Export Controls and Trade Sanctions in the University Context: A Presentation to the University of Arizona

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Presentation Overview

- Export controls background: the ITAR and EAR
  - ITAR
    - Key definitions and concepts
    - Fundamental Research Exemption
    - Other University-specific topics, including publication, conferences, and travel
  - EAR
    - Key definitions and concepts
    - Fundamental Research Exemption
    - Other University-specific topics, including publication, conferences, and travel
- OFAC – trade sanctions
- Case studies
Why Export Controls?

- Advance Foreign Policy Goals
- Restrict Exports of Goods and Technology That Could Contribute to the Military Potential of Adversaries
- Prevent Proliferation of Weapons of Mass Destruction
- Prevent Terrorism
- Fulfill International Obligations
Export Control Agencies and Legal Regimes

- State Department: Munitions Items (International Traffic in Arms Regulations or “ITAR”)
- Commerce Department: “Dual-Use” Items (Export Administration Regulations or “EAR”)
- Treasury Department, Office of Foreign Assets Control (“OFAC”): Trade Sanctions, Embargoes, Restrictions on Transactions and Transfers Involving Certain End-Users, Terrorism, Anti-Narcotics
Fundamental Research Exemptions

- U.S. is broadly supportive of international research collaboration and hosting international students at U.S. schools
- Fundamental Research Exemption is intended to further this policy
- Research intended to be published and not subject to proprietary or government publication restrictions is covered
- Will begin with an overview of key concepts of U.S. export controls, and then discuss the FRE in more detail
International Traffic in Arms Regulations ("ITAR")
What the ITAR Cover

- The ITAR cover (under ITAR § 120.3):
  - Any article, technical data or services specifically designed, developed, configured, adapted or modified for a military application; AND
  - That does not have predominant civil applications; AND
  - Does not have a performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications; OR
  - Any article, technical data or services specifically designed, developed, configured, adapted or modified for a military application AND has significant military or intelligence capability

- Goods and technology designed to kill people or defend against death in a military setting (e.g., firearms, armored vehicles, personal body armor, etc.) AND space-related projects (though that is in the process of being changed, it has not changed yet)

- Defense articles: are hardware described on the U.S. Munitions List (“USML”)
  - Examples: Aircraft, tanks, rockets, guns and ammunition, certain types of chemicals, personal protective equipment

- Will review circumstances under which technology is not subject to the ITAR under the FRE

- If FRE not available, almost always need a license for export or non-U.S. person access
Technical Data under the ITAR (ITAR § 120.10)

- Information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles
- Includes information in the form of blueprints, software, drawings, photographs, plans, instructions and documentation
- Excludes basic marketing information on function or purpose or general system descriptions of defense articles
- Excludes information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the “public domain”
“Public Domain” (ITAR § 120.11)

“Public domain” means information which is published and which is generally accessible or available to the public, for example:

- Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States;

- Through public release (i.e., unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency

- Through fundamental research that is ordinarily published and shared broadly by the scientific community (not classified or proprietary/trade secret industrial research)
The Concept of “Defense Services” (ITAR § 120.9)

(1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) The furnishing to foreign persons of any technical data controlled under the ITAR, whether in the United States or abroad

- NOTE: Defense services can be based solely on public domain information, and need not involve U.S.-origin defense articles
  - For example, assisting a non-U.S. person to solve a problem by pointing to public domain information may still be a defense service
  - Providing any “value-added” information, i.e. information that can add value to a non-U.S. person’s defense article, could be viewed as a defense service
  - U.S. government is sole arbiter of whether something is a defense service relevant to national security
What is an Export? (ITAR § 120.17)

- Sending or taking a defense article out of the U.S.
- Disclosing or transferring technical data to a non-U.S. person, whether in the U.S. or abroad
  - Sometimes referred to as a “deemed export”
  - Applies to technology transfers under the EAR and the provision of ITAR technical data and defense services
  - Unless the fundamental research exemption applies, a university’s transfer of controlled technology to a foreign national in the U.S. may be controlled and/or prohibited
- Performing a defense service on behalf of, or for the benefit of, a non-U.S. person, either in the U.S. or abroad
- U.S. person is: (1) a U.S. citizen, (2) U.S. permanent resident (green card holder), or (3) asylee
ITAR Issues in the University Context
Key ITAR Topics for Universities

