U.S. EXPORT CONTROL LAWS: A QUICK REFERENCE GUIDE FOR UNIVERSITY COUNSEL

by

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This summary of legal issues will cover three areas of U.S. export control law:

- The trade embargoes administered by the Treasury Department's Office of Foreign Assets Control (OFAC) and codified at 31 C.F.R. Part 500 *et seq.*;
- The Export Administration Regulations (EAR) administered by the Commerce Department's Bureau of Industry and Security (BIS) and codified at 15 C.F.R. Part 730 *et seq.*; and
- The International Traffic in Arms Regulations administered by the State Department's Directorate of Defense Trade Controls (DDTC) and codified at 22 C.F.R. Part 120 *et seq.*

General Background. In their broadest terms, the U.S. export control laws are intended to control the export of goods and technology that affect either U.S. national security or U.S. foreign policy interests. Some of these controls are aimed at purely military products and some are aimed at so-called "dual use" items that can be used in either civilian or military applications. Other legal controls focus solely on the nationality of the proposed end-user and affect all U.S.-origin goods and services and U.S. persons because of foreign policy differences between the United States and those countries. That is, these prohibitions apply regardless of the technological content of those goods or services and irrespective of whether any actual or likely national security threat as such exists. In other words, these latter controls might be properly labeled as total trade embargoes against certain countries, persons or groups. As such, the precise nature or degree of technical content in the goods or services is irrelevant.

This guide summarizes the U.S. export control laws as of May 2011, but, through its Export Control Reform Initiative, the Obama Administration is working to consolidate these independent sets of regulations by combining all controlled products and technology into a single consolidated control list, to bring all export licensing within a single agency and within a single information technology system and to administer those consolidated regulations within a single enforcement agency. Accordingly, this guide may be superseded when and as these impending legal changes take effect.

"U.S. Person" versus "Foreign Person". One common feature to all three present systems of U.S. export control laws (and that is expected to be carried over into the new consolidated rules) is a clear distinction between individuals who are "U.S. persons" and "foreign persons." In general, under the U.S. export control laws:

- A "U.S. person" is any U.S. citizen, permanent resident alien or person admitted on an asylum status to the United States; or a legal entity organized under U.S. law; and

- By the process of elimination, a "foreign person" (or "foreign national") is any other individual or legal entity.

Trade Embargoes. OFAC administers a range of regulations that impose partial or total trade embargoes against certain designated countries, groups and individuals. These regulations are "foreign policy"-driven controls and can come into effect and be terminated or changed quite quickly by the U.S. Government in response to evolving geopolitical events.

The OFAC website contains country-by-country explanations for each of the OFAC embargoes, written in plain English. The OFAC website is found at www.treas.gov/offices/enforcement/ofac/. The site also includes published lists of "Specially Designated Nationals" (SDNs) and so-called "blocked persons" with whom it is illegal for U.S. persons to trade or do business. Those official lists can be found at www.treas.gov/offices/enforcement/ofac/sdn/index.shtml.

It is important to note that, because each of the OFAC embargoes came into effect at a different point in time and for different geopolitical reasons, the wording of the embargoes is non-parallel. Consequently, one cannot reliably extrapolate from one set of OFAC embargoes to another. (For example, the OFAC Cuban embargo limits U.S. persons traveling to Cuba and also applies to non-U.S. corporate subsidiaries owned or controlled by a U.S. parent entity, whereas the OFAC Iranian embargo expressly exempts travel to Iran and does not apply directly to non-U.S. subsidiaries.)

Issues may arise in a diverse range of circumstances for university counsel in regard to the OFAC embargoes: if a principal investigator wishes to conduct research in or collaborate with other university scholars in an embargoed country (or, even more delicate, with government-employed scientists or physicians in an embargoed country who are not strictly based in a university setting), if a faculty member and students want to travel to Cuba for study or if a school admits students from an embargoed country and needs to make arrangements for payment of tuition and other school expenses from that home country of the student where direct funds transfers may be illegal because of these U.S. laws. If a U.S. school wants to establish a formal school-to-school exchange or joint degree program with a school in an embargoed country, that may require an extensive dialog with OFAC and an OFAC license to be compliant with the applicable U.S. embargo, entirely apart from the standard student visas that might be required for the individual students to be enrolled in the U.S. institution.

