note: If you have several comments that are similar and you have one response for those comments, you may group them together.]

Formatted: Highlight

Formatted: Font: Not Bold

## Background

For the purposes of this regulation, public disclosure of technical data and technology is the same as providing uncontrolled foreign access. This rule instructs DoD employees, contractors, and grantees to ensure unclassified technical data and technology that discloses technology or information with a military or space application may not be exported without authorization and should be controlled and disseminated consistent with U.S. export control laws and regulations. These policies preserve the U.S. military's technological superiority, establish and maintain interoperability with allies and coalition partners, and manage direct and indirect impacts on defense industrial base. There are penalties for export control violations. For export control violations involving items controlled by the United States Department of State under the International Traffic in Arms Regulations (ITAR), including many munitions items, the statute authorizes a maximum criminal penalty of \$1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, ITAR violations can result in the imposition of a maximum civil fine of \$500,000 per violation, as well as debarment from exporting defense articles or services. For export control violations involving dual-use and certain munitions items controlled by the United States Department of Commerce under the Export Administration Regulations, criminal and civil penalties are currently provided by the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §1705, which has continued the Export Administration Regulations (EAR) in effect while the Export Administration Act is in lapse through Executive Order 13222 of August 17, 2001 (3 CFR 2001 Comp. 783 (2002)), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013) and as extended by successive Presidential Notices, the most recent being that of August 4, 2016 (81 FR 52587 (Aug. 8, 2016)). Under the EAR and IEEPA, as adjusted by 15 CFR

§5.4(b), the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the export control regulations includes civil penalties of not more than \$284,582 per transaction or twice the amount of the transaction, whichever is greater, and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both. Violations of the EAR may also result in the denial of export privileges and other administrative sanctions.

#### AUTHORITY TO ISSUE THIS REGULATION

In accordance with 10 U.S.C. 133 part (b)(2), the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) may exercise powers relating to establishing policies for acquisition (including procurement of goods and services, research and development, developmental testing, and contract administration) for all elements of the Department of Defense. In addition, U.S. export control laws, including 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act” (IEEPA)); 22 CFR parts 120 [through](#) -130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730 [through](#) -774 (also known as “Export Administration Regulations” (EAR)) govern this rule.

#### SUMMARY OF THE MAJOR PROVISIONS OF THE RULE [MAKING](#)

This [final proposed](#) rule describes procedures for the release of technical information; discusses procedures for technical data and technology to be marked for distribution; and provides an example of the notice to accompany export-controlled technical data and technology.

#### COSTS AND BENEFITS

DoD is proposing this regulation to update the CFR and DoD Directive 5230.25 (available at <http://dtic.mil/whs/directives/corres/pdf/523025p.pdf>). The Department currently spends \$571,876 annually on export control certification activities. The costs to DoD contractors and grantees consist primarily of the time needed to organize, format, and submit information to the

U.S./Canada Joint Certification Office to qualify for export controlled technical data and technology.

The program has no discernible increase in anticipated costs and benefits as the program is being updated to conform to national security guidance cited in the text in §§ 250.1 through §250.7.

The potential benefits include greater public access and understanding of information about the qualifications needed for access to export controlled technical data and technology. Such information may help potential contractors and grantees to better understand their options for participating in DoD activities; to better enable funders and researchers to determine the need for information and technology; to provide more complete information of those who use information from DoD research and contracts to inform other decisions; and to better enable the scientific community to examine the overall state of information and technology in this area as a basis for engaging in quality improvement (e.g., with regard to research methods). The finalproposed rule is also expected to provide greater clarity about what is required for those who are authorized holders of export controlled technical data and technology.

This finalproposed rule is included in DoD's retrospective plan, completed in August 2011, and will be reported in future status updates of DoD's retrospective review in accordance with the requirements in Executive Order 13563. DoD's full plan can be accessed at:

<http://www.regulations.gov/#!docketDetail;D=DOD-2011-OS-0036>.

## **REGULATORY PROCEDURES**

**Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Although, this rulemaking is not “economically significant” because it does not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, it has been deemed “other significant” for raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB).

**Section 202, Public Law 104-4, “Unfunded Mandates Reform Act”**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This ~~finalproposed~~ rule ~~would~~ not mandate any requirements for State, local, or tribal governments, nor ~~would~~ it affect private sector costs.

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

The Department of Defense certifies that this ~~finalproposed~~ rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

It has been certified that this [finalproposed](#) rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These reporting requirements have been approved by OMB under OMB Control Number 0704-0207 titled DD Form 2345, Militarily Critical Technical Data Agreement.

