
GENERAL COUNSEL NOTE

November 2008

In September of this year, University of Tennessee professor emeritus J. Reece was found guilty of 18 violations of the Arms Export Control Act in connection with a project for the U.S. Department of Defense and could face a prison sentence for the rest of his life. The violations occurred when he permitted two foreign graduate students to have access to information on the Defense Department project and carried data about the project on his computer during a trip to China. These violations are related to an area of the law commonly referred to as export controls law. While export control laws are not new, the U.S. Department of Justice has increasingly focused enforcement activity in this area in the academic arena. As the number of foreign graduate students and international collaborations among colleges and Universities continues to rise, the federal government has grown increasingly concerned about the many different ways in which equipment, technology, and technical information is shared in the academic community with foreign nationals, both at home and abroad. Export controlled information and technology can be disclosed during research collaborations, academic exchanges, international conferences, or simply by traveling overseas to meet colleagues with export controlled information on your laptop. At Vanderbilt, we have a newly created position in the Division of Sponsored Research that is tasked with export compliance. Whenever you have export control questions or issues, you should contact Marcia Williams, Assistant Director – Export Compliance in the Division of Sponsored Division.

Basic Regulations

The body of law commonly referred to as “export controls” is actually a complex set of intertwined statutes, regulations, and executive orders, and colleges and universities are coming under increasing scrutiny with respect to export controls.¹ Generally, this body of law can be categorized into two sets of regulations administered by the U.S. Departments of State and Commerce and the U.S. sanctions administered by the U.S. Treasury Department (discussed below). Essentially, these regulations and sanctions prohibit the transfer of certain items and information to specified foreign states or foreign nationals without permission from the relevant federal agency. The underlying objective of export control laws is to prevent the transfer of items or information that might be of military use to enemies of the U.S. or otherwise detrimental to the interests of the U.S. Violations of these laws can carry stiff penalties including imprisonment for up to twenty years for each violation.

In order to transfer or export items or information (including electronic or digital transmission) that are subject to export control laws to a foreign nation or foreign national lawfully, permission from the relevant U.S. agency must be obtained, usually in the form of an export license. Exports can be considered to have occurred when export controlled data or information is provided to a foreign national (including verbal or visual transmission) within the borders of the United States. This concept is referred to as a “deemed export” because the foreign national will be able to take the data or information back to his or her home country so an export is deemed to have occurred. Thus, export control issues can arise when export controlled technology is disclosed to foreign nationals

¹ U.S. Government Accountability Office Report to the Committee on the Judiciary, House of Representatives, “Export Controls – Agencies Should Assess Vulnerabilities and Improve Guidance for Protecting Export-Controlled Information at Universities,” (December 2006) available at www.gao.gov/new.items/d0770.pdf.

and staff or visiting foreign scholars.² For the most part, only U.S. citizens, businesses organized in the U.S., and lawful permanent resident aliens (Green Card holders) are considered to be U.S. citizens for purposes of export control law, and everyone else is considered to be a foreign national with some exceptions.

The primary export control regulations are the Export Administration Regulations (EAR) administered by the Bureau of Industry and Security in the Department of Commerce and the International Traffic in Arms Regulations (ITAR) administered by the Directorate of Defense Trade Controls in the U.S. State Department. The EAR regulates virtually all commercial items with a “dual-use” potential, which means that the item has both a commercial and military application. These dual-use items are designated on the Commerce Control List in the EAR. Technology and information required for the “development,” “production,” or “use” of an item on the Commerce Control List is also controlled just as the item to which it relates. In order to determine whether a license is required, the Commerce Control List must be reviewed against the Commerce Country Chart based upon the intended country for the export, as the list of prohibited items from the Commerce Control List will vary by nation.

