



# Department of Defense INSTRUCTION

NUMBER 5535.11

March 19, 2012

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USD(AT&L)

**SUBJECT:** Availability of Samples, Drawings, Information, Equipment, Materials, and Certain Services to Non-DoD Persons and Entities

**References:** See Enclosure 1

1. **PURPOSE.** In accordance with the authority in DoD Directive (DoDD) 5134.01 (Reference (a)), this Instruction:

a. Establishes authority, assigns responsibilities, and prescribes procedures in accordance with section 2539b of title 10, United States Code (U.S.C.) (Reference (b)) as amended by section 232 of the FY 2008 Defense Authorization Act (Reference (c)) for provision of samples, drawings, information, equipment, materials, and certain services to non-DoD persons and entities.

b. Incorporates and cancels the Under Secretary of Defense for Acquisition and Technology Memorandum (Reference (d)).

2. **APPLICABILITY.** This Instruction applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the DoD, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (hereinafter referred to collectively as the "DoD Components").

3. **POLICY.** It is DoD policy:

a. To promote research and development within the commercial sector of the U.S. economy, and the transfer of technology from the military to the commercial sector. Efforts to improve the quality of the defense laboratories and increase their ability to perform their designated missions effectively and efficiently, while at the same time utilizing that taxpayer-funded infrastructure to support private sector activities when in the interest of national defense, shall be supported. These policies further national military and economic security by promoting the development of a national technology and industrial base from which to sustain military technology superiority

while enhancing productive capabilities for the Nation overall. In many cases, providing information or unique or scarce items to a private sector entity will significantly aid that entity's ability to engage in research critical to the development of a useful military or commercial technology.

b. That the provisions of Reference (b) as amended by Reference (c) delineate specific statutory authority to DoD that are a detailed component of this policy. Those specifically delineated policies along with the accompanying procedures are included in Enclosure 2 of this Instruction as a means to facilitate a clear understanding of both the specific authorities and accompanying procedures.

4. RESPONSIBILITIES. The Secretaries of the Military Departments, the Directors of the Defense Agencies and DoD Field Activities, and the Commanders of the Combatant Commands shall execute the authorities specified in paragraphs 1.a. – 1.e. of Enclosure 2 consistent with the policies in paragraphs 3.a. and b. in the Policy section. These authorities may be delegated to their subordinate entities that function as directors or commanders of DoD laboratories, centers, ranges, or other facilities or activities that own or have control of the types of facilities, equipment, information, and personnel as specified in paragraphs 1.a. – 1.e. of Enclosure 2, respectively, subject to direction or control by Component headquarters.

5. PROCEDURES. See Enclosure 2.

6. RELEASABILITY. UNLIMITED. This Instruction is approved for public release and is available on the Internet from the DoD Issuances Website at <http://www.dtic.mil/whs/directives>.

7. EFFECTIVE DATE. This Instruction is effective upon its publication to the DoD Issuances Website.



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Acting Under Secretary of Defense for  
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Enclosures

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ENCLOSURE 1

REFERENCES

- (a) DoD Directive 5134.01, "Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L))," December 9, 2005
- (b) Sections 2208, 2320, 2371, 2500, 2539b, 2563, 2572, 2667, 2681, 4543, of title 10, United States Code
- (c) Section 232 of Public Law 110-181, "National Defense Authorization Act for Fiscal Year 2008," January 28, 2008
- (d) Under Secretary of Defense for Acquisition and Technology Memorandum, "Interim Draft Department of Defense Guidance Implementing 10 U.S.C. 2539b 'authority to sell'," April 17 1997 (hereby cancelled)
- (e) DoD 7000.14-R, "Department of Defense Financial Management Regulations (FMRs)," Volumes 1-15, date varies per volume
- (f) Sections 3710, 3710a, and 5807 of title 15, United States Code
- (g) Defense Federal Acquisition Regulation (DFAR) 252.227-7013, "Rights in Technical Data – Noncommercial Items," March 2011
- (h) DoD 5200.1-R, "Information Security Program," January 14, 1997
- (i) DoD Directive 5230.24, "Distribution Statements on Technical Documents," March 18, 1987
- (j) DoD Directive 5230.25, "Withholding of Unclassified Technical Data From Public Disclosure," November 6, 1984
- (k) DoD Instruction 2040.02, "International Transfers of Technology, Articles, and Services," July 10, 2008
- (l) Directive-Type Memorandum 09-019, "Policy Guidance for Foreign Ownership, Control, or Influence (FOCI)," September 2, 2009
- (m) DoD Instruction 5010.40, "Managers' Internal Control Program (MICP) Procedures," July 29, 2010
- (n) DoD Directive 5400.07, "DoD Freedom of Information Act (FOIA) Program," January 2, 2008
- (o) DoD 5400.7-R, "DoD Freedom of Information Act Program," September 4, 1998
- (p) Section 200 of title 35, United States Code
- (q) Section 70111 of title 49, United States Code
- (r) DoD 4160.21-M, "Defense Materiel Disposition Manual," August 18, 1997
- (s) DoD 4140.1-R, "DoD Supply Chain Materiel Management Regulation," May 23, 2003
- (t) DoD Directive 3200.15, "Sustainment of Ranges and Operating Areas (OPAREAs)," January 10, 2003