Cost to the public:

In exchange for Government-owned unclassified export controlled technical data and technology, a contractor provides basic company information, identifies a technical data and technology custodian, and describes need-to-know. The reporting burden is estimated to average 20 minutes per response. The DD Form 2345 and supporting documentation must be submitted to the U.S./Canada Joint Certification Office in hardcopy. Approximately 24,000 U.S. companies have active certifications.

24,000 responses	\$9.94* per response	\$19.99 postage** per response	\$638,400
------------------	----------------------	--------------------------------	-----------

\*US Department of Labor. Bureau of Labor Statistics. 2014 median weekly earnings of full-time workers with at least a bachelor’s degree: \$1,193. <http://www.bls.gov/spotlight/2015/a-look-at-pay-at-the-top-the-bottom-and-in-between/home.htm>

\*\*Most applicants choose Priority Mail Express Flat Rate Envelope USPS Postage Price Calculator <http://postcalc.usps.com/>

Cost to the government:

4 FTE registrars	GS 9 step 5	\$59,036*	\$236,144
1 FTE Team Lead	GS11 step 5	\$71,429*	\$71,429
.5 FTE US Representative	GS13 step 5	\$101,807	\$50,904
.25 FTE Division Chief	GS14 step 5	\$120,303	\$30,075
.25 FTE Director	GS15 step 5	\$35,378*	\$35,378
O&M for IT	SP4701-15-F-0031	\$2,958,915	\$147,946
Total			\$571,876

\*2014 General Schedule (Base) Office of Personnel Management Salaries and Wages <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule/>

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has fFederalism implications. This final~~proposed~~ rule will not have a substantial effect on State and local governments.

**List of Subjects in 32 CFR Part 250**

\_\_\_ Exports, Science and technology.

Accordingly, 32 CFR part 250 is ~~proposed to be~~ revised to read as follows:

**PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND TECHNOLOGY FROM PUBLIC DISCLOSURE**

- Sec.
- 250.1 Purpose.
- 250.2 Applicability.
- 250.3 Definitions.
- 250.4 Policy.
- 250.5 Responsibilities.
- 250.6 Procedures.
- 250.7 Directly arranged visits.

Authority: 10 U.S.C. 133.

**~~PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA AND TECHNOLOGY FROM PUBLIC DISCLOSURE~~**

**§ 250.1 Purpose.**

\_\_\_ This part establishes policy, assigns responsibilities, and prescribes procedures for the dissemination and withholding of certain unclassified technical data and technology consistent with the requirements of 10 U.S.C. 130.

**§250.2 Applicability.**

Formatted: Font: Bold

Formatted: Indent: Left: 0", First line: 0"

Formatted: Line spacing: single

\_\_\_This part:

\_\_\_(a) Applies to:

\_\_\_(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).

\_\_\_(2) All unclassified technical data and technology that discloses technology or information with military or space application, in the possession or under the control of a DoD Component, that may not be exported lawfully without an approval, authorization, license, license exception, or exemption in accordance with U.S. export control laws and regulations: 22 U.S.C. 2778 (also known as the “Arms Export Control Act”); 50 U.S.C. chapter 35 (also known as the “International Emergency Economic Powers Act”); 22 CFR parts 120-130 (also known as “International Traffic in Arms Regulations” (ITAR)); and 15 CFR parts 730 [through](#) -774 (also known as “Export Administration Regulations” (EAR)).

\_\_\_(b) Does not modify or supplant the regulations governing the export of technical data and technology established by 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120 [through](#) -130, 10 CFR 810, and 15 CFR parts 730 [through](#) -774.

\_\_\_(c) Does not apply to technical information under the control of the Department of Energy or the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as amended.

\_\_\_(d) Does not introduce any additional controls on the dissemination of technical data and technology by private enterprises or individuals beyond those specified by export control laws

and regulations or in contracts or other agreements, including certifications as specified in paragraph (a)(9) of § 250.5. Accordingly, the fact that DoD may possess such technical data and technology does not in itself provide a basis for control of such technical data and technology under this part.

\_\_\_(e) Does not introduce any controls on the dissemination of:

\_\_\_(1) Scientific, educational, or other items that are not subject to the EAR or exclusively controlled for export or reexport by another department or agency pursuant to 15 CFR 734.3, 734.7 through 734.8;

\_\_\_(2) Information in the public domain as described in 22 CFR 120.11 and technical data that has been approved for release in accordance with 22 CFR 125.4(b)(13)).

\_\_\_(f) Does not alter the responsibilities of the DoD Components to protect proprietary technical data and technology of a private party, including:

\_\_\_(1) In which the DoD has less than unlimited rights (e.g., pursuant to 48 CFR 227.7202, 252.227-7013, 252.227-7014, 252.227-7015, and 252.227.7018); and

\_\_\_(2) That is authorized to be withheld from public disclosure pursuant to 5 U.S.C. 552, also known and referred to in this part as the “Freedom of Information Act (FOIA).”

