

July 2023

Overview of Department of Defense Statement on Countering Unwanted Foreign Influence in Department-Funded Research institutions of Higher Education

On June 29, 2023, the Department of Defense (DOD) issued [materials](#) (“DOD Materials”) concerning the DOD’s requirement for review of fundamental research projects for conflicts of interest, conflicts of commitment, and unwanted foreign influence.¹ The DOD Materials consist of the following documents and accompanying distribution statements:

- June 8, 2023, Under Secretary of Defense Memorandum on Policy for Risk-Based Security Reviews of Fundamental Research
- DOD Component Decision Matrix to Inform Fundamental Research Proposal Mitigation Decisions (“Decision Matrix”)
- FY22 Lists Published in Response to Section 1286 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232), as amended (“Lists”)

The DOD Materials require DOD components to develop policies and processes for the risk-based security review of proposals for funding for fundamental research projects. The Materials lay out requirements for these policies and include a matrix of risk factors, some of which are prohibited or must be addressed via mitigation measures, and others for which mitigation measures are recommended, suggested, or not required. Importantly, the Materials also contain the first publicly available list (compiled pursuant to the FY 2019 NDAA) of entities in countries of concern that institutions are cautioned against engaging with.

Key Takeaways:

- ✦ **Risk Assessment & Mitigation:** DOD components are expected to establish research security review processes/policies to assess risk factors associated with conflicts of interest/commitment and “unwanted foreign influence” in making decisions regarding the funding of fundamental research project proposals. Mitigation of identified risks through means such as training, reporting, and replacing personnel is the preferred method for addressing identified risks.
- ✦ **Decision Matrix and Entity Lists:** As a part of these processes, DOD components are expected to use a provided Decision Matrix to assess researcher (and in some cases research collaborator) ties to foreign talent recruitment programs, foreign funding sources, foreign entities on specified lists, and patents resulting from federally funded research filed outside the U.S. The materials also include a list of foreign entities and talent programs that have been confirmed as engaging in problematic activities.
- ✦ **Cross-Unit Consistency:** Use of the Decision Matrix is expected to drive consistency across DOD components’ risk assessment processes, but it is unclear how/when components that currently have their own risk assessment matrices (e.g., [DARPA](#), [DEVCOM Army Research Lab](#)) will revise/replace these with the new Decision Matrix.
- ✦ **Risk Categorization Tied to Date of Activity:** Under the Decision Matrix, the risk level of certain activities/associations increases the more recently that they occurred. After August 9, 2024, researcher associations with Malign Foreign Talent Recruitment Programs and institutional failure to have a policy prohibiting these associations will be considered a prohibited factor.

¹ These documents are issued as a part DOD’s implementation of [National Security Presidential Memorandum-33](#) (“NSPM-33”).

Below, the DOD Materials are summarized.

I. June 8, 2023, Under Secretary of Defense Memorandum on Policy for Risk-Based Security Reviews of Fundamental Research (“Memorandum”)

A. Purpose of Memorandum: DOD issued this Memorandum in partial fulfillment of its plan to implement the requirements of NSPM-33 and to ensure “that a consistent, all-of-Government risk-based security review process [of fundamental research] is implemented as required by OSTP’s” [NSPM-33 Implementation Guidance](#). The overall goals of the risk-based security review process are to: (a) ensure security of DOD-funded fundamental research; (b) ensure researchers fully disclose information pertinent to potential conflicts of interest and commitment; and (c) communicate acceptable behaviors and behaviors that may jeopardize DOD funding.

B. Key Definitions: The Materials provide a Definitions Section. The following definitions should be kept in mind while reading this overview:

Covered Individuals are defined as an those individuals “who contribut[e] significantly to the design and/or execution of a fundamental research project that is, or if selected for award would be, funded, in whole or in part, by the DOD, and who [are] considered essential to the successful performance of the fundamental research project.” Covered Individuals include key personnel such as the PI and co-PIs.