ENCLOSURE 2

PROCEDURES

1. DELINEATED AUTHORITIES. This enclosure provides the specific delineated authorities of Reference (b) as amended by Reference (c) and the guidelines necessary to implement and use those authorities. Pursuant to the policies in paragraphs 3.a. and 3.b. above the signature of this Instruction and the delineated authorities in Reference (b) as amended by Reference (c) and when it is determined to be in the best interest of national defense, the DoD Components shall:

a. Sell, rent, lend, or give samples, drawings, and manufacturing or other information (subject to the right of third parties) to any person or entity.

b. Sell, rent, or lend Government equipment or materials to any person or entity:

(1) For use in independent research and development (IR&D) programs, subject to the condition that the equipment or material be used exclusively for such research and development.

(2) For use in demonstrations to a friendly foreign government.

c. Make available to any person or entity, at an appropriate fee, the services of any Government laboratory, center, range, or other testing facility for the testing of materials, equipment, models, computer software, and other items.

d. Make available to any person or entity, through leases, contracts, or other appropriate arrangements, facilities, services, and equipment of any Government laboratory, research center, or range, if the facilities, services, and equipment provided will not be in direct competition with the domestic private sector.

e. In addition, the DoD, in its use of the provisions in paragraphs 1.c. and 1.d. of this enclosure, shall:

(1) Maintain confidentiality of test results performed with services made available as stated in paragraph 3.c of this enclosure such that test results shall not be disclosed outside the DoD without the consent of persons for whom tests are performed.

(2) Charge appropriate fees for those things provided consistent with paragraphs 3.c. and 3.d. in this enclosure and in a manner consistent with DoD 7000.14-R (Reference (e)). Such fees may not exceed the amount necessary to recoup the direct and indirect costs involved, such as direct costs of utilities, contractor support, and salaries of personnel that are incurred by DoD to provide for the testing. Full cost recovery is not required if the approving official determines that it is not in the best interest of the DoD from a cost versus benefit standpoint. Fees received for actions taken pursuant to the authority of paragraphs 3.c. and 3.d. of this enclosure may be credited to the appropriations or other funds of the activity providing such services in accordance with References (b) and (c).

f. The policies and procedures in this Instruction are in addition to but not intended to supplant comparable authorities provided by section 3710a of title 15, U.S.C. (Reference (f)) or section 2681 of Reference (b). DoD policies and procedures that may impact or be used in place of the procedures provided in this enclosure, as appropriate.

2. PROCESS. This enclosure provides guidelines for use of authorities delineated in paragraphs 1.a. – 1.e. of this enclosure and paragraph 3.b. above the signature of this Instruction.

a. Samples, Drawings, and Manufacturing Information. Samples, drawings, and manufacturing or other information that is technical data (see Defense Federal Acquisition Regulation 252.227-7013 (Reference (g))) shall not be disclosed to buyers, renters, lessees, or potential buyers, renters, or lessees, unless the Government is authorized by section 2320 of Reference (b) to do so; the owner or licensor of such information has authorized the Government to do so; or the Government has obtained a license to the data that permits such disclosure. Any classified information sold or otherwise permanently transferred pursuant to delineated authorities of specified in paragraphs 1.a – 1.d of Enclosure 2 must be declassified in accordance with the requirements of DoD 5200.1-R (Reference (h)). Controlled unclassified information shall be handled in accordance with Reference (h), DoDD 5230.24 (Reference (i)), DoDD 5230.25 (Reference (j)), and DoD Instruction (DoDI) 2040.02 (Reference (k)).