- Determining ITAR-controlled material
- Deemed exports and non-U.S. graduate students
- Fundamental Research Exemption (“FRE”)
- Conferences and publication
- Exemption for full-time university employees who are non-U.S. persons
- Travel with laptops
Identifying ITAR-controlled Material

- A university may self-classify items as being ITAR-controlled
- Work with export compliance personnel – they are there to help you identify ITAR-controlled items
- Communicate with research sponsors to obtain their views
- Not certain? Treat item as ITAR until question resolved
- Ultimately, only U.S. government can officially determine an item is ITAR-controlled (commodity jurisdiction process)
- **ONLY** the U.S. government can determine whether an item is important to national security (including using classified information)
Deemed Exports and Non-U.S. Graduate Students

- If graduate students are non-U.S. persons, a license is required for them to access material that is ITAR-controlled unless FRE applies.

- Be particularly aware of nationals of countries subject to U.S. arms embargoes or other U.S. concerns, such as:
  - Burma
  - China
  - Sudan
  - Syria
  - Iran
  - North Korea
Fundamental Research Exemption

- Technical data and defense services are not ITAR-controlled if they qualify for the FRE.
- FRE provides powerful support for research with international scholars in the U.S. and research abroad.
- “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.
- Research for which the PI has accepted access and dissemination controls is *not* FRE.
Fundamental Research Exemption

- PIs must zealously preserve and protect the ability to use the FRE
  - Review research contracts carefully
  - Be careful of contracts with publication or disclosure restrictions; corporate and government grants may limit access by foreign nationals
  - Proprietary restrictions or restrictions on publication by corporate grants may invalidate the FRE
  - An NDA can be an access and dissemination control – any withholding under the ITAR likely removes the FRE
  - Hard to recover FRE protection once given up

- To avoid inadvertent violations, PIs that accept restrictions should make colleagues aware of the restrictions and the fact that FRE does not apply
Items That Do NOT Qualify for the FRE

- Research contracts or agreements with publication or dissemination restrictions
  - Classified research with U.S. government
  - Contracts/projects with U.S. government agencies that explicitly identify the project as being subject to ITAR controls
  - Contracts that require U.S. government review before release
  - Contracts with private research sponsors to perform research, the results of which will be proprietary and subject to publication restriction

- To publish non-FRE work, must obtain U.S. government review and authorization

- Exports of hardware or software – cannot export ITAR-controlled equipment to support an international fundamental research project
  - Exception: Category XV (space) exports to accredited institutions of higher learning in a NATO country or major-non-NATO ally and involves nationals exclusively of those countries, and information about the article obtained through fundamental research will be published (ITAR 123.16(b)(10))
Publications, Technical Data, and Public Domain Information

- Need authorization to publish ITAR-controlled data if not FRE
- Universities often used web publication of technical data to protect themselves
- Some agency personnel believe that failure to follow the proper government release process prior to publication can trigger a violation for the unauthorized dissemination of ITAR-controlled information
- Publication provides authorization for transfer of a document but not any associated defense services
- **Conferences:** Material discussed in conferences subject to dissemination controls or attendance restrictions does not qualify for the FRE
Exemption for Full-time University Employees who are Non-U.S. Persons (ITAR § 125.4(b)(10))

- Non-U.S. persons who are university FTEs may receive disclosures of unclassified technical data if:
  - Employee’s permanent abode during employment is in the U.S.
  - Employee not a national of one of the countries subject to an arms embargo or other U.S. concerns
  - University informs the FTE in writing that the technical data may not be retransferred without State Dept. authorization

- This does **NOT** apply to third parties!
  - Third parties may not disclosure ITAR-controlled technical data to university FTEs under this exemption
Other ITAR Topics

- **Travel with Laptops**
  - Taking a laptop containing ITAR-controlled information outside the U.S. is an export
  - If the material on the laptop is subject to the FRE, an ITAR license is not required (but an EAR license may be)

- **Government requests**
  - “But I did this at the request of [insert relevant government agency]”
  - Acting on behalf of a government agency is **not** a defense
Export Administration Regulations ("EAR")

- Covers dual-use items
- Regulates items designed for commercial purpose but which can have military applications (e.g., computers, pathogens, civilian aircraft)
- Covers both the goods and the technology
- Licensing regime encourages balancing competing interests
- Balance foreign availability, commercial and research objectives with national security
- If an item is not ITAR-controlled, it is likely subject to the EAR
Items Not Subject to the EAR: Fundamental Research Exemption