\_\_\_(g) Does not pertain to or affect the release of technical data and technology by DoD Components to foreign governments, international organizations or their respective representatives, or contractors pursuant to official agreements or formal arrangements with the U.S. Government (USG), or pursuant to USG-licensed transactions involving such entities or individuals. However, in the absence of such USG-sanctioned relationships this part does apply.

\_\_\_(h) Does not apply to classified technical data. However, after declassification, dissemination of the technical data and technology within the scope of paragraph (a)(2) of this section is governed by this part.

\_\_\_(i) Does not alter the responsibilities of the DoD Components to mark and protect information qualifying for designation as controlled unclassified information in accordance with Executive Order 13556, "Controlled Unclassified Information," as implemented by vVolume 4 of DoD Manual 5200.01, "DoD Information Security Program" (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol4.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf)).

### **§ 250.3 Definitions.**

\_\_\_ Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Certification. The United States-Canada Joint Certification Program certifies contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology that discloses technology or information with military or space application controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>).

Formatted: No underline

Controlling DoD office. The DoD activity that sponsored the work that generated the technical data and technology or received the technical data and technology on behalf of the DoD and therefore is responsible for determining the distribution of a document containing the technical data and technology. In the case of joint sponsorship, the controlling office is determined by advance agreement and may be a party, a group, or a committee representing the interested activities or the DoD Components.

Formatted: No underline

Critical technology. Technology or technologies essential to the design, development, production, operation, application, or maintenance of an defense or dual-use article or service, which makes or could make a significant contribution to the military potential of any country, including the United States (also referred to as militarily critical technology). This includes, but is not limited to, design and manufacturing know-how, technical data, keystone equipment including manufacturing, inspection, and test equipment that is required for the effective application of technical information and technical know-how.

Formatted: No underline

\_\_\_(1) With respect to defense articles or defense services: those technologies specified in 22 CFR 121.1.

\_\_\_(2) With respect to categories of systems, equipment, and components; test, inspection, and production equipment; materials; software; and technology subject to the EAR: those technologies specified in 15 CFR part 774.

\_\_\_(3) With respect to nuclear equipment, materials, and technology: those technologies specified in 10 CFR [part](#) 810.

\_\_\_(4) With respect to select agents and toxins: those technologies specified in 7 CFR part 331, 9 CFR part 121, and 42 CFR part 73; and any other technologies affecting the critical infrastructure.

\_\_\_(5) With respect to emerging critical defense technology: research and engineering development, or engineering and technology integration that will produce a defense article or defense service, including its underlying technology and software, covered by 22 CFR parts 120 [through](#) -130, or a dual-use or munitions item, including its underlying technology and software, covered by 15 CFR parts 730 [through](#) -774.

Defense article. Defined at 22 CFR 120.6

Formatted: No underline

Defense services. Defined at 22 CFR 120.9

Formatted: No underline

Formal arrangement. An instrument that provides the formal authorization to establish a voluntary agreement between two or more parties for mutual sharing of resources and tasks to achieve a common set of objectives, such as The Technical Cooperation Program.

Formatted: No underline

Legitimate business relationship. A relationship in which the DoD determines that a need exists to acquire, share, exchange, or disseminate DoD technical information to anyone other than a DoD employee for supporting the DoD mission. The relationship may be established by a memorandum of understanding, agreement, contract, or grant. The DoD has the sole responsibility for determining that a legitimate business relationship exists since the only purpose is to provide access to information created by or under the control of the DoD. Relationships may be established with an individual or organization in another Ffederal department or agency; contractors, grantees, or potential DoD contractors; other branches of the Federal Government; State and local governments; and foreign countries.

Formatted: No underline

Limited rights. The rights to use, modify, reproduce, release, perform, display, or disclose technical data and technology, in whole or in part, within the government.

Formatted: No underline

Other legitimate business purposes. Include:

Formatted: No underline

\_\_\_(1) Providing or seeking to provide equipment or technology to a foreign government with USG approval (for example, through foreign military sale).

\_\_\_(2) Bidding, or preparing to bid, on a sale of surplus property.

\_\_\_(3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.

\_\_\_(4) Engaging in scientific research in a professional capacity.

\_\_\_(5) Acting as a subcontractor to a qualified contractor.

Potential DoD contractor. An individual or organization outside the DoD declared eligible for DoD information services by a sponsoring DoD activity.

Formatted: No underline

Public disclosure. Making technical data available without restricting its dissemination or use.

Formatted: No underline

Qualified contractor. A qualified U.S. contractor or a qualified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition and certified in the Joint Certification Program through acceptance of a valid DD Form 2345.

