Export Controls & U(niversities)

What You (and U) Need to Know!

NCURA Region IV Spring Meeting
April 14-17, 2013
Milwaukee, WI

Jennifer P. May, J.D.
Associate Director of Compliance
University of Missouri

Objectives

- Basics and Foundational Issues
- Impacts and Strategies
- Export Management & Compliance Programs

No Prerequisites!

Acknowledgements

I would like to take this opportunity to thank the following colleagues for their assistance in putting this presentation together…

Gretta Rowold, University of Oklahoma
Jen Yucel, The Ohio State University
Allen DiPalma, University of Pittsburgh

Academic Export Controls: Basics & Foundational Issues

• • •

What is an "Export"?

- Transfer of controlled technology, information, equipment, software or services to a foreign person <u>in the U.S. or abroad</u> by any means. For example:

    o actual shipment outside the US
    o visual inspection in or outside the US
    o written or oral disclosure

What is the Intent of Export Control Laws?

- Restrict exports of goods and technology that could contribute to the military potential of adversaries
- Prevent proliferation of weapons of mass destruction (nuclear, biological, chemical)
- Prevent terrorism
- Comply with U.S. trade agreements and trade sanctions against other nations

What are the Rules & Agencies?

- State Department: International Traffic in Arms Regulations (**ITAR**), which pertain to inherently military technologies
- Commerce Department: Export Administration Regulations (**EAR**), which pertain to "dual use" technologies (civilian or military use)
- Treasury Department, Office of Foreign Assets Control (**OFAC**): Prohibits certain transactions with countries subject to boycotts, trade sanctions and embargoes

What do the rules cover? (EAR and ITAR)

- Export controls cover
    - o Any item in U.S. trade (goods, technology, information)
    - o U.S. items wherever located, even internationally
    - o "Deemed exports" (access to controlled technology and source code by a foreign national in the U.S.)
    - o Providing a defense service or ITAR technical data to a foreign national in the U.S. or abroad
- Excludes
    - o Items in the public domain
    - o Artistic or non-technical publications (maps, children's books, sheet music, calendars, film)

Penalties
Against Institutions *and Individuals*

- Penalties for ITAR Violations:
  - o Criminal (Entities): Up to $1M
  - o Criminal (Individuals): Up to $1M / 10 years prison
  - o Civil Fines: Up to $500K and Forfeitures
- Penalties for EAR Violations:
  - o Criminal (Entities): Up to $1M
  - o Criminal (Individuals): Up to $250K / 10 years prison
  - o Civil Fines: $10K - $100K

Penalties
Against Institutions *and Individuals*

- Penalties for OFAC violations:
  - o Criminal (Entities): Up to $1M
  - o Criminal (Individuals): Up to $1M / 10 years prison
  - o Civil Fines: $12K - $55K per violation

- Institution also subject to administrative penalties:
  - o Termination of export privileges (EAR and ITAR; and/or
  - o Suspension and/or debarment from government contracting (EAR and ITAR)

What are Deemed Exports?

- The Export Administration Regulations (EAR) define a deemed export as the release of technology or source code subject to the EAR to a foreign national in the United States. Part 734.2(b)(2)(ii).

- Such release is "deemed" to be an export to the home country of the foreign national.

- Situations that can involve release of U.S technology or software include:

    - Tours of laboratories
    - Foreign national employees involved in certain research, development, and manufacturing activities
    - Foreign students or scholars conducting research
    - Hosting of foreign scientist

Technology Not Subject to the EAR

- Publicly available (EAR 734.7)
    - Generally accessible to the interested public
    - Periodicals, books, print, electronic other media forms
    - Libraries (university, public etc)
    - Open patents
    - Open conferences
- Fundamental Research (EAR 734.8)
    - Basic and applied research where resulting information is ordinarily published and broadly shared within scientific community
- Educational information (EAR 734.9)
    - Released by instruction in catalog courses
    - Associated teaching laboratories of academic institutions
- Patent information (EAR 734.10)
    - Public information available on patent application

Fundamental Research Exclusion

- EAR 734.8- information resulting from fundamental research is not subject to EAR licensing requirements:

  "Fundamental research is basic and applied   research in science and engineering where the   resulting information is ordinarily published and   shared broadly within the scientific community."

- This definition of fundamental research is echoed in NSDD-189, Presidential Policy Directive issued by President Reagan in 1985, and reaffirmed in 2001 by Condeleeza Rice, and 2008 by the Under Secretary of Defense.

Scope of Fundamental Research

- Confusion exists over the scope of fundamental research.

- Some research entities believe the fundamental research exclusion regulatory language provides relief from all export licensing consideration.

- Fundamental research only applies to information that "arises during or results from" the research.

- There is no "blanket exemption" for all information that is transferred in the context of such research.

- If there is preexisting export controlled technology required to conduct the research then deemed export licensing implications must be considered.