b. Government Facilities, Equipment, or Materials. In determining whether to sell, rent, or loan Government equipment or materials or to otherwise make available Government facilities or equipment through leases, contracts, or other appropriate arrangements in accordance with the delineated authorities in paragraphs 1.b and 1.d. of this enclosure, considerations shall include, but not be limited to:

- (1) The current or probable future need of the Government for the item.
- (2) The residual value of the item.
- (3) Expenses incident to handling and storage of the item.
- (4) The probable cost of reproduction of the item in the event of future procurement.
- (5) Potential requests in the future and the ability of the laboratory or facility to handle the requests once a precedent has been established.
- (6) Whether the sale, rent, loan, or availability for use furthers this Instruction's policies and the delineated authorities of paragraphs 1.a. through 1.f. of this enclosure.
- (7) Adherence to the provisions of Reference (k).

c. Services of Government Facility Resources.

(1) In accordance with the delineated authorities in paragraphs 1.c. and 1.d. of this enclosure, use of Government facilities may be provided when the person or entity requiring the services, facilities, or equipment has established in writing, and to the satisfaction of the director or commander, that provision of the services or use of the facilities or equipment will not constitute undue competition with the private sector; and that the provision of the services or use of the facilities or equipment does not involve expansion of the capabilities and capacities of the laboratory or facility providing the service, even if the person or entity agrees to finance the expansion.

(2) Except as provided in paragraph 2.c.(3) in this enclosure, the testing of material and other items not owned by the Government, and provision of facilities, services, and equipment, shall not cause Government personnel or other Government resources to be diverted from scheduled tests of Government material or otherwise interfere with Government mission requirements.

(3) The laboratory director, facility director, or activity commander with immediate authority over the Government testing facility shall determine, according to paragraph 1.c. of this enclosure, the priority of use of such facility for testing of material and other items not owned by the government. In making this determination, the director or commander shall consider the degree to which the proposed test furthers this Instruction's policies set forth in paragraphs 3.a. and b. above the signature of this Instruction, the delineated authorities of section 1. of this enclosure and the priorities of scheduled Government tests and may revise established test schedules in order to accommodate tests of material and other items not owned by the Government.

(4) The Government may not disclose the results of tests performed in Government testing facilities pursuant to the authority of paragraph 1.c. of this enclosure without the consent of the persons for whom the tests are performed in accordance with the provisions of subparagraph 1.e.(1) of this enclosure.

(5) The laboratory director, facility director, or activity commander with immediate authority over the facilities, services, or equipment to be made available in accordance with paragraphs 1.b. – 1.d. of this enclosure shall determine the priority of use of such resources for non-government activities. In making this determination, the director or commander shall consider the degree to which the proposed activity further this Instruction's policies set forth in paragraphs 3.a. and 3.b. of this Instruction and the priorities of scheduled Government activities and may revise established schedules in order to accommodate the use of such resources for non-Government activities.

d. Any activities undertaken under the delineated authorities specified in paragraphs 1.a. – 1.c. of this enclosure that may result in transfer of sensitive technology shall be vetted in accordance with the policy and procedures in Directive-Type Memorandum 09-019 (Reference (1)).

### 3. CHARGING FEES AND DISPOSITION OF PROCEEDS

#### a. General

(1) Fees charged for sales, rentals, loans, or services provided in accordance with paragraphs 1.a. and b. of this enclosure or services provided in accordance with paragraph 1.c. of this enclosure may include up to the full amount of all direct and indirect costs to the Government. Less than full cost recovery may be charged in accordance with the guidance in subparagraph 3.b.(2) of this enclosure. Fees for DoD Working Capital Fund activities shall be the standard (stabilized) price. Guidance for full cost recovery is prescribed in chapter 14 of Volume 11A of Reference (e).

(2) Internal management controls must be established in accordance with DoDI 5010.40 (Reference (m)) to ensure that fees and proceeds are developed and adjusted, using current, accurate, and complete data, to provide reimbursement conforming to these requirements.

