Whither Export Control Reform?

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A Look Back

• Goals of ECR: restructured “positive” control lists realigned to facilitate future combination; harmonized tiered licensing policies; Export Enforcement Ctr.; single IT system

• Report card?

• Much accomplished even if not all goals yet achieved
We Have Come a Long Way

• Tension Between Open University Research Environment and Deemed Export Controls
• Progress Made Over the Past Decade in USG Response to University Concerns (e.g. Young/Carter Memos; Revised DOD 7000 Clause; Satellite Transfer)
• Have Been Awaiting Revised Final Definitions including critical “fundamental research” def.
Our Starting Point—NSDD-189

“Fundamental research” means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community. Where national security requires control, the mechanism for control at universities is classification.

No restrictions may be placed on conduct or reporting of federally-funded fundamental research that has not received national security classification except as provided in statutes.
University research will not be deemed to qualify as fundamental research if ... the university or research institution accepts any restrictions on publications resulting from the research, other than limited prepublication reviews by research sponsors to prevent inadvertent divulging of the sponsor’s proprietary information or for filing of patent applications.
Protection of Fundamental Research

• Our biggest priority throughout the ECR process was protecting fundamental research
• Both EAR and ITAR recognize that technology or technical data that arises during, or results from, fundamental research is not subject to export controls
• Continue to preserve NSDD-189 in most important respect
A Note on Conduct

• Proposed EAR and ITAR state that “inputs used to conduct fundamental research, such as information, equipment or software, are not technology or technical data that arises during or results from fundamental research” (EAR 734.8 Note 1; ITAR 120.49(a) Note 1)

• Query if fully consistent with NSDD-189
Sponsor Proprietary Review

- EAR in Synch With NSDD-189 on Sponsor Proprietary Review (EAR 734.8(b))
- ITAR Never Specifically Addressed (ITAR 120.11 Ambiguous)
- Proposed ITAR 120.49(b) provides “Technical data that arises during, or results from, fundamental research is intended to be published to the extent the researchers are free to publish the technical data without any restriction or delay, including....research sponsor proprietary review.”
Implications of Sponsor Proprietary Review Restrictions

• ITAR Prepublication Sponsor Proprietary Review Provision Raises Major Problems for Ability of Institutions to Work with Companies on Defense Technologies

• Companies generally insist on such review

• Many institutions conduct only fundamental research and will not conduct research subject to ITAR restrictions

• Inconsistent with Administration’s Commercialization and Lab to Market Initiatives as well as harmonization objective of ECR
Treatment of Software

• Proposed EAR and ITAR internally inconsistent
• Distinguish technology and technical data from software with regard to fundamental research, but not elsewhere
• Why should information in computer language that results from fundamental research be treated differently that natural language information?
The Bottom Line

• Many changes helpful to universities in ECR
• Migration of controlled items to EAR and harmonization of many controls beneficial
• “Defense services” in ITAR longstanding concern which has been largely addressed
• But ITAR exclusion of sponsor proprietary review from fundamental research and exclusion of software from fundamental research outcomes remain major concerns which we hope final rules will address