"Dual Use" Products or Technologies. Most U.S. technology products are "dual use" in nature and are covered under the EAR administered by the BIS. The BIS has published a detailed list of products and technologies that are considered controlled. This list is known as the Commerce Control List (CCL) and is found in Supplement No. 1 to EAR Part 774. Using the CCL and the EAR's Country Chart (found in Supplement No. 1 to EAR Part 738), one can determine whether a BIS export license is required to export a controlled product or technology to a particular end-user in a particular country.

The official BIS website contains the current EAR and various lists that an exporter should check prior to exporting products or technology. The official BIS website is located at www.bis.doc.gov. The Denied Persons List identifies those persons who have been officially denied export privileges by the BIS pursuant to punitive orders and is located at www.bis.doc.gov/dpl/Default.shtm. The Entity List is a list that sets forth foreign end-users known to be involved in proliferation activities and the development of weapons of mass destruction or missiles to deliver those weapons. The Entity List is located at

www.bis.doc.gov/Entities/Default.htm. There is also a BIS "Unverified List" in which the BIS has named certain companies about which it has suspicions. U.S. exporters are not forbidden, as such, to deal with any of the persons or entities listed on the Unverified List, but such exporters and their international resellers should proceed quite cautiously in any transaction with a person or entity on the Unverified List. In the language of the BIS, being included on the Unverified List should be considered to raise a "red flag," as further explained here: www.bis.doc.gov/Enforcement/UnverifiedList/UnverifiedParties.html.

One of the central and distinctive aspects of the EAR is that it does not treat all nations and all technologies with a single universal export control rule. Rather, the application of the EAR involves a "matrix" approach for university counsel and compliance officials that will lead to unique legal results depending upon the end-user, the destination county and the type of U.S. technology at issue in a given potential export situation. In essence, a U.S. university "exporter" needs to use the EAR to make three determinations:

(1) Is the type of product or technology at issue on the CCL?

(2) If so, above what functional level of power, performance, size or other parameter must the BIS issue an "export license" before the export can be made, and, conversely, below what level might a U.S. exporter ship the product or technology overseas under a "license exception" even if a license is nominally required by the CCL?

(3) Are there specific end-uses, end-users or destinations that require any different treatment in terms of licensing or handling?

The BIS also draws a fundamental distinction between export license situations and situations in which an exporter would be qualified to use a "license exception" instead of seeking an export license. License exceptions are broad categories that allow, within certain stated limits, exports of certain products or technologies (e.g., computer software) to certain "safe" destinations (e.g., western Europe or Japan) without any formal BIS license application. If no license exception is applicable, then a U.S. exporter must file a BIS license application and justify the individual transaction to the BIS. Export licensing under the EAR must generally be done online through a BIS system known as "SNAP-R" that requires an exporter to be registered with the BIS.

From a university counsel's point of view, the scenarios that may bring a university within the EAR's scope revolve around both the physical export of specific tangible items (e.g., a controlled chemical reagent or biological sample or a controlled instrument system) and the "deemed export" of controlled intangible information or knowledge. In addition, a university counsel should caution faculty, students and staff that the "fundamental research exemption" (FRE)[1] that usually shields on-campus research and instruction inside the United States that generally allows academic instruction and research without regard to the nationality of the participants will likely not afford the same degree of protection if they were to engage in offshore collaborations or research outside the United States. The BIS has published a very helpful set of *Frequently Asked Questions* in Supplement No. 1 to EAR Part 734 that offers reasonably

[1] Technically, the EAR recognizes three separate sets of somewhat overlapping exclusions that are broadly applicable to U.S. colleges and universities: EAR Section 734.7 for published information and software; EAR Section 734.8 for information resulting from fundamental research in accredited institutions of higher education (which includes both colleges and universities); and EAR Section 734.9 for educational and instructional information typically conveyed in a classroom or laboratory setting.

clear and concise guidance for many common situations involving academic research, publications, attendance and presentations at technical or scientific meetings.

In the 21st century, with the enhanced mobility and geographic reach of many university communities and the push for broader global research and instructional collaborations, university counsel will be challenged to help guide faculty, students and staff to understand when and how to make use of the EAR's exclusions and license exceptions and when and how it may be necessary to seek BIS export licenses when neither the FRE nor such license exceptions will permit a given research or instructional activity.