Foreign Talent Recruitment Program (FTRP) is defined as an “effort organized, managed, or funded by a foreign government, or a foreign government instrumentality or entity, to recruit science and technology professionals or students (regardless of citizenship or national origin or whether providing the recruited individual a full-time or part-time position).

Malign Foreign Talent Recruitment Program (MFTRP) is defined in accordance with Section 10638(4) of the [CHIPS and Science Act of 2022](#) (“CHIPS”) and encompasses programs/positions/activities that include specified hallmarks (e.g., engaging in unauthorized transfer of intellectual property, being required to recruit trainees for the MFTRP, etc.) **AND** are a program sponsored by a foreign country of concern or entity based in a foreign country of concern or are on specified lists of foreign talent recruitment programs or academic institutions.

NOTE: Section 10632(d) of CHIPS lists certain scholarly collaborative activities that are specifically NOT prohibited (“Carve Outs”) unless they are “funded, organized, or managed by an academic institution or foreign talent recruitment program” on specified lists. **HOWEVER**, the MFTRP definition in the DOD Materials does not include, or reference, these Carve Outs.

C. Required Policies for DOD Components under the Memorandum

(1) Risk-Based Security Review Policy: DOD components are required to develop “a risk-based security review policy/process to identify fundamental research project proposals’ (FRPP) research security risk mitigation needs.” Components are responsible for defining what levels of research security mitigation determination can be covered by standard processes, and when situations must be elevated for leadership decisions.

Policy/process requirements include:

- (a) Timing of Review: At a minimum, a review must be conducted on each FRPP that is selected for award based on technical merit and annually thereafter for funded projects.
- (b) Reporting on Reviews Conducted: Semiannually, DOD components must provide the Office of the Under Secretary of Defense for Research and Engineering (OUSDRE) a summary of all risk-based reviews conducted, including the number of FRPPs rejected and the reasons for rejection.
- (c) Prohibited Activities:
- Beginning August 9, 2024, DOD components may not provide an award of, or funding to, a FRPP that has a Covered Individual who is participating in an MFTRP, or to a proposing institution “that does not have a policy addressing” MFTRPs pursuant to Section 10632 of CHIPS.
 - Beginning in FY 2024, no U.S. institution of higher education may receive DOD funding if they host a Confucius Institute unless the Secretary of Defense has issued a waiver.
 - **NOTE**: Section 10632 requires agencies to implement policies requiring Covered Individuals to initially (and annually thereafter) certify that they are not in a MFTRP, and institutions must certify that the Covered Individuals they employ have been made aware of the requirement and have complied. It is unclear what the Memorandum means when it refers to an institutional “policy addressing” MFTRPs, but the Decision Matrix clearly states **that after August 9, 2024, an institution’s failure to have a policy prohibiting Covered Individuals from participating in a MFTRP is considered a “prohibited factor,” and that after August 9, 2022, it is a factor for which mitigation measures are recommended.**
- (d) Information that Components Should Review: (i) Researcher disclosures and Standard Form 424 submitted for all “Covered Individuals” in a FRPP; (ii) relevant publicly available information; and (iii) information in Research Performance Progress Reports (RPPR) for funded projects. Components may also choose to review additional information.
- (e) Criteria DOD Components Must Use for Review:
- [Latest Version of Science and Technology \(S&T\) Protection Guide, Appendix B](#). Appendix B requires review of the proposal to identify elements that constitute “Open Research” (i.e., fundamental research), Controlled Unclassified Information (CUI), and Classified Information. Appendix B provides a list of seven “Fundamental Research Review Questions,” all of which must be answered in the affirmative for a determination that a program element constitutes fundamental research.
 - Decision Matrix (Table 1 in the DOD Materials): The Decision Matrix lists factors to be used in assessing (a) a Covered Individual’s associations, affiliations, collaborations, and funding; and (b) the policies of the proposing institution that employs the Covered Individual. For the various factors, the Decision Matrix lists those that are: prohibited; discouraged; capable of being addressed via mitigation measures; or require no mitigation.
 - Constraints: DOD component policies/processes must:
 - Refrain from discouraging international research collaboration.
 - Balance minimization of time-to-award with the need for effective review. (The time required for negotiation of risk mitigation measures is not considered as part of the time-to-award period.)
- (2) **Policies for Research Security Risk-Based Mitigation Decisions**: DOD must, to the maximum extent possible, mitigate research security risks identified by the risk-based review. Mitigation

