

**To:** Contract & Grant Officers

**Subject:** NASA Restriction on Funding Activity with the People's Republic of China (PRC)

### **Purpose**

This memo is issued to assist University of California campuses managing NASA-funded awards that include the "NASA Restriction on Funding Activity with the People's Republic of China (PRC)," originally implemented by NASA pursuant to funding restrictions inserted into its federal funding appropriations as of April 25, 2011.

This guidance was developed in consultation with the University's Office of General Counsel and after careful consideration of the required certifications and clauses appearing in NASA proposal announcements and awards.

### **Definitions**

For the purposes of this Guidance document, the following definitions apply:

**China or Chinese-owned Company** means the People's Republic of China (PRC), any company owned by the People's Republic of China or any company incorporated under the laws of the People's Republic of China, **including Chinese universities**. The PRC includes Hong Kong and Macau, but not Taiwan (Republic of China). The statute does not restrict individual involvement based on citizenship or nationality.

**ALL REFERENCES TO "CHINA" OR THE "PRC" IN THIS DOCUMENT ARE UNDERSTOOD TO MEAN CHINA AS DEFINED ABOVE.**

**Bilateral** applies to a policy, program, order, or contract, means a reciprocal policy, program, order, or contract between China and a US entity, where there are no other international parties involved. This is distinct from a multilateral arrangement with parties from multiple countries. **The NASA funding restriction does not apply to multilateral arrangements.**

**Vendor Agreement** means a contract for the acquisition of commercial and non-developmental items.

### **Background**

Since federal fiscal year 2011, the continuing appropriations acts that fund the National Aeronautics and Space Administration (NASA)<sup>1</sup> have instituted what is commonly referred to as

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<sup>1</sup> See **Exhibit A** for the specific text from the appropriations acts that contain this prohibition.

the “NASA Restrictions on Funding Activity with the Peoples Republic of China (PRC).” This restriction prohibits NASA and the White House Office of Science and Technology Policy from engaging in or funding any joint scientific activity with China.<sup>2</sup>

For the purpose of understanding the application of this prohibition, the statutory language can be broken down into three parts:

**Part 1** None of the funds made available by this Act may be used for the National Aeronautics and Space Administration (NASA) or the Office of Science and Technology Policy (OSTP)

**Part 2** to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract of any kind to

**Part 3** participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company unless such activities are specifically authorized by a law enacted after the date of enactment of this Act.

The effect of this prohibition on UC comes into play in part 3. That is, NASA cannot fund the activities described in parts 1 and 2, and when UC receives funds from NASA, UC must assure that it will not engage in activities described in part 3 in violation of any restriction inserted into our award documents.

NASA’s internal implementation instructions are codified in the Procurement Information Circular (PIC) 12-01A (February 16, 2012) and the Grant Information Circular (GIC) 12-01A (September 26, 2012). Both documents direct NASA Contract & Grant Officers to insert certifications and restrictions in solicitations and awards.<sup>3</sup>

In addition to the PIC 12-01A and the GIC 12-01A, NASA has published a series of frequently asked questions (FAQs) to help their internal and external research community better understand the restrictions. The FAQs apply to both NASA contracts and grants, and are posted in the NASA Research Opportunities in Space and Earth Science (ROSES), a website that lists various

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Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub.L. No. 112-10, §1340 (Apr. 15, 2011) 125 Stat. 38. <http://www.gpo.gov/fdsys/pkg/PLAW-112publ10/html/PLAW-112publ10.htm>

Consolidated and Further Continuing Appropriations Act of 2012, Pub.L. No. 112-55, § 539(Nov. 18, 2011) 125 Stat. 639. <http://www.gpo.gov/fdsys/pkg/PLAW-112publ55/html/PLAW-112publ55.htm>

Consolidated and Further Continuing Appropriations Act of 2013, Pub.L. No. 113-6, §§535 and 516 (Mar. 26, 2013) 127 Stat. 198. <http://www.gpo.gov/fdsys/pkg/PLAW-113publ6/html/PLAW-113publ6.htm>

<sup>2</sup> These prohibitions were inserted by U.S. Representative Frank Wolf, R-VA, House spending committee chair. For further background, see “Wolf Statement at U.S. - China Commission Hearing on Military and Civil Space Programs in China,” <http://wolf.house.gov/index.cfm?sectionid=34&itemid=1724>.

