“International Collaborations”

Impact of Export Controls on Higher Education and Scientific Institutions

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Topics

• Shipping items and getting licenses
• Traveling with laptops
• Working abroad
• Foreign jurisdiction export controls
• Screening and denied parties
• Visa issues and I-129 forms
• Cloud computing with collaborators
Shipping Items

- Shipping equipment abroad is an export!
- FRE does not cover commodity exports
- Jurisdiction
  - EAR
  - ITAR
- Classification
- License or license exceptions
Traveling with Laptops

• Controlled under the CCL (e.g., 5A992.c)
• License exceptions available
• TMP – Temporary Imports, Exports, Re-exports, and Transfers (In-Country)
• BAG - Baggage
TMP License Exception
15 CFR 740.9

• Export for temporary use abroad (including international waters)
  – Tools of trade – covers commodities and software
  – Must “remain under the effective control” of the exporter
  – Use of software under TMP must be protected against unauthorized access
    • VPN, password protection on storage, use of firewall
  – Authorized up to 12 months
BAG License Exception
15CFR740.14

• Covers individuals and family members who are traveling or moving taking commodities, software, and technology as personal baggage

• Tools, instruments, equipment for occupation, employment, vocation or hobby of traveler.

• TMP and BAG not available for Cuba, Iran, North Korea, Sudan, Syria
Information on the Laptop

• Product of fundamental research?
  – Already in the public domain

• Other information on the laptop
  – Mass market encryption
  – Higher level encryption
  – Other controlled technical data
  – Data provided under a nondisclosure agreement
Risk of intrusion/loss

- “Clean” laptop or device
- Review what is on laptop/device before traveling
- Use encrypted hard drive and encrypted communication
- Key logging risk of password/cut and paste
- WiFi, Bluetooth channels
Conducting Research Overseas

• EAR – Fundamental Research
  – Not subject to the EAR if it arises during or results from fundamental research (734.3(b)(3))
  – Research based elsewhere
    • Must have intention to publish and be free to share scientific and technical information without proprietary restriction or more than temporary delay
Conducting Research Overseas

- FRE does not apply to proprietary research used for background purposes
- “Release” of “technology” for export purposes includes:
  - Oral disclosure
  - Application of personal knowledge or technical experience acquired in the US
- License may still be required for equipment that will be used in fundamental research
Conducting Research Overseas

ITAR Fundamental Research

• “fundamental research in science and engineering at accredited institutions of higher learning in the U.S.”

• But see proposed 22 C.F.R. § 121.49(c) (80 FR 31525, June 3, 2015)
Conducting Research Overseas

Sanctions regulations on overseas research

• Export of “services” may be prohibited
• “Information and informational materials” typically exempt
• Some sanctions programs contain exemptions or General Licenses for collaboration
• See OFAC guidance regarding scope of exemptions
Foreign Jurisdiction Export Controls
Case Study: China

• Overlap between export controls and IP
• General rule - if the results relate to state security, state interest or public interest:
  – state or the local government shall be the owner of such results
  – otherwise the entity which conducts the research owns the result
  – State interest or public interest are broad categories
Export Controls in China

• Ministry of Commerce and Ministry of Science and Technology

• *Catalogue of Technologies Prohibited and Restricted from Export*

• *Catalogue of Technologies Prohibited and Restricted from Import*
Export Controls in China

• **Catalogue of Technologies Prohibited and Restricted from Export**
  – State secret related information security technology used by PRC government, political, economic or financial departments
  – Secure satellite data transmission technology involving
    • Security principles, security schemes, and secure route design technology
    • Software and hardware for encryption and decryption
Export Controls in China

- *Catalogue of Technologies Prohibited and Restricted from Import*
  - Case study: zero pollution domestic waste treatment technology
    - Import restriction on domestic waste treatment technology
    - Restriction on conventional technology (trade protection), not a restriction on advanced waste treatment technology
Export Controls in China