strategies may include, but are not limited to, the following measures: additional training and/or reporting, provision of additional information to DOD for evaluation, verification of Top Secret security clearance, and replacement or resignation of specified individuals.

(3) Policies for Rejection of a FRPP Based on Research Security Risk: DOD components may reject a FRPP when component leadership/designee determines there are one or more security risks that cannot be mitigated, and the risks are unacceptable. If an FRPP is rejected, the component must send an explanatory rejection letter (copied to OUSDRE) to the proposing institution that permits the institution to make an informed response. Findings from the rejection letter may also be disclosed to other DOD components.

- a. **Appeal Process:** A proposing institution may challenge a DOD component's rejection of a FRPP based on a risk-based security review by referring the matter to OUSDRE for mediation. OUSDRE will review the matter to determine if review was conducted:
 - Consistent with the Memorandum and factors in the Decision Matrix.
 - Consistent with risk-based security reviews conducted by other DOD components or federal agencies.

If OUSDRE determines the review was not appropriately conducted, then the FRPP will be returned to the DOD funding component for a funding decision and use of mitigation strategies, as well as a review of the component's security review process if OUSDRE determines the process is inconsistent with that used by other DOD Components or other federal agencies.

(4) Policies for Ensuring Consistency of Risk-Based Security Review Processes: Each DOD component will develop its own risk-based research security review policy that it can tailor as it sees fit, within the bounds of the requirements set forth in the Memorandum. The Memorandum lists requirements for ensuring consistency across DOD components and with other federal agencies including the following:

- Each component must provide its risk-based security assessment policies/process to OUSDRE.
- Components must conduct periodic spot checks of Covered Individuals on samples of FRPPs (focusing on those not identified as needing mitigation) to identify any missed research security issues. The spot-check process must be documented, and OUSDRE also may conduct spot checks.
- Components must provide informal summaries of all their risk-based security reviews to OUSDRE.
- The Decision Matrix will be updated to account for changes in laws/policies, to address identified gaps, and to ensure consistency with other federal agencies.

II. DOD Component Decision Matrix to Inform Fundamental Research Proposal Mitigation Decisions (“Decision Matrix”)

A. Purpose of Decision Matrix: DOD components will use the Decision Matrix to review FRPPs for conflicts of interest, conflicts of commitment, prohibited actions, and conditions under which mitigation is required.

1. **Matrix Consistency Across DOD Units:** Presently, [DARPA](#) and [DEVCOM Army Research Laboratory](#) have risk assessment matrices that were published prior to the Decision Matrix. Although each of these matrices consider similar types of behavior as risk factors, they are not

completely aligned with the Decision Matrix. In presentations, DOD personnel have indicated that the Decision Matrix ultimately will be used by all DOD components in their FRRP risk-based research security reviews. However, it remains to be seen when DARPA and DEVCOM Army Research Laboratory will make the switch to the new matrix.