Formatted: No underline

Qualified Canadian contractor. Canadian contractors are qualified for technical data and technology that do not require a license or other authorization for export to Canada under 22 CFR 126.5 by submitting a certification request to the United States-Canada Joint Certification Office established at the Defense Logistics Agency, Battle Creek, Michigan, in accordance with the “Memorandum of Understanding Between the Government of Canada and the Government of the United States Concerning Strategic Technical Exchange”.

Formatted: No underline

Qualified U.S. contractor. A private individual or enterprise that, in accordance with procedures established by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and as a condition of obtaining export-controlled technical data and technology subject to this part from the DoD:

Formatted: No underline

\_\_\_(1) Certifies that the individual who will act as recipient of the export-controlled technical data and technology on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

\_\_\_(2) Certifies that such data and technology are needed to bid or perform on a contract with the DoD or other USG agency, or for other legitimate business purposes in which the U.S.

contractor is engaged or plans to engage. The purpose for which the data and technology are needed must be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data and technology are related properly to such business purpose.

\_\_\_(3) Acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data and technology within the United States) and agrees that it will not disseminate any export-controlled technical data and technology subject to this part in violation of applicable export control laws and regulations.

\_\_\_(4) Agrees that, unless dissemination is permitted by paragraph (i) of §\_250.6, it will not provide access, including network access, to export-controlled technical data and technology subject to this part to persons other than its employees or persons acting on its behalf, and who meet the same citizenship or residency requirements without the permission of the DoD Component that provided the technical data and technology.

\_\_\_(5) To the best of its knowledge, knows of no person employed by it or acting on its behalf who will have access to such data and technology, who is debarred, suspended, or otherwise ineligible from performing on USG contracts; or has violated U.S. export control laws or a certification previously made to the DoD under the provisions of this part.

\_\_\_(6) Asserts that it is not debarred, suspended, or otherwise determined ineligible by any agency of the USG to perform on USG contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part.

\_\_\_(7) Requests the certification be accepted based on its description of extenuating circumstances when the certifications required by this definition cannot be made truthfully.

Restricted rights. The government's rights to use a computer program with one computer at one time. Applicable only to noncommercial computer software.

Formatted: No underline

Technical data. Defined at 22 CFR 120.10.

Formatted: No underline

(1) Classified data relating to defense articles and defense services on the U.S. Munitions List;

(2) Information covered by an invention secrecy order; or

(3) Software (see 22 CFR 120.45(f)) directly related to defense articles.

(b4) The definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in 22 CFR 120.11 or telemetry data as defined in note 3 to Category XV(f) of in 22 CFR part 121. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

Commented [GB1]: What does this paragraph go to?

Technical information. Includes technical data and technology as defined in 15 CFR parts 730 through -774, as well as technical information that is not subject to 22 CFR parts 120 through -130 or 15 CFR parts 730 through -774. It also includes technical data or computer software of any kind that can be used or adapted for use in the design, production, manufacture, assembly, repair, overhaul, processing, engineering, development, operation, maintenance, adapting, testing, or reconstruction of goods or materiel; or any technology that advances the state of the art, or establishes a new art, in an area of significant military or space applicability in the United States. The data may be in tangible form, such as a blueprint, photograph, plan, instruction, or an operating manual, or may be intangible, such as a technical service or oral, auditory, or visual descriptions. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets,

Formatted: No underline

manuals, technical reports, technical orders, catalog item identifications, data sets, studies and analyses and related information, and computer software.

Technology. Defined in 15 CFR 772.1.

Formatted: No underline

United States. The 50 States, the District of Columbia, and the territories and possessions of the United States.

Formatted: No underline

United States-Canada Joint Certification Office. The office established to certify contractors of each country for access, on an equally favorable basis, to unclassified technical data and technology disclosing technology controlled in the United States by this part and in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

Formatted: No underline

U.S. DoD contractor. Those qualified U.S. contractors currently holding grants or contracts with DoD or those contractors declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in a DoD Potential Contractor Program.

Formatted: No underline

#### **§ 250.4 Policy.**

It is DoD policy that:

(a) Pursuant to 10 U.S.C. 130 and 133, the Secretary of Defense may withhold from public disclosure any technical data and technology with military or space application in the possession or under the control of the DoD, if such technical data and technology may not be exported lawfully without a license, exemption, or other export authorization, in accordance with U.S. export control laws and regulations (including 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120 through -130, and 15 CFR parts 730 through -774). However, technical data and technology may not be withheld if regulations distributed in accordance with 22 U.S.C. 2778

authorize the export of such technical data and technology pursuant to a general unrestricted license or exemption.