"Munitions List" Products and Technical Data. Articles, services and technical data that are intended mainly or exclusively for military purposes or that may have direct use in military applications are controlled by the ITAR administered by the DDTC. The ITAR list of controlled military articles, services and technical data is known as the United States Munitions List (USML). As of May 2011, the USML is not a particularly precise or detailed list but is rather a generalized list of "defense articles" and "defense services."

The USML is found at: www.pmddtc.state.gov/regulations_laws/itar_consolidated.html. The official DDTC website is located at www.pmddtc.state.gov and contains the current version of the ITAR. The State Department also maintains a list of parties who are barred by ITAR Section 127.7 from participating directly or indirectly in the export of defense articles, including technical data, or in furnishing of defense services for which a license or approval is required by the ITAR. That list of statutorily debarred parties is located at: www.pmddtc.state.gov/compliance/debar.html.

The ITAR procedure for exporting ITAR-controlled articles or services to foreign persons is quite distinct from the process outlined above for exports of "dual use" products and technologies under the EAR. Affected exporters who come within the DDTC's jurisdiction must register with the DDTC after payment of a registration fee and must obtain a DDTC registration code. The ITAR does not preclude universities or other institutions of higher education from possessing or exporting ITAR-controlled articles or information but does obligate those schools who work in this arena to comply with its stricter limitations if they do so (e.g., in the case of universities who may do advanced research projects funded by a unit of the U.S. Department of Defense (DoD), such as the Defense Advanced Research Projects Agency (DARPA) or the Office of Naval Research (ONR)). It must be stressed, in addition, that such defense-related research may be either unclassified or classified, and it is not only classified research that could be subject to ITAR restrictions.

The ITAR also contains and codifies its own form of the FRE through a key definition for controlled and uncontrolled "technical data" in ITAR Section 120.10, especially the exclusion for "information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain as defined in Section 120.11." The latter cross-reference to ITAR Section 120.11 contains several directly pertinent provisions that should be well understood by university counsel:

- ITAR Section 120.11(a)(4) regarding materials published in journals that are available at "libraries open to the public or from which the public can obtain documents;"

- ITAR Section 120.11(a)(6) regarding information for unlimited distribution at "a

conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States" (which means a non-U.S. meeting or conference would not qualify for this exclusion); and

- ITAR Section 120.11(a)(8) regarding information derived from fundamental research at accredited institutions of higher education (meaning both colleges and universities).

It will be important to university counsel to understand in particular what is covered by the ITAR version of the FRE and what may be excluded and thus subject to ITAR regulation. ITAR Section 120.11(a)(8) states in pertinent part:

> Through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. University research will not be considered fundamental research if: (i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or (ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.

If information is considered controlled under the ITAR and not sheltered within any of the foregoing exclusions, then the DDTC must also approve any technology transfer or other information sharing with a foreign person before such technology transfer or sharing can take place (even if done entirely within the United States, such as a disclosure by a principal investigator to a non-U.S. national graduate student or post-doctoral fellow who is in the United States on an F-1 visa). Also, there are generally no "license exceptions" within the ITAR system.[2] As a general rule, if an article or technical data is subject to the ITAR, then every international transaction involving such an article or technical data will require DDTC export licensing. In other words, unlike the EAR's "matrix" and nuanced approach, if an item is considered ITAR-controlled, then any exposure of that item to a foreign person (regardless of nationality) will be permitted only upon issuance of a DDTC license. Export licensing under the ITAR must be done online through a DDTC online system known as "D-Trade" that requires an exporter to be separately registered with DDTC.

In a time of more constrained university budgets and more limited funding from traditional sponsors such as the National Institutes of Health (NIH) or the National Science Foundation (NSF) for academic research, many institutions that had not historically sought DoD funding are now looking to alternative or additional research funding from agencies such as DARPA or ONR to augment their research budgets. However, from an export control standpoint, not all such federal grant dollars are the same, and the specific terms and conditions applicable to a DoD-funded research program may imply or even affirmatively dictate that ITAR restrictions will be applicable. It is therefore crucial for university counsel and compliance personnel, as well as contract and research administrators, to be conscious of any federal restrictions on the open publishing of funded research results or on the engagement of non-U.S.

[2] Technically, the ITAR does allow one exception for Canadian nationals under the so-called "Canadian exemption" per ITAR §126.5. To be eligible for this exemption, the Canadian nationals who are to gain access to articles or technical data subject to the ITAR must be employed at an entity that has been registered with the Canadian government under the Canadian Defense Production Act or must be so registered individually.

national personnel on the actual research being funded that would break down the FRE protection as enunciated in ITAR Section 120.11(a)(8).