B. Decision Matrix Factors: The Decision Matrix lists “Factors for Assessing a Covered Individual’s Associations, Affiliations, Collaborations, Funding, and the Policies of the Proposing Institution that Employs the Covered Individual.” There are four categories of factors, each of which lists “indicators” of activities that pose risk, some with triggering time periods (as discussed below):

- Foreign Talent Recruitment Program Factors:
 - Covered Individual participated in a foreign talent recruitment program (FTRP) or a MFTRP
 - Institution’s policy does not prohibit participation in a MFTRP
 - Covered Individual’s co-authors on publications in scientific/engineering journals are participants in an FTRP or MFTRP
- Funding Sources Factors:
 - Covered Individual is currently receiving funding from a foreign country of concern (FCOC), or foreign country of concern connected entity (FCOCC Entity)
 - Covered Individual previously received funding/limited funding from an FCOC or FCOCC Entity.
- Patent Factors:
 - Covered Individual’s patents/patent applications resulting from U.S. government funded research that were filed in a FCOC or on behalf of FCOCC Entity before filing on in the U.S.
 - Covered Individual has a co-patent applicant who is listed on the U.S. BIS Denied Persons List.
 - Level of risk depends, in part, on whether the patent/patent application was disclosed in a proposal.
- Entity Lists Factors:
 - Covered Individuals’ and co-authors listed on publications in scientific/engineering journals have affiliations with entities on the U.S. BIS Entity List, or other specified lists.

C. Classification of Matrix Factors: For each factor category, the Decision Matrix lists when a factor is considered:

- A prohibited factor
- A discouraged factor that requires mitigation and for which a FRPP must be rejected if mitigation is not possible.
- A factor for which mitigation is recommended.
- A factor for which mitigation is suggested.
- A factor for which mitigation is not required.

D. Decision Matrix Trigger Times: The classification of factors as (a) prohibited, (b) discouraged, or (c) mitigation recommended, suggested, or not required, may depend not only on the factor, but when the factor occurred. The Decision Matrix considers whether a factor occurred:

- October 10, 2019, and August 9, 2022;
- August 10, 2022, to August 9, 2024; or
- After August 9, 2024

A factor’s risk assessment is higher when the behavior occurs in more recent periods, after researchers were made aware of the U.S. government’s concerns regarding inappropriate foreign influence. For example, a Covered Individual’s participation in a FTRP between October 10, 2019, and August 9, 2022, is considered a factor for which mitigation measures are recommended, while participation after August 9, 2022, is considered a “factor discouraged by DOD policy, mitigation measures required.”

Other factors, however, are categorized without regard to when they occurred. For example, if a Covered Individual has a patent application or patent, which resulted from research funded by the U.S. government, that was not disclosed in a proposal and that was filed in a FCOC before filing in the U.S., this activity is considered a “discouraged factor” without regard to when the activity occurred.

III. FY22 Lists Published in Response to Section 1286 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232), as amended

Section 1286 FY 2019 NDAA required the publication of lists of foreign institutions and foreign talent programs that have been determined to pose a threat to U.S. national security interests. The lists are referenced in the Decision Matrix and should be consulted with respect to Factor 4, Entity Lists.

The lists are divided into the following tables:

- Table 1: List of Institutions of the People’s Republic of China, Russian Federation, and other Countries with Specified Characteristics: The list contains a number of well-known universities and scientific institutions in China and should be reviewed carefully.
- Table 2: Foreign Talent Programs that Pose a threat to National Security Interests of the United States: In addition to six named talents program, this table also includes a catch-all provision that encompasses “any program that meets one of the criteria contained in Section 10638(4)(A) and either Section 10638(4)(B)(i) or (ii) in the CHIPS and Science Act.

IV. Conclusion

The DOD Materials provide transparency as to how the DOD intends for its funding components to evaluate research security risks concerning FRPPs. This information will be useful to institutions in communicating to faculty information that must be disclosed and how various collaborations, affiliations, activities, and funding may require mitigation and/or impact funding opportunities. When reviewing the Decision Matrix and the lists of institutions and foreign talent programs, institutions will note the broad range of activities and/or affiliations that may be considered to pose risks. Accordingly, institutions will need to train faculty on the extent and types of activities that may be problematic and emphasize the need for complete and accurate disclosures.