\_\_\_(b) Because public disclosure of technical data and technology subject to this part is the same as providing uncontrolled foreign access, withholding such technical data and technology from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest.

\_\_\_(c) Notwithstanding the authority in paragraph (c)(1) of this section, it is DoD policy to provide technical data and technology governed by this part to individuals and enterprises that are:

\_\_\_(1) Currently qualified U.S. contractors, when such technical data and technology relate to a legitimate business purpose for which the contractor is certified; or

\_\_\_(2) A certified Canadian contractor referred to in and governed by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition (available at <http://laws-lois.justice.gc.ca/PDF/SOR-86-345.pdf>) and registered at the United States-Canada Joint Certification Office when a legitimate business relationship has been established between the government and the contractor.

\_\_\_(d) This part may not be used by the DoD Components as authority to deny access to technical data and technology to the Congress or to any Ffederal, State, or local government agency that requires the technical data and technology for regulatory or other official government purposes. Dissemination of the technical data and technology will include a statement that DoD controls it, in accordance with this part.

\_\_\_(e) The authority in this part may not be used to withhold from public disclosure unclassified information regarding DoD operations, policies, activities, or programs, including the costs and

evaluations of performance and reliability of military and space equipment. When information does contain technical data and technology subject to this part, the technical data and technology must be excised from what is disclosed publicly.

\_\_\_(f) This part may not be used as a basis for the release of limited rights or restricted rights data as defined in 48 CFR or those that are authorized to be withheld from public disclosure pursuant to the 5 U.S.C. 552.

\_\_\_(g) This part may not be used to provide protection for technical data that should be classified in accordance with Executive Order 13526, "Classified National Security Information," and [Volume 1](#) of DoD Manual 5200.01 (available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol1.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf)).

\_\_\_(h) This part provides immediate authority to cite section (b)(3) of 5 U.S.C. 552 (FOIA Exemption 3) described in 32 CFR part 286 as the basis for denials under 5 U.S.C. 552 of technical data and technology currently determined to be subject to the provisions of this part. The technical data will be withheld under the authority of 10 U.S.C.130. If the information originated or is under the control of a Government Agency outside the DoD, DoD Components will refer to that Government Agency for a release determination.

\_\_\_(i) Technical data and technology subject to this part must be marked in accordance with DoD Instruction 5230.24, "Distribution Statements on Technical Documents" (available at <http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf>) and [Volume 4](#) of DoD Manual 5200.01 and released in accordance with DoD Instruction 2040.02, "International Transfers of Technology, Articles, and Services" (available at [http://www.dtic.mil/whs/directives/corres/pdf/204002\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/204002_2014.pdf)), DoD Directive 5230.09, "Clearance of DoD Information for Public Release" (available at

<http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>), DoD Instruction 5230.29, “Security and Policy Review of DoD Information for Public Release” (available at <http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf>), and 32 CFR part 285.

\_\_\_(j) Technical data and technology subject to this part, when disseminated electronically, must be marked in accordance with vVolume 4 of DoD Manual 5200.01 and are subject to all applicable security requirements specified in DoD Instruction 8500.01, “Cybersecurity” (available at [http://www.dtic.mil/whs/directives/corres/pdf/850001\\_2014.pdf](http://www.dtic.mil/whs/directives/corres/pdf/850001_2014.pdf)) and Chairman of the Joint Chiefs of Staff Instruction 6510.01F, “Information Assurance (IA) and Support to Computer Network Defense (CND),” February 9, 2011, as amended (available at [http://www.dtic.mil/cjcs\\_directives/cdata/unlimit/6510\\_01.pdf](http://www.dtic.mil/cjcs_directives/cdata/unlimit/6510_01.pdf)).

(k) In accordance with DoD Instruction 5015.02, “DoD Records Management Program” (available at <http://www.dtic.mil/whs/directives/corres/pdf/501502p.pdf>), technical data and technology subject to this part must be maintained and managed consistent with National Archives and Records Administration approved dispositions to ensure proper maintenance, use, accessibility, and preservation, regardless of format or medium.

#### **§ 250.5 Responsibilities.**

\_\_\_(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility for the implementation of this part and will designate an office to:

\_\_\_(1) Administer and monitor compliance with this part.

\_\_\_(2) Receive and disseminate notifications of temporary revocation of contractor qualification in accordance with paragraph (e) of § 250.6.

\_\_\_(3) Receive recommendations for contractor disqualification made in accordance with paragraph (f) of § 250.6, and act as disqualification authority.

\_\_\_(4) Provide technical assistance when necessary to the DoD Components to assess the significance of the military or space application of technical data and technology that may be withheld from public disclosure in accordance with this part.