(3) Unless otherwise permitted by law or regulation, payment for items and fees incident to a sale, rent, loan, or services in accordance with paragraphs 1.a. – 1.d. of this enclosure shall be made in advance and only be made by cashier's check, certified check, bank money order, electronic funds transfer, or postal money order. Fees from services that may incur variable costs over time such as personnel or utility costs may be collected incrementally over time.

(4) Payments received for transactions undertaken under the authority of this Instruction in accordance with References (b) and (c) may be retained by the providing or furnishing activity. Proceeds from these transactions shall be credited to the appropriation, fund, or account charged with costs of producing and providing the facility, equipment, or services, in corresponding amounts, and amounts so credited shall be merged with the appropriation, fund, or account to which credited and shall be available for the same time periods and for the same purposes as the appropriation, fund, or account to which merged.

#### b. Services and Use of Government Facilities and Equipment

(1) When Government services, facilities, and equipment are made available in accordance with paragraphs 1.c. and 1.d. of this enclosure, a fee generally shall be imposed to recoup the total cost incurred by the Government in providing the service, facility, or equipment. These costs may include capital improvement costs, utility costs, depreciation, and all other ancillary support costs. DoD Working Capital Fund laboratories and facilities shall always use the standard (stabilized) rate to establish fees. DoD Activities designated as "Major Ranges, Test Facilities, and Bases" shall determine costs and fees in accordance with chapter 12 of Volume 11A of Reference (e) and DoD Working Capital Fund Activities shall determine costs and fees in accordance with Volume 11B of Reference (e). For all other laboratories and facilities, when approved by the director or commander, prior to providing the service or use of facilities and equipment, all or a portion of the indirect costs may be eliminated from the fees. Direct costs must, at a minimum, be recouped. Sales of services at less than the total cost are only permitted when there is a compelling reason, in the interest of national defense and in accordance with the policy considerations in this Instruction, to provide the services at less than the total cost.

(2) Special consideration as to recovery of less than full cost may be given when:

(a) The recipient of the benefit is engaged in a nonprofit activity designed for public safety, health, or welfare;

(b) Payments of the full fees by a State, local government, or nonprofit activity would not be in the Federal Government's best interest; or

(c) The director or commander has determined that the administrative costs of determining the full fees would be an unduly large part of the receipts from the activity.

(3) When less than full cost is charged, laboratory directors, facility directors, and commanders shall maintain adequate documentation that justifies or supports each decision. Such documentation should address the criteria in subparagraphs 3.b.(1) and 3.b.(2) of this enclosure and be available for review by higher authorities or any audits or inspections.

(4) Under no circumstances may fees exceed the amount necessary to recoup the total costs incurred.

(5) Specific guidance pertaining to the calculation of charges and fees for provision of services, equipment, and facilities pursuant to paragraphs 1.c. and d. of this enclosure is provided in chapter 14 of Volume 11a of Reference (e).

c. Collection of Fees or Proceeds

(1) All fees or proceeds from persons or entities outside the U.S. Government must be collected in advance or at the time the service or use of the facilities and equipment is provided.

(2) Specific guidance pertaining to the collection of fees is provided in chapter 14 of Volume 11A of Reference (e).

d. Disposition of Fees or Proceeds Received

(1) Fees received from sales, rentals, or loans of DoD property in accordance with paragraphs 1.a. and 1.b. of this enclosure shall be deposited in the miscellaneous receipts account of the U.S. Treasury, unless the sales, rentals, or loans are made by DoD Working Capital Fund activities or are otherwise authorized by statute.

(2) Fees received for services performed, and for provision of facilities, services, and equipment (in accordance with, respectively, paragraphs 1.c. and d. of this enclosure, shall be credited to the appropriation, fund, or account that finances the activity making such service, facility, or equipment available. Proceeds from the provision of services, facilities, and equipment under these sections shall be credited to the appropriation, fund, or account charged with the costs of producing and providing the articles or services, in corresponding amounts. Amounts so credited shall be merged with the appropriation, fund, or account to which credited

and shall be available for the same time periods and for the same purposes as the appropriation, fund, or account to which merged.

e. Warranties and Liabilities. All transfers of property or services of whatever nature made pursuant to this guidance shall be without any express or implied warranty. The recipient must agree in writing to hold harmless and indemnify the United States Government from any liability or claim for damages or injury to any person or property arising out of the articles or services, except in any case of willful misconduct or gross negligence on the part of the Government.