- Material that arises during, or result from, fundamental research

What constitutes fundamental research:

- Research conducted by scientists, engineers, or students at a U.S. university normally exempt from licensing – not subject to publication restrictions
- Prepublication review solely to insure no inadvertent release of proprietary information generally does not trigger licensing
- Exemption still available for work under U.S. government grants involving Commerce-controlled technology even if there are access and dissemination controls provided that university follows national security controls in grant proposal

NOTE: Material transferred to the university in support of fundamental research is still subject to the EAR

Some limited technologies ineligible for fundamental research exemption (e.g., advanced encryption)
Items Not Subject to the EAR:
Published Information

- Information that has been published or will be published is not subject to the EAR

- Information is “published” when it becomes generally accessible to the interested public in any form, including:
  - (1) Publication in periodicals, books, print, electronic, or any other media available to the public or to a community of persons interested in the subject matter, either free or at a price that does not exceed the cost of reproduction and distribution
  - (2) Ready availability at public or university libraries
  - (3) Patents and published patent applications available at any patent office;
  - (4) Release at an open conference, meeting, seminar, trade show, or other open gathering
EAR Licensing Requirements

- Items subject to the EAR may require a license for export, depending on: (1) the controls on the item; and (2) the licensing requirements for the destination.

- Items qualifying as FRE or published information are not subject to these requirements.

- License Exception TMP – allows exporter to export “tools of trade” to most locations without a license, such as carrying university-owned laptops, equipment, and software overseas.
  - Must remain under effective control of the traveler – in physical possession or locked in a safe; leaving in a locked hotel room is not enough.

- License Exception BAG – also allows exporter to export “tools of trade” to most locations without a license.
  - For example, carrying personally-owned laptops, equipment, and software overseas.

- Only need exceptions if needed a license for the computer or data being taken.
Sanctions

- Economic sanctions focus on the end-user or country rather than the technology

- Embargoes administered by Office of Foreign Assets Control, U.S. Department of Treasury (“OFAC”)
  - Prohibitions on trade, transactions, and payments with or to individuals or entities located in countries such as Iran, Cuba
  - Limitations on trade in certain areas of countries or with certain actors – Specially Designated Nationals (or “SDNs”)

- Countries subject to the most comprehensive sanctions are Iran, Cuba, and Syria
Enforcement

- **State Department (ITAR)**
  - Criminal violations: up to $1,000,000 per violation, up to 10 years imprisonment
  - Civil penalties: fines of up to $500,000 per violation + seizure and forfeiture of the articles involved in attempted violation + possible revocation of exporting privileges

- **Commerce Department (EAR)**
  - Criminal violations: $50,000 to $1,000,000 or up five times the value of the export, whichever is greater per violation (range depends on the applicable law), up to 20 years imprisonment
  - Civil penalties: fines up to $250,000 per violation or up to twice the value of the export + possible loss of export privileges

- **Treasury Department (OFAC)**
  - Criminal violations: up to $1,000,000 per violation, up to 10 years imprisonment
  - Civil penalties: $55,000 to $250,000 fines (depending on applicable law) per violation
  - Violation of specific sanctions laws may add additional penalties
Enforcement

- Increasing scrutiny post-9/11
- Agencies have been criticized for failure to enforce “deemed exports”
- State and Commerce are both focusing on enforcement against individuals to a greater extent
- Acting under a government grant is no defense
- Culture of Compliance is \textbf{VERY} important
  - Universities with a proven track record and commitment to compliance will be able to withstand “anomalies” in export compliance
  - But perception of ignorance, lack of commitment, or circumvention of requirements could result in treatment of minor infractions as major violations
Case Study

Roth case

- Roth was a professor at the University of Tennessee
- Worked with Iranian and Chinese graduate students on ITAR-controlled plasma actuators used in Air Force drones, sharing technical data with them
- Took a laptop with the technical data to China
- Was warned several times by university counsel and others that the technology may be ITAR-controlled, but continued to allow access by non-U.S. persons from proscribed countries
- University of Tennessee was not prosecuted – it was able to demonstrate and document that it operated an effective compliance program
- Roth was sentenced to four years in prison