



Document Downloaded: Tuesday September 15, 2015

**Summary of University Concerns with Commerce IG Report**

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Published Date: 07/22/2004

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### Summary of University Concerns with Commerce IG Report

The March 31, 2004 report of the Department of Commerce Inspector General (IG), *Deemed Export Controls May Not Stop the Transfer of Sensitive Technology to Foreign Nationals in the U.S. (IPE-16176)*, contains recommendations causing grave concern to research universities. Their emphasis on “deemed exports” (defined as the release of controlled technology or technical data that conveys information to a foreign entity or individual in the U.S.), is particularly troublesome. Key issues include the following:

- While the Commerce IG report contains a number of “Observations and Conclusions” of concern, the most immediate issue is the discussion of the “use” of EAR-controlled equipment by foreign nationals at universities and the fundamental research exemption. While universities have assumed that use of controlled equipment for fundamental research is exempt under the EAR fundamental research exemption, Commerce (IG and BIS) believes that “technology relating 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.”
- If Commerce acts as indicated, many fundamental research projects at universities will require determinations of the need for deemed export licenses in order for foreign students, faculty, visitors, technicians and other research staff to work on such projects. Security will have to be implemented to ensure in such cases that non-licensed foreign members of and visitors to the campus will not have access to controlled equipment. This interpretation eviscerates the EAR fundamental research exemption. It will have a chilling effect on university research and education as well as compel discriminatory treatment of foreign nationals on campus.
- Substantial investment of staff and resources will be required for universities to monitor the equipment openly available on campus that may be subject to deemed export controls. Many items routinely used in university research, e.g. GPS equipment and fermenters, are included in the controlled list. Under the Commerce/IG interpretation the conveyance of information on use and operation to a foreign national would be a deemed export. The effect of the Commerce position would be to impose an enforcement burden on universities that is not imposed on others, particularly since retailers sell controlled equipment without such constraints.
- The Commerce IG report also discusses the EAR exemption for publicly available technology that is intended for publication. The report indicates that actual publication may be more appropriate. Neither the EAR fundamental research exemption nor National Security Decision Directive 189 supports this interpretation. The report also contains an extended discussion of fundamental research in the context of NSDD-189. The report renews

a finding in a previous (March 2000) IG report that the definition of fundamental research may be vague and unclear. However, universities believe that the context of conducting research in a U.S. university whose mission is the creation and dissemination of knowledge really does matter, and that drawing a bright line between fundamental and other research at universities is inherently problematic.

- The report also discusses the EAR education exemption for information released in catalog courses and associated teaching laboratories as potentially allowing release of controlled technology to foreign nationals. However, without this exemption universities would have to exclude foreign students, faculty and others or strictly secure and control the subjects taught or entry into classrooms and teaching laboratories. This would severely limit the diversity and richness of U.S. higher education and threaten our nation's world leadership position. It should be pointed out that the interagency IG report adopts the Commerce IG observations on both the fundamental research and education exemptions.
- Finally, the IG report suggests that deemed export policy should take into account all the nationalities a foreign national has ever maintained, and require employers to obtain export licenses based on country of origin regardless of an individual's most recent citizenship or residency status. Although currently under review, this raises issues both of discriminatory treatment and added burden for universities.

**July 22, 2004**