4. RELATIONSHIP TO OTHER POLICIES AND PROCEDURES ISSUED BY OR APPLICABLE TO THE DoD. Use of the policies and procedures in this Instruction are not intended to replace other practices or procedures that in a particular case might be the more appropriate means to achieve the policy objectives in this Instruction. Therefore it is incumbent upon the DoD activity contemplating a transaction under this authority also to have decided that it is in the best interest of the DoD to apply these policies and procedures when compared to:

a. Records made available to the public, under the Freedom of Information Act, DoDD 5400.07 (Reference (n)). Charges for such record searches and copies of records are governed by chapter 5 of DoD 5400.07-R (Reference (o))

b. Leases entered into pursuant to section 2667 of Reference (b).

c. Articles or services sold by a DoD industrial facility pursuant to section 4543 of Reference (b).

d. Supplies or articles sold, or services or work performed pursuant to section 2208 of Reference (b).

e. Grants, cooperative agreements, or other transactions pursuant to section 2371 of Reference (b), also known as the Grants and Cooperative Agreements Act.

f. Agreements entered into pursuant to section 200 et seq. of title 35, U.S.C. (Reference (p)).

g. Agreements entered into to support U.S. commercial space launch activities pursuant to section 70111 of title 49, U.S.C. (Reference (q)), or section 5807 of Reference (f).

h. Loans, gifts or exchanges pursuant to section 2572 of Reference (b).

i. Sales or disposal of excess or surplus personal property pursuant to DoD 4160.21-M (Reference (r)).

j. Sale or exchange of non excess personal property pursuant to DoD 4140.1-R (Reference (s)).

k. Sale of articles or services by DoD Working Capital Fund facilities to persons outside DoD pursuant to section 2563 of Reference (b).

## GLOSSARY

### PART I. ABBREVIATIONS AND ACRONYMS

DoDD DoD Directive

DoDI DoD Instruction

IR&D independent research and development

U.S.C. United States Code

### PART II. DEFINITIONS

These terms and their definitions are for the purposes of this Instruction.

drawing. A diagram, plan, or list detailing the fabrication and assembly of structural elements, or the installation of materials and equipment. A drawing details the characteristics, or outlines the parts of operation of a product or item.

equipment or materials. Personal property, including machinery, devices, and apparatuses, and components of such items.

facilities. Property used for production, maintenance, research, engineering, development, evaluation, and /or testing. It includes equipment, plant equipment, test equipment, tooling, real and personal property, and material.

IR&D. A research and development effort performed by a non-government entity that is not sponsored by, or required in performance of a government contract or grant for: basic research, applied research, development, or systems and other concept formulation studies. IR&D programs also do not include technical efforts expended in developing and preparing technical data specifically to support submitting a bid or proposal.

laboratory. A facility or group of facilities owned, leased, or otherwise under the jurisdiction and control of the DoD, a substantial purpose of which is the performance of research, development, engineering, test and evaluation, or otherwise developing or maintaining a technology in accordance with section 3710a(d)(2) of Reference (f).

manufacturing or other information. Any blueprints, drawings, plans instructions, documentation, or other technical information or technical data that can be used or adopted for use to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce any equipment or material.

national technology and industrial base. Defined in section 2500 of Reference (b).

person or entity. An individual, partnership, corporation, association, State, local, or tribal Government, or an agency or instrumentality of the United States Government other than DoD.

range. A specifically bounded geographic area under the jurisdiction of the DoD that may encompass a landmass, body of water (above or below the surface), and/or airspace used to conduct operations, training, research and development, and test and evaluation of military hardware, personnel, tactics, munitions, explosives, or electronic combat systems. This includes both operational and test ranges as those terms are defined in DoDD 3200.15 (Reference (t)).

research center. A facility or group of facilities owned, leased or otherwise under the jurisdiction and control of the DoD, a substantial purpose of which is the performance of research, development, engineering, test and evaluation, or otherwise developing or maintaining a technology in accordance with section 3710a(d)(2) of Reference (f).

sample. A unit or units of a product drawn from a lot or batch that is representative of the product and is constructed in conformance with the requirements and complies with specifications of the product. The item may be from a prototype or final production version of the product.