\_\_\_(5) Maintain and update procedures and appropriate mechanisms for the certification of qualified contractors, in accordance with paragraph (c) of § 250.4 of this part.

\_\_\_(6) Ensure that the requirements of this part are incorporated into 48 CFR for application to contracts involving technical data and technology governed by this part.

\_\_\_(7) Develop, in conjunction with the Office of the General Counsel of the Department of Defense (GC DoD), guidelines for responding to appeals, as identified in paragraph (k) of § 250.6.

\_\_\_(8) Develop procedures to ensure that the DoD Components apply consistent criteria in authorizing exceptions in accordance with paragraph (j) of § 250.6.

\_\_\_(9) Prescribe procedures to develop, collect, and disseminate certification statements; to ensure their sufficiency, accuracy, and periodic renewal; and to make final determinations of qualification.

\_\_\_(10) Take such other actions that may be required to ensure consistent and appropriate implementation of this part within the DoD.

\_\_\_(b) The Under Secretary of Defense for Policy (USD(P)):

\_\_\_(1) Prepares and issues policy guidance regarding the foreign disclosure and security controls for information in international programs within the scope of this part.

\_\_\_(2) Provides consultation to DoD offices on export control and commodity jurisdiction determinations.

\_\_\_(c) The Deputy Chief Management Officer (DCMO) of the Department of Defense:

\_\_\_(1) Monitors the implementation of the provisions of this part that pertain to 5 U.S.C. 552 and 32 CFR part 285.

\_\_\_(2) Provides such other assistance as may be necessary to ensure compliance with this part.

\_\_\_(d) The GC DoD:

\_\_\_(1) Advises DoD Components with respect to the statutory and regulatory requirements governing the export of technical data and technology.

\_\_\_(2) Advises the USD(AT&L) regarding consistent and appropriate implementation of this part.

\_\_\_(e) The DoD Component heads:

\_\_\_(1) Disseminate and withhold from public disclosure technical data and technology subject to this part consistent with its policies and procedures.

\_\_\_(2) Designate a focal point to:

\_\_\_(i) Ensure implementation of this part.

\_\_\_(ii) Identify classes of technical data and technology whose release are governed by paragraph (d)(3) of § 250.6.

\_\_\_(iii) Act on appeals relating to case-by-case denials for release of technical data and technology.

\_\_\_(iv) Temporarily revoke a contractor's qualification in accordance with paragraph (e) of § 250.6.

\_\_\_(v) Receive and evaluate requests for reinstatement of a contractor's qualification in accordance with paragraph (e)(4) of §\_250.6.

\_\_\_(vi) Recommend contractor's disqualification to the USD(AT&L) in accordance with paragraph (f) of §\_250.6.

\_\_\_(3) Develop, distribute, and effect Component regulations to implement this part.

\_\_\_(4) Ensure that the controlling DoD office that created or sponsored the technical information exercises its inherently governmental responsibility to determine the appropriate marking in accordance with DoD Instruction 5230.24 and ~~y~~volumes 2 and 4 of DoD Manual 5200.01 (volume 2 available at [http://www.dtic.mil/whs/directives/corres/pdf/520001\\_vol2.pdf](http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf)) and that all technical documents, including research, development, engineering, test, sustainment, and logistics information, regardless of media or form, are marked correctly.

**§\_250.6 Procedures.**

\_\_\_(a) Procedures for release of technical information must be made under the following guidelines:

\_\_\_(1) DoD Components may make their technical information for other than military or space application available for public disclosure in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29. DoD has the authority to withhold technical data and technology as defined [in §\\_250.3](#) from public disclosure.

\_\_\_(2) DoD Components will process FOIA requests from the public for technical information in accordance with 32 CFR part 286 and governing DoD Component issuances. All requested technical data and technology currently determined to be subject to the withholding authority in this part will be denied under Exemption 3 of 5 U.S.C. 552 and 10 U.S.C. 130. Any FOIA

Formatted: No underline

Formatted: No underline

appeals for the denied information will be processed in accordance with 32 CFR part 286 and governing DoD Component issuances.

\_\_\_(3) DoD Components may give qualified contractors access to their technical data and technology as permitted by the provisions of this part.

\_\_\_(i) United States-Canada Joint Certification Office adjudicates certification of qualified contractors.

\_\_\_(ii) To qualify, U.S. and Canadian contractors must submit a completed DD Form 2345 “Militarily Critical Technical Data Agreement,” to the United States-Canada Joint Certification Office.

\_\_\_(iii) To qualify, Canadian contractors will submit a completed DD Form 2345 when a Canadian contractor intends to request access to DoD-controlled technical data and technology.