<sup>3</sup> See <http://www.hq.nasa.gov/office/procurement/regs/pic12-01A.html> and [http://naistst1.nais.nasa.gov/pub/pub\\_library/grantnotices/gic12-01A.html](http://naistst1.nais.nasa.gov/pub/pub_library/grantnotices/gic12-01A.html).

The PIC and GIC 12-01A as of the date of this guidance are attached here for convenience as **Exhibits B and C**, respectively. Note that these documents (PIC12-01A and GIC12-01A) replace previous versions (PIC12-01 and GIC12-01).

NASA calls for proposals in the fields of Astrophysics, Heliophysics, Earth Science, and Planetary Science.<sup>4</sup>

It is important to note that per the GIC and PIC, the award terms and certifications/assurances for contracts differ from those required for grants and cooperative agreements. The table below outlines the award terms and certifications and assurances by category.

GRANT or COOPERATIVE AGREEMENT	CONTRACT
<p>By submission of its proposal, the proposer represents that the proposer is not China or a Chinese-owned company,</p> <p>and that the proposer will not <b>participate, collaborate, or coordinate bilaterally</b> with China or any Chinese-owned company, at the prime recipient level or at any subrecipient level, <b>whether the bilateral involvement is funded or performed under a no-exchange of funds arrangement.</b></p> <p>The Recipient shall include the substance of this provision in all subawards made hereunder.</p>	<p>By submission of its offer, the offeror represents that the offeror is not China or a Chinese-owned company.</p> <p>The contractor <b>shall not contract</b> with China or Chinese-owned companies for any effort related to this contract except for acquisition of commercial and non-developmental items.</p> <p>If the contractor anticipates making an award to China or Chinese-owned companies, the contractor must contact the contracting officer to determine if funding on this contract can be used for that purpose.</p> <p>The contractor shall include the substance of this clause in all subcontracts hereunder.</p>

## Guidance

### I. Best Practices and Certifications

- A. Campuses should promote awareness about the NASA Restriction on Funding Activity with China, including outreach to: Principal Investigators (PI) and others working on a NASA-funded scope of work, Contract and Grant Officers, departmental administrators, and all persons that might be responsible for executing subcontracts, memoranda of understanding, collaboration agreements, or any other type of written agreements.
- B. Subcontracts, subawards, memoranda of understanding, collaboration agreements, or any other type of **written bilateral agreements with China** under NASA-funded awards which contain the restriction regarding activity with China are expressly prohibited regardless of whether the prime award is a grant, cooperative agreement or contract.
- C. The following guidance is provided for each award type. See also **Exhibit F** for a Quick Guide.

#### 1. NASA Contracts:

- a. Since the NASA procurement certifications are limited to prohibiting bilateral *contracting* “with China or Chinese-owned companies for any effort related to [the] contract except

<sup>4</sup> See <http://science.nasa.gov/researchers/sara/faqs/prc-faq-roses/>. FAQs as of the date of this guidance are attached here for convenience as **Exhibit E**.

for acquisition of commercial and non-developmental items,”<sup>5</sup> **our only legal obligation under NASA contracts is to assure that we do not enter into bilateral written contracts or subcontracts with China for the performance of any part of the NASA scope of work.** This representation is made as part of the proposal and award certifications.

- b. The PI should certify that s/he will not enter or cause The Regents to enter into a bilateral contract or subcontract with China to perform the scope of work of a NASA-funded contract. A sample PI certification for NASA contracts is included as **Exhibit G**. A certification such as this should be collected by the campus Contracts & Grants/Sponsored Projects Office before The Regents can accept a NASA contract.
- c. A certification should be secured from all entities with whom we enter into subcontracts or other types of written funded agreements (except for Vendor Agreements) for the performance of any part of the scope of work of a NASA-funded contract attesting that they are not China or a Chinese-owned company. The complete certification should be similar to that in the PIC and incorporated into the written subcontracts or other written funded agreements. The applicable NASA FAR clauses must also be flowed down.
- d. If the campus anticipates subcontracting to China, the campus should contact the NASA contracting officer to determine if funding can be used for that purpose.