"Deemed Exports". All of the U.S. export control laws embody the concept of a "deemed export," which is the disclosure of information, technology or software to a "foreign person," whether that disclosure occurs in the United States or overseas. The applicable export control laws might require an export license to approve the export of controlled information, technology or software to specific countries. U.S. colleges and universities, like U.S. companies, must therefore be cognizant of when their contacts with non-U.S. persons may trigger a "deemed export" situation and thus be subject to export licensing, unless the situation is covered by one or another of the specific exceptions or exemptions in these laws.

A "deemed export" situation may arise in many different circumstances: hiring a non-U.S. engineer or scientist to work in a U.S. facility; offering a summer internship to a foreign graduate student at a local university; engaging a foreign distributor or reseller; working with a foreign affiliate or subsidiary company; hosting the visit of a foreign customer; or training foreign sales or technical support staff. Because of the "matrix" legal analysis under the EAR, a possible "deemed export" under the EAR may or may not require an export license from BIS, depending on the factual circumstances, but, generally speaking, a possible "deemed export" under the ITAR automatically requires an export license from DDTC, because all exports under the ITAR are subject to formal prior approval by DDTC.

Foreign Worker Visa Applications. As of February 2011, U.S. Citizenship and Immigration Services (USCIS), an arm of the Department of Homeland Security (DHS), requires an employer sponsoring foreign individuals for certain work visa categories (H-1B, H-1B1, L-1 and O-1A) to file a version of Form I-129 (Petition for Nonimmigrant Worker) that requires an employer such as a university or college to certify, under penalty of perjury, that it has first reviewed the EAR and the ITAR and affirmatively "determined" either no export license is needed from the relevant agencies who enforce the EAR (BIS) and the ITAR (DDTC) for the worker's exposure to the employer's technology or such an export license is needed and, if such a license is needed, then the employer will then "prevent access" to any controlled technology within the employer organization unless and until the employer has secured the proper export license. It should also be noted that Immigration and Customs Enforcement (ICE), which is another arm of DHS and thus a sister agency to USCIS in the same department, has been aggressively investigating cases of illegal access by non-Americans to controlled technology under the EAR and the ITAR.

A university employer should respond to this new USCIS certification requirement only after due and appropriate consideration of its factual and legal basis to make such certifications. In particular, if a university employer has not previously dealt with the EAR or the ITAR before but wants to offer employment to foreign workers in the H-1B, H-1B1, L-1 or O-1A visa categories, the university employer will likely need first to examine those U.S. export control laws to determine their applicability before completing these new certification requirements on a Form I-129. The university employer's certification will likely pertain not only to the university employer's own technology but also that of any of the university employer's collaborators that would be accessible by the foreign worker in the university employer's work environment. It is also important to consider that, in most academic settings, a university researcher is usually given wide access across the school's technical resources: its computers, its stores of equipment and materials, its network of inter-disciplinary collaborations, and so on. The breadth of technology "exposure" may thus be potentially much wider in a college or university than in a corporate setting, where an employee's access tends to be compartmented automatically by

ordinary commercial trade secret protection measures.

These certifications are a novel and somewhat unprecedented requirement that poses a different set of legal questions for university counsel and their administrative colleagues than traditional export control laws. On its face, the new Form I-129 does not increase or change the burden of the employer to know and understand the potential applicability of the underlying U.S. export control laws as expressed in the EAR and the ITAR, but, because these certifications must be made under penalty of perjury, if the certified statements given to USCIS later turn out not to be correct, the university, the person signing that certification or both might potentially be liable to prosecution for a false statement to the U.S. Government under 18 U.S.C. Section 1001, depending on the factual circumstances that led to the certifications being made.

Penalties. The penalties in these different U.S. export control laws are varied, including substantial administrative and civil penalties, criminal prosecution and potential loss of the "privilege" of exporting goods or services. Each of the agencies may also conduct unannounced audits or inspections to check on an exporter's compliance records, and investigations launched from such audits or checks can themselves be intrusive, time-consuming and expensive. As of the date of this guide (May 2011), it remains to be seen how the USCIS and DHS would handle the penalties for any inaccurate certifications rendered on the new I-129 form.

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