\_\_\_(iv) A copy of the company’s State/Provincial Business License, Incorporation Certificate, Sales Tax Identification Form, ITAR Controlled Goods Registration letter or certificate, or other documentation that verifies the legitimacy of the company must accompany all DD Forms 2345.

\_\_\_(v) The contractor’s business activity is a key element of the certification process since this information is used by the controlling office as a basis for approving or disapproving specific requests for technical data and technology. The business activity statement should be sufficiently detailed to support requests for any data that the contractor expects for legitimate business purposes.

\_\_\_(b) Upon receipt of a request for technical information in the possession of, or under the control of the DoD, the controlling DoD office for the requested information will determine whether the information is governed by this part.

\_\_\_(1) The determination will be based on whether

\_\_\_(i) The information is subject to 22 CFR part 121 or 15 CFR part 774.

\_\_\_(ii) The information would require a license, exception, exemption, or other export authorization in accordance with U.S. export control laws and regulations in accordance with 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120 [through](#) -130, and 15 CFR parts 730 [through](#) -774.

\_\_\_(iii) The information would not fall into the categories of information described in paragraphs (c) and (d) of § 250.2.

\_\_\_(2) In making such a determination, the controlling office may consult with the Defense Technology Security Administration for advice on whether U.S. export control laws or regulations apply. The controlling DoD office may request assistance in making this determination from the USD(AT&L), and if necessary, consult the Departments of State, Commerce, or Energy.

\_\_\_(c) The controlling DoD office will ensure technical data and technology governed by this part are marked for distribution in accordance with DoD Instruction 5230.24 and [y](#)Volume 4 of DoD Manual 5200.01.

\_\_\_(d) The controlling DoD office will authorize release of technical data and technology governed by this part to qualified contractors, as defined in § 250.3, unless either:

\_\_\_(1) The qualification of the contractor concerned has been temporarily revoked in accordance with paragraph (e) of this section;

\_\_\_(2) The controlling DoD office judges the requested technical data and technology to be unrelated to the purpose for which the qualified contractor is certified. When release of technical data and technology is denied in accordance with this paragraph, the controlling DoD office will request additional information to explain the intended use of the requested technical data and

technology and, if appropriate, request a new certification (see § 250.3) describing the intended use of the requested technical data and technology; or

\_\_\_(3) The technical data and technology are being requested for a purpose other than to permit the requester to bid or perform on a contract with the DoD or other USG agency. In this case, the controlling DoD office will withhold the technical data and technology if the DoD Component focal point determines the release of the technical data and technology may jeopardize an important technological or operational military advantage of the United States.

\_\_\_(e) Upon receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law; violated its certification; made a certification in bad faith; or omitted or misstated material fact, the DoD Component will temporarily revoke the U.S. contractor's qualification. Canadian contractors are disqualified in accordance with Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition.

\_\_\_(1) The DoD Component may delay such temporary revocations with the potential to compromise a USG investigation.

\_\_\_(2) Immediately upon a temporary revocation, the DoD Component will notify the contractor and the USD(AT&L).

\_\_\_(3) The contractor will be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified.

\_\_\_(4) Any U.S. contractor whose qualification has been temporarily revoked may present information to the DoD Component showing that the basis for revocation was in error or has been remedied and be reinstated.

\_\_\_(f) When the basis for a contractor’s temporary revocation cannot be removed within 20 working days, the DoD Component will recommend to the USD(AT&L) that the contractor be disqualified.

\_\_\_(g) After receipt of substantial and credible information that a qualified U.S. contractor has violated U.S. export control law, the DoD Component must notify the appropriate law enforcement agency.

\_\_\_(h) Charges for copying, certifying, and searching records rendered to requesters will be levied in accordance with chapter 4, appendix 2 of ~~y~~Volume 11A of DoD 7000.14-R, “Department of Defense Financial Management Regulations (FMRs)” (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_11a.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_11a.pdf)). Normally, only one copy of the same record or document will be provided to each requester. Each release to qualified contractors of controlled technical data and technology governed by this part will be accompanied by a “Notice to Accompany the Dissemination of Export-Controlled Technical Data and Technology” (see Figure [to § 250.6\(h\)](#)).