## 2. NASA Assistance Awards (Grants and Cooperative Agreements):

- a. Pursuant to Grant Information Circular 12-01A, NASA requires entities submitting proposals for NASA assistance (e.g., in response to a Broad Agency Announcement) to provide an assurance that we “will not participate, collaborate, or coordinate bilaterally with China or any Chinese-owned company, at the prime recipient level or at any subrecipient level, whether the bilateral involvement is funded or performed under a no-exchange of funds arrangement.”<sup>6</sup> This assurance requirement imposes an award restriction which is broader than the “contracting with China” restriction under NASA contracts and extends to individuals performing part of the NASA-funded Scope of Work who have an affiliation with China or a Chinese-owned company.
- b. At the award stage (or earlier if mandated by the campus), the PI should complete a questionnaire such as that attached as **Exhibit H**, on their own behalf and on behalf of all other UC participants performing part of the NASA grant scope of work (“Participants”) to help determine whether anyone has an affiliation with China that would preclude their participation (whether funded or unfunded or on-campus or remote). If the PI does not know the answers for any Participant, the PI should obtain the necessary information directly from such Participant.

PIs should be directed to consult with the Contract & Grant/Sponsored Projects Office if an affiliation with China is indicated for any project participant. There are no absolute definitions of what constitutes an affiliation, nor has NASA defined the term.

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<sup>5</sup> NASA FAR Supplement Clause 1852.225-71

<sup>6</sup> See **Exhibit C**, NASA Grant Information Circular 12-01A, NASA Assurance of Compliance - China Funding Restriction (Deviation Feb 2012)

However, the following situations are likely to preclude a person from participating in a NASA-funded scope of work:

- The receipt of substantial financial support from China (other than scholarships).
  - Present or committed employment relationships with China.
  - Present or committed student status in China.
- c. If no affiliations with China are indicated on the questionnaire described above, the PI should next complete a certification attesting that bilateral participation, collaboration, or coordination with China, whether funded or unfunded, will not be performed as part of their NASA-funded award. A sample PI certification for NASA assistance awards is attached as **Exhibit I**. The Regents should not accept a NASA award before a certification such as this is in place.
- d. A certification attesting that they are not China or a Chinese-owned company should be secured from all entities with whom we enter into subawards and other types of written funded or unfunded agreements (except for vendors) for the performance of any part of the scope of work of a NASA-funded assistance award. The certification should be similar to that in the GIC and may be incorporated into subawards or other written agreements or separately secured. In addition, the applicable NASA assistance clauses must be flowed down.

## II. Limitations of the NASA Restriction on Funding Activity with the PRC

The impact of the NASA Restriction on Funding Activity with the PRC may be mitigated by keeping in mind the following:

### A. Scope of Work

The prohibition applies **only** to bilateral participation, collaboration, or coordination with China occurring in the performance of a **scope of work under a NASA-funded award (or subaward)** that contains the NASA Restriction on Funding Activity with China. Note that this is true for both NASA-funded activities and for cost shared activities described in the NASA award scope of work.

To the extent that it is feasible, a PI may be able to extract portions of the work that involve the bilateral participation, collaboration, or coordination with China from a NASA proposal so that these stand alone as independently funded and distinct projects that are not part of the NASA scope of work.

### B. Bilateral vs. Multilateral Activities

Since only bilateral activities are covered by the restriction, to the extent that it makes sense and is feasible for a given project, the PI may be able to legitimately include another international party in the participation, collaboration or coordination, making the project multi-lateral. This would require a careful description of the benefits of such international collaboration at the proposal stage and in the subsequent multilateral agreement with all collaborators. Be aware that NASA will carefully review, and may or may not approve, proposed multilateral arrangements.

### C. No Effect on Open Fundamental Research

It is important to note that UC performs open fundamental research. Limiting access to data/results based on citizenship is contrary to University policies. Therefore, data/results arising from a NASA project can and should be broadly shared and disseminated. Such dissemination is not prohibited by the NASA Restriction on Funding Activity with China.