The FRE can be lost if…

- The agreement requires sponsor <u>approval</u> prior to publication
    - Sponsor "Review" vs "Approval"
    - Okay to review and comment, but not approve
- The government contract involves an ITAR project with access and dissemination of information controls
    - There is a carve-out under the EAR
- There is a transfer of defense services
    - Potential license requirements for work with foreign nationals

Impacts & Strategies

• • •

How Export Controls
Can Impact "U"

Export controls directly impact the University personnel's ability to:

- Ship items out of the U.S. (including project deliverables)
- Travel internationally with equipment/laptops
- Collaborate with foreign colleagues/institutions
- Allow the participation of foreign students or foreign researchers in research activities at the University
- Provide services (including training) to foreign persons, both here and abroad
- Conduct research freely without having to implement restrictive and inconvenient security access control

When Export Controls
might apply to Research

The following list of questions is designed to help you determine if Export Controls may apply to your research:

1. Does the research involve military, weapons, defense, chemical or biological weapons, encryption technology & software, space or other dual-use items or export restricted technologies?
2. Does the research involve collaboration with foreign colleagues (including graduate students) either here in the U.S. or abroad?
3. Does the research involve the transfer or shipment of equipment, materials or funding out of the U.S.?
4. Does any part of the research take place outside of the U.S. (e.g. field work)?

When Export Controls might apply to Research

5. Does any part of the research involve the receipt or use of Export Controlled information or items provided by a 3rd party?
6. Are there any contractual restrictions on publication or access to or dissemination of the research results?
7. Does the research involve the shipment or transfer of materials, money or any other type of collaboration with foreign nationals from a sanctioned or embargoed country (i.e., Iran, Cuba, Syria, Sudan, or North Korea)?
8. Do you have any reason to believe that the end-user or the intended end-use of the item or information violates any existing export controls?

When Export Controls might apply to Research

If you answered yes to any of the proceeding questions than the research may be subject to Export Controls or OFAC regulations and an assessment should be done to determine if the activity requires an export license or other governmental authorization before proceeding.

Strategies for Ensuring Compliance

- Work with your Sponsored Program Officer to ensure that all publication and access restrictions are negotiated appropriately to preserve the Fundamental Research Exclusion whenever possible.

- Maintaining the FRE is critical to allowing academic institutions to pursue the academic mission of free and open exchange of information and the pursuit and dissemination of knowledge.

- Beware the troublesome clauses and unnecessary flow down from restrictions placed in the prime contracts when subcontracting. **Fight back**! If what you are doing is FRE try not to accept unnecessary restrictions on fundamental research.

Problematic Clauses

In some cases, sponsors (especially DoD) will add contract restrictions that nullify the Fundamental Research Exclusion.

Examples include:

- DFARS 252.204-7000 – Disclosure of Information
- ARL 52.205-4401 – Release of Information
- ARL 52.004-4400 – Foreign Nationals Performing under contract
- AFMC 5352.227-9000 – Export Control Data Restrictions
- DFARS 252.204.7008 – Export Controlled Items

Problematic Clauses

252.204-7000 Disclosure of Information.

As prescribed in 204.404-70(a), use the following clause:

DISCLOSURE OF INFORMATION (DEC 1991)

   (a) The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless —
     (1) The Contracting Officer has given prior written approval; or
     (2) The information is otherwise in the public domain before the date of release.

   (b) Requests for approval shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Contracting Officer at least 45 days before the proposed date for release.

   (c) The Contractor agrees to include a similar requirement in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.

Strategies for Ensuring Compliance

- If you determine that an Export License is required to take or ship an item out of the US, check EAR part 740 to see if there is a valid License Exception that might be available for use (e.g., TMP or BAG)

- If no License Exception is available, work with your Export Control Officer to obtain any necessary licenses. Start early as this can take a while!

- When shipping/taking export controlled items out of the US, include the appropriate licensing information (e.g., license number, License Exception symbol or No License Required) on all export documents.

Strategies for Ensuring Compliance

- Document, document, document . . .
    - Maintain original records of all Export documents including all assessments/reviews for five (5) years.
- When you have an export controlled project you need to generate a Technology Control Plan (TCP)and follow those access or control provisions through out the life of the project and beyond (as required).

A Technology Control Plan (TCP) outlines the export controlled technology or item. The TCP details the specific access and security controls that will need to be applied when handling or using the export controlled item.

Technology Control Plan

A typical TCP will include the following elements:

- Project description – General summary of the project, implicated federal regulations and the export controlled technology/item;
- Physical security plan – outlines how item will be handled, marked, accessed, stored, returned and/or destroyed;
- Information security plan – outlines how electronic information materials will be handled, marked, accessed, stored, returned and/or destroyed;
- Personnel security plan – provides a specific listing of who is specially authorized to access the technology/item;
- Training plan – details where to get information regarding export control regulations and who to contact with questions. Training on each TCP will be provided to all project members;
- Monitoring plan – TCPs are formally monitored annually to ensure compliance with export control regulations; and a
- Certification – All individuals involved in an export restricted project will be asked to sign a certification acknowledging that they understand the restrictions and their obligations.