**Figure to § 250.6(h).— Example of the Notice to Accompany Export-Controlled Technical Data and Technology**

Formatted: Font: Bold, No underline

Formatted: Font: Bold, No underline

1. Export of information contained herein, including release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.
2. Under 22 U.S.C. §2778 the penalty for unlawful export of defense articles controlled under the ITAR is not more than 20 years imprisonment, a fine of \$1,000,000, or both.
3. Under 50 U.S.C. §1705 and 15 CFR §764.3, as adjusted for inflation by 15 CFR §6.4, the penalty for persons who violate, attempt or conspire to violate, or cause a violation of the EAR, while the EAR is continued in effect by Executive Order under the International Emergency Economic Powers Act, may include civil penalties of not more than \$284,582 per transaction (subject to further adjustment for inflation) or twice the amount of the transaction, whichever is greater and criminal penalties of not more than \$1,000,000, imprisonment of not more than 20 years, or both. Violations of the EAR may also result in the denial of export privileges.
5. In accordance with the certification that establishes you as a “qualified contractor,” unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.
6. The U.S. Government assumes no liability for direct patent infringement, contributory patent infringement, or misuse of technical data and technology.
7. The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.
8. The U.S. Government assumes no liability for loss, damage, or injuries resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data and technology furnished in response to the request for technical data and technology.
9. If the technical data and technology furnished by the government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data and technology do not include or involve any license rights.
10. A copy of this notice must be provided with any partial or complete reproduction of these technical data and technology that are provided to qualified contractors.

\_\_\_(i) Qualified U.S. contractors who receive technical data and technology governed by this part may disseminate that technical data and technology for purposes consistent with their certification without the permission of the controlling DoD office or when dissemination is:

\_\_\_(1) To any foreign recipient for which the technical data and technology are approved, authorized, or licensed in accordance with 22 U.S.C. 2778 or 15 CFR parts 730 [through](#) -774.

\_\_\_(2) To another qualified U.S. contractor including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of the recipient.

\_\_\_(3) To the Departments of State and Commerce to apply for approvals, authorizations, or licenses for export pursuant to 22 U.S.C. 2778 or 15 CFR parts 730 [through](#) -774. The application will include a statement that the technical data and technology for which the approval, authorization, or license is sought is controlled by the DoD in accordance with this part.

\_\_\_(4) To the Congress or any [F](#)federal, State, or local governmental agency for regulatory purposes or otherwise as may be required by law or court order. Any such dissemination will include a statement that the technical data and technology are controlled by the DoD in accordance with this part.

\_\_\_(j) A qualified contractor desiring to disseminate technical data and technology subject to this part in a manner not permitted expressly by the terms of this part must be granted authority to do so by the controlling DoD office, consistent with U.S. export control laws and regulations specified in 22 U.S.C. 2778, 50 U.S.C. chapter 35, 22 CFR parts 120 [through](#) -130, and 15 CFR parts 730 [through](#) -774 and DoD policies.

\_\_\_(k) Any requester denied technical data and technology or any qualified U.S. contractor denied permission to disseminate such technical data and technology in accordance with this part

will be promptly provided with a written statement of reasons for that action, and advised of the right to make a written appeal to a specifically identified appellate authority within the DoD Component. Other appeals will be processed as directed by the USD(AT&L).

\_\_\_(1) Denials will cite 10 U.S.C. 130 and 133 as implemented by this part. Implementing procedures will provide for resolution of any appeal within 20 working days.

**§ 250.7 Directly arranged visits.**

\_\_\_(a) USG officials and certified U.S. contractors and Canadian government officials and certified Canadian contractors may use the certification process to facilitate directly arranged visits that involve access to unclassified technical data and technology. Activities under this process are limited to:

\_\_\_(1) Procurement activities such as unclassified pre-solicitation conferences, discussions related to unclassified solicitations, and collection of procurement unclassified documents.

\_\_\_(2) Performance of an unclassified contract.

\_\_\_(3) Scientific research, in support of unclassified U.S. or Canadian national defense initiatives.

\_\_\_(4) Attendance at restricted meetings, conferences, symposia, and program briefings where technical data and technology governed by this part or Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition will be presented, or the event is being held in an unclassified access controlled area.

\_\_\_(b) A directly arranged visit does not apply to uncertified U.S. or Canadian contractors; classified visits, where confirmation of the visitors' security clearances is required; or unsolicited marketing visits.

\_\_\_(c) A directly arranged visit related to the release of information controlled in the United States by this part or in Canada by Canada Minister of Justice, Technical Data Control Regulations SOR/86-345, May 27, 2014 current edition, is permitted when two conditions are satisfied.

\_\_\_(1) First condition:

\_\_\_(i) There is a valid license covering the export of the technical data and technology;

\_\_\_(ii) The export or release is permitted under the Canadian exemption on 22 CFR 126.5;

\_\_\_(iii) The export or release is covered by the general exemptions in 22 CFR 125.4; or

\_\_\_(iv) The export or release qualifies for a license exception under 15 CFR parts 730 [through](#) - 774.

\_\_\_(2) Second condition:

\_\_\_(i) The distribution statement applied to the technical data and technology pursuant to DoD Instruction 5230.24 permits release; or

\_\_\_(ii) The originator or government controlling office authorizes release.

Dated: October 26, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.