### D. No Effect on General Scientific Discussions

The NASA ROSES FAQs (see Exhibit E) specifically state that “general scientific discussions with PRC researchers do not constitute a bilateral policy, program, order, or contract and thus are permitted,” and clarify that projects outside of a NASA-funded scope of work are not affected by the restriction. Thus, general interactions with visitors or laboratory colleagues who are not performing any part of the NASA-funded scope of work are permitted without further investigation as to a person’s affiliation with China.

### E. No Effect on Vendor Agreements

PIC 12-01A specifically exempts contracts and purchases of “commercial and non-developmental items,” while GIC 12-01A exempts “the purchase of commercial items of supply.” Thus, the NASA Restriction on Funding Activity with the PRC should have no effect on University Vendor Agreements.

Additionally, Section 516 of Public Law 113-6 imposes a separate restriction on NASA regarding the acquisition by NASA of information technology systems produced, manufactured or assembled by the PRC.<sup>7</sup> However, NASA Procurement Information Circular 13-04<sup>8</sup> on this subject specifically defines “acquire” as “procure with appropriated funds by and for the use of NASA through purchase or lease” and further states that IT systems do not include: 1) systems acquired by a contractor incidental to a contract; 2) Imbedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information; 3) Services in support of IT systems; or 4) flight hardware. Thus, it would be inappropriate for NASA to insert the IT clauses called for in PIC 13-04 (NASA FAR clauses 1852.225-73 and 1852.225-74) in University awards, and the purchase of IT systems from China by the University under research awards is not prohibited.[emphasis added]

### F. Summary of the Applicability of the Restriction

In summary, the restriction:

- Only applies to activities described in the scope of work of a NASA award.
- Only applies to Bilateral activities with China.
- Does not restrict individual involvement based on citizenship or nationality.

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<sup>7</sup> Consolidated and Further Continuing Appropriations Act of 2013, Pub.L. No. 113-6, § 516 (Mar. 26, 2013) 127 Stat. 198. <http://www.gpo.gov/fdsys/pkg/PLAW-113publ6/html/PLAW-113publ6.htm>  
See **Exhibit A** for the specific text from the appropriations act cited above.

<sup>8</sup> PIC 13-04, <http://www.hq.nasa.gov/office/procurement/regs/pic13-04.html>). See **Exhibit D**.

- Does not prohibit dissemination of data/results arising from a NASA project.
- Does not disqualify us from using the Fundamental Research Exclusion under the export control regulations.
- Does not apply to multilateral projects.
- Does not apply to “general scientific discussions.”
- Does not apply to the purchase of commercial and non-developmental items, including the purchase of IT systems by the University under research awards.

### III. Exceptions

The statute allows for the possibility of an exception if NASA (or the Office of Science & Technology Policy) certifies that the activities pose no risk of resulting in the transfer of technology, data, or other information with national security or economic security implications to China, will not involve knowing interactions with officials who have been determined by the United States to have direct involvement with violations of human rights, and submits to the Committees on Appropriations for the House of Representatives and the Senate no later than 30 days prior to the activity in question. However, given political ramifications and Congressional scrutiny, it is unlikely that NASA would be willing to contemplate granting such an exception. For these reasons, **RPAC should be consulted prior to the submission of an exception request.**

### IV. If in Doubt, Contact NASA

Should a question remain about whether a particular situation would be prohibited, the campus contracts & grants office should consult the corresponding NASA program officer.

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**Attachments:**

- Exhibit A – Public Laws 112-10, 112-55, and 113-6
- Exhibit B – Procurement Information Circular (PIC) 12-01A
- Exhibit C – Grant Information Circular (GIC) 12-01A
- Exhibit D – Procurement Information Circular (PIC) 13-04
- Exhibit E – NASA ROSES FAQ
- Exhibit F – Quick Guide
- Exhibit G – Sample PI Certification for NASA Contracts
- Exhibit H – Sample Questionnaire for NASA Assistance Awards
- Exhibit I – Sample PI Certification for NASA Assistance Awards