- **Catalogue of Dual-Use Items and Technologies**
  - MOFCOM and Gen Administration of Customs
    - Nuclear dual-use items
    - Biological agents, related equipment and technologies
    - Controlled chemicals, related equipment and technologies (weapons and precursors)
    - Missile and related items
    - Drug precursor chemicals (certain countries Myanmar, Afghanistan and Laos)
    - Certain unmanned aircraft and high performance computers
Conducting Research Overseas - Screening

• Even if working under FRE, can’t export item to an entity or individual identified as restricted end user
  – Industrial parties
  – Collaborating universities
Foreign Jurisdiction Export Controls
Case Study: EU and UK

• Controls on two levels
  – EU controls
  – Member state implementation

• Split commodity jurisdiction
  – Military
  – Non-military
EU Arms Export Controls

• EU “Common Position” (2008/944/CFSP)
  – Contemplates harmonization of controls
  – EU Common Military List
  – Includes brokering and technology controls

• Member states implement individually

• Annual reports highlight disharmony
EU Nonmilitary Controls

• EU Regulation (428/2009)
  – Common EU control rules
  – Common EU list of items
• EU Regulation is “binding and directly applicable throughout the EU”
• Member State implementation
  – Procedures
  – Enforcement
  – Penalties
UK Controls

• Regulator: Export Control Organisation
• Arms List: UK Military List
• Nonmilitary: UK Strategic Export Control Lists
  – Incorporates EU List
  – Familiar categories: Wassenaar Arrangement
• Licensing
  – OGL: Published, open; like a License Exception
  – SIEL: Individual license; must apply
  – OIEL: multiple shipments, multiple destinations
Screening: Entity List Universities

• 13 Institute
• 33 Institute
• 35 Institute
• 54th Research Institute
• Beijing Aeronautical Manufacturing Technology Research Institute
• Beijing Aerospace Automatic Control Institute
• Beijing Institute of Structure and Environmental Engineering
• Beijing Power Machinery Institute,
• Beijing University of Aeronautics and Astronautics
• Ben Gurion University
• China Aerodynamics Research and Development Center
• Chinese Academy of Engineering Physics
• Ninth Academy
• Southwest Institute of . . .
• National University of Defense Technology
• Northwest Institute of Nuclear Technology in the Science Research
• Northwestern Polytechnical University
• Shanghai Academy of Spaceflight Technology
• Sichuan University
• Sun Yat-Sen University
• University of Electronic Science and Technology of China
Entity List Tips

• Screen for all aliases
• Note License requirement
  – Some denied for all items subject to EAR
  – Some denied for all but EAR99 and XX999
  – Some denied for only certain ECCNs
• Listed entities subject to listed controls
• Subsidiaries and affiliates not controlled
  – Contrast with OFAC 50% rule
Screening

- What if not a denied party but other sensitivities?
- Example: Huawei
  - Execute a scope of work?
    - Proprietary research
    - Fundamental research
  - Use of hardware
Visa Issues and I-129 Form

- International collaboration in US with visiting scholar (H1-B, L-1, O-1A)
- Part – 6 technology released to foreign person
  - License is not required from Commerce or State to release technology to foreign person
  - License is required and petitioner will prevent access by the beneficiary until license or authorization is secured
Visa Issues and I-129 Form

• Screening of foreign person and technology
  – Sponsor: DOD, DOE, NASA
  – Research area: science, engineering
  – Restrictions on foreign participation or publication?
  – Type of work performed: basic, applied, development, testing

• ECO review and approval

• DHS visits
International Collaborations – Cloud Computing

• Storage of export controlled information in the cloud

• Email from US researcher to US colleague (traveling in China) with attachment with controlled technology

• BIS Advisory Opinions – responsible for releases of controlled technology, even unintentional violations
Cloud Computing

- Proposed rules on harmonized definitions - limited authorization
  - Information is unclassified
  - Uses “end to end” encryption
  - Secured using specified cryptographic modules
  - Not stored in country subject to US arms embargo (e.g., ITAR 126.1)

- Uninterrupted cryptographic protection between sender and intended recipient
QUESTIONS?