Strategies for Ensuring Compliance

- Mark any export controlled projects so that everyone knows that they are controlled

- Under OFAC regulations, you must ensure that your university does not provide financial assistance to any blocked or sanctioned individual or organization. This includes payments to international subks, payments to individuals (e.g. research subjects in other countries, reimbursements to NRAs, etc)

- Ensure that vendors are not sending you something that is subject to ITAR or EAR control and not telling you. Include defensive clauses in your purchasing T&Cs

Export Management and Compliance Programs

• • •

What Can an EMCP Do for You?

- Reinforce senior management commitment
- Provide management structure and organization
- Enhance accountability
- Provide compliance safeguards
- Provide written instructions for employees
- Serve as a communications vehicle
- Provide personnel with tools
- Streamline the process
- Protect employees

Elements of an EMCP

- Senior Management Commitment
- Continuous Risk Assessment
- Formal Written Program
- Ongoing Training & Awareness
- Security & Screening Measures
- Record-keeping
- Monitoring & Auditing
- Addressing Problems
- Corrective Actions

30

Developing an EMCP

It's All About You!

No "One Size Fits All" Approach…
- Use Your Risk Assessment
- Talk to Similar Peer Institutions
- Review Current Campus Policies

EMCP Element Worksheet
- Track Elements 1-9
- Appoint a Leader
- Set a Priority

Risk Assessments
Element 2 in building an ECMP

• • •

Not all risk is the same

- Part of an EC Officer's role is to:
  - o Identify risk
  - o Evaluate risk
  - o Put policies and procedures in place to minimize or mitigate risk (ECMP)
  - o Accept risk when appropriate
    - This will depend upon a university administration's risk tolerance

EAR	ITAR	FACR
Antiboycott		
Restrictive trade practice		
	Temporary imports of defense articles	*Importation of goods or services*
Prohibited end use		
Restricted parties	*Restricted parties*	*Restricted parties*
Physical exports	*Physical exports*	*Exportation of goods*
Deemed exports	*Exports of tech data*	*Exportation of technology*
Recordkeeping	*Recordkeeping*	*Recordkeeping*
	Defense services	*Exportation of services*
	Registration	
	Brokering	
		Travel (Cuba)

Recurring Risks

- Restricted parties
- Physical exports
- Deemed exports
- Recordkeeping
- Also
  - o Service issues
  - o Imports

These tend to be the focus areas for time and resources because this is where the risk is.

Other Considerations

- High profile risk
  - o Enforcement is allocating more resources
    - ITAR (especially if it involves China or Iran)
    - Knowing violations
  - o Likelihood of institutional liability exists

- Costly risk
  - o Dollar amount
  - o Bad publicity/reputational risk

- Likelihood of occurrence
  - o Cuba exchange program?
  - o Sponsored research portfolio?
  - o FRE-only university?

Complete a Risk Assessment

- Pick a topic
- Rank the risk (High, Medium, Low)
  - o Note your justification for the ranking
- Identify mitigation strategy
  - o Control
  - o Avoid
  - o Transfer
- Describe the operating controls
- Describe monitoring controls
- Re-rank the risk
- Communicate results to executive management

Common themes: Deemed Exports

- We know sponsored research can create deemed export risk. But what about. . .
- Technology Development / Technology Transfer Offices
  - o NDAs and CAs, trade secret protection of university technologies?
- Investigators
  - o side-deals, decision not to publish

Suggested Operating Controls: Deemed Exports

- Procedures for identifying projects with export controlled items/technologies and placing them under Technology Control Plan (or rejecting them if you are an FRE only university)
  - Pursuing licenses when appropriate

- Training/written guidance for PIs

- Written procedures for sponsored programs
  - Screening for and 'flag and hold' function for anything that is potentially export controlled

- Written procedures for Tech Transfer
  - Incoming NDAs and CAs, Mutual Agreements

Suggested Monitoring Controls: Deemed Exports

- Reviewing flagged proposals

- Reviewing incoming visiting scholars
  - o   Is their host a researcher subject to a TCP?

- Reviewing assigned personnel on a project with a TCP

At the end of the day. . .

- A completed risk assessment helps you understand where your risk is.
  - o Time consuming and challenging
  - o But it's worth the effort!

Communicate with your Executive Level

- There will always be risk.
- Attach the completed risk assessment.
- The top risks for that year
  - o Are they different from last year? Why?
  - o Explain the controls you have in place, and those that are currently being created/implemented

- Use your resources accordingly
  - o Do you have adequate resources?
  - o This is the perfect opportunity to explain your needs

After the risk assessment: Deemed Exports

- Asking faculty if their research involves anything on the CCL or USML may not be an efficient way of screening for EC issues.
    - o Why? Because they don't know!

- They're looking to the university to tell them when export controls are an issue.

- Capture the situations that pose the greatest risk.

After the risk assessment: Deemed Exports

Make your agreements work for you
- Sponsored Research Agreements
    - o Publication will result
    - o Full and free right to assign project personnel regardless of nationality
- Confidentiality Agreements
    - o Incoming info/technology is confidential, but it's not on the CCL/USML; OR it's not 'export controlled'
    - o Standard written communication to any researcher requesting a CA or NDA

But wait…
Final Questions!

• • •

Best of Luck!