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Presentation on Deemed Export Controls - Slides

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The “Deemed Export” Concept

- Defined as the transfer or disclosure (including visually or orally) of controlled “technologies” (EAR) or “technical data” (ITAR) to a foreign entity or individual anywhere including in the U.S. (15 CFR 734.2; 22 CFR 120.17).
- “Technology” is defined as specific information necessary for the “development”, “production”, or “use” of a product (EAR 772.1); “technical data” is defined as information required for design, development, production, manufacture, assembly, operation, repair, testing, main. or mod. of controlled articles (ITAR 120.10)
- Added to export regulations in 1994; intent apparently was to cover information needed for commercial development, production and use of technologies.

The Fundamental Research Exclusion (FRE)

- Applies to information resulting from basic and applied research in science and engineering conducted at an accredited institution of higher education (EAR) or higher learning (ITAR) located in the U.S. that is not restricted for proprietary reasons or specific national security reasons (EAR) or subject to specific U.S.G. access and dissemination controls (ITAR) (15 CFR 734.8(a), 22 CFR 120.11(a)(8)).
- Also note EAR 734.3(b)(3)(ii) exemption for “publicly available technology” that “arise(s) during or result(s) from fundamental research.”

University Based Research

- EAR 734.8 (b) (1) – University Based Research. Research conducted by scientists, engineers or students at a university normally will be considered fundamental research.
 - Prepublication review for proprietary information or to ensure that publication would not compromise patent rights does not change the status of the research as fundamental research.
 - University based research is not considered “fundamental research” if the university or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity.

Use of Controlled Research Equipment

- Universities have assumed that a deemed export license is not required before foreign students or researchers receive information related to use of controlled equipment for fundamental research purposes under the FRE.
- Q&A D1 in EAR Supplement 1 states that a license is not needed for a foreign graduate student to work in a university lab if the research on which the foreign student is working qualifies as fundamental research.

The IG Reports

- Commerce March '04 IG Report: “technology related to controlled equipment—regardless of how use is defined—is subject to the deemed export provisions (and the requirement to license foreign nationals having access to that equipment) *even if the research being conducted with that equipment is fundamental.*”

University Response to IG Reports

- 7/30/04 Senior VPs Letter to Commerce: IG recommendation eviscerates the FRE and would fundamentally change the open academic research environment.
- Commerce response (8/13/04): FRE applies only to technology that arises during or results from fundamental research; transfer of use technology for equipment not developed for the research project may not be covered by FRE.

University Response to IG Report

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- University Presidents Letter (9/9/04) to National Security Advisor: expressed deep concern about implications, particularly for international students.
- Condoleezza Rice 10/13/04 response: cites importance of U.S. S&T leadership to national security and expresses commitment to work with academic community to assure that export control policies do not undermine openness and strength of universities.
- However, notes “misunderstandings” of export control rules and impact of IG report.
- Establishes State/Commerce/NSC liaisons with research community on export controls and asks for report from NSC on progress of discussions by 1/15/05.
- President Vest of MIT accepts dialogue invitation 11/1.

University Response to IG Reports--continued

- Harvard President Letter (10/8/04): IG report would impose need to canvass campuses to assess if individuals have too much access to controlled technology and required extensive security measures to ensure unlicensed individuals do not have access.
- Commerce response (10/12/04): rules have not changed since “deemed export” concept was adopted 10 years ago; commitment to work closely with academic community to obtain data and analysis on impact of any proposed changes; *if current or proposed regulations impose unnecessary burdens on fundamental research willing to consider appropriate modifications.*
- Commerce to provide list of controlled use technologies to Harvard to assist in assessing impact.

Other IG Reports

- DOD March '04 IG Report : recommends that an export control compliance clause be incorporated into DOD contracts involving export controlled technology, requiring access control plans with security badging requirements, etc.
- Does not acknowledge FRE.
- Contracting officers likely to default to clause; once included, will be difficult to negotiate out.
- Effectively eliminates FRE by contract.

Other IG Reports--continued

- Interagency 4/04 IG Report: FRE and other broadly applied license exemptions should be reexamined for potential to allow transfer of sensitive U.S. technology to entities of concern.
- Includes summaries of non-public State and Homeland Security IG reports, which call for enhanced tracking systems for foreign nationals on campus.

Where are We?

- AAU Presidents Task Force Established on October 17
- Task force to take lead for university side in dialogue with Commerce (AAU/COGR staffing)
- NSTC Task Force created to bring together science agencies and regulatory agencies to jointly review U.S. policies on transfer of technologies to foreign persons

AAU Presidents Task Force Charge

- Develop a unified strategy and approach for future interactions with the federal government concerning export controls.
- Represent AAU and its members in discussions with the White House and relevant federal agencies as changes to existing export control regulations and/or their interpretation are considered.
- Agree on the best mechanisms by which to assess and convey to the appropriate government agencies the impact of export control regulations on university research and education.
- Assess and evaluate existing university practices for ensuring export control compliance and identify and disseminate best practices.

Where are We?—The Upside

- Clear government commitment to work with university community on issues identified by IGs.
- Success in involving other levels of government in Commerce report issues.
- No precipitous government action is likely that would change current rules or their interpretation.

Where are We?—The Downside

- Government has not retreated from the position that deemed export rules are unchanged and that universities may have misinterpreted them.
- We have heard repeated warnings that universities are being targeted and must tighten their practices to prevent leakage of sensitive technologies.

Observations

- Confusion exists over “use technology.”
- Exchanging “short” lists of sensitive technology may be a slippery slope.
- Is university vs. commercial research distinguished only by the claimed intent to publish?
- Focus might be on new definition of research use appropriate for university setting.

Outlook

- Need for due diligence by universities on export control compliance.
- We are likely to continue to see increasing attempts to eliminate FRE by contract.
- University community needs to coordinate its position through national associations and “dial down” level of public discourse about export control issues for dialogue to be productive.