The ITAR regulate the transfer of items that are designed, developed, configured, adapted, or modified for a military application, however, the intended use of an item after its export does not determine whether or not the item is controlled under ITAR. These items are designated as “defense articles” and are included on the U.S. Munitions List, including a catch-all category for items with substantial military applicability that have been specifically designed or modified for military purposes. The ITAR also regulate technical data related to a defense article. Technical data includes software directly related to the defense article and any other information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of the defense article. Additionally, the ITAR regulate the provision of “defense services” to foreign nationals either in the U.S. or abroad which includes the furnishing of military training, technical data, or assistance in the design, development, engineering, manufacture, modification, operation, demilitarization, destruction, processing, or use of a “defense article.” A defense service can even include assistance provided even when no controlled data or articles are disclosed if assistance with respect to a defense article is provided. For example, information that is published and in the public domain is ordinarily exempt from export controls (discussed below), unless it is provided to a foreign national in connection with the design, development, engineering, manufacture, etc., of a defense article because the assistance to the foreign national would constitute a “defense service.” In order to obtain an export license under the ITAR, the exporter must first register with the Office of Defense Trade Controls. The provision of a “defense service” typically requires approval from the Directorate in the form of a Technical Assistance Agreement.

Export Control Exemptions

There are several exemptions from the application of the EAR and the ITAR that are commonly available to the educational and research activities of colleges and universities. Be aware, however, that these exemptions typically do not apply to encryption software or items and information that are

² The arena of “deemed exports” was recently the subject of review by the Deemed Export Advisory Committee which submitted its report to the Secretary of the U.S. Department of Commerce entitled “The Deemed Export Rule in the Era of Globalization” on December 20, 2007. The report is available at <http://tac.bis.doc.gov/2007/deacreport.pdf>.

used for or pertain to weapons of mass destruction such as nuclear, chemical or biological weapons or missile technology.

Perhaps the most familiar exemption for research activities is the fundamental research exemption. Neither the EAR nor the ITAR apply to information that results from fundamental research that includes basic and applied research in science and engineering conducted at an accredited college or university located within the U.S. where the resulting information is ordinarily published and shared broadly within the scientific community. Fundamental research is distinguished from proprietary research and industrial development where the results are ordinarily restricted for proprietary or national security reasons. The fundamental research exemption is lost when the university or its researchers agree to publication restrictions from the sponsor or national security restrictions from a federal sponsor. Under the EAR, however, a sponsor may conduct a brief (90 days) pre-publication review to ensure that no patentable information or proprietary information provided by the sponsor is inadvertently disclosed in the publication. Whenever the university or its researchers receives confidential or proprietary information from a sponsor that is export-controlled in connection with a research project, that information must be segregated from the rest of the project and handled accordingly (e.g., no foreign nationals) so as to preserve the nature and scope of the main research project as a fundamental research project under the EAR and the ITAR.

Another common exemption for universities is the exemption from the EAR and the ITAR for information that is already published and in the public domain. This exemption would include information available in published books and periodicals, at libraries open to the public, in published patents available at any patent office, or from conferences generally available to the public if the conference is located within the U.S. and the attendees may take personal notes. Additionally, information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities is not subject to export control laws if it is released through instruction in catalog-listed courses and associated teaching laboratories. ITAR also provides for an additional exemption for disclosures of technical data by colleges and universities to their bona fide, full-time employees who are foreign nationals if the employee resides permanently in the U.S. throughout the term of employment and the institution informs the employee in writing that technical data may not be transmitted to any other foreign national without the prior written permission of the Office of Defense Trade Controls. The exemption for employees, however, is not available under the EAR or to students or citizens of certain prohibited countries.

There is another exemption that may be useful for travelers. Temporary “exports” are permitted for U.S. travelers to many, but not all, foreign countries for purposes of the EAR for items that are considered to be “tools of the trade” for the traveler (such as laptop computers) so long as the items are usual and reasonable in kind and quantity for use in the lawful enterprise or undertaking of the traveler. The traveler must maintain effective control over the items at all times and the items must be returned back to the U.S. within one year. Generally, effective control means personal possession.

Embargoed Nations and Restricted Parties

In addition to the EAR and ITAR, the area of export controls law also includes the U.S. sanctions administered by the Office of Foreign Assets Control (OFAC) in the U.S. Treasury Department. These sanctions primarily provide for embargos and controls against nations and persons known to

support terrorism, drug-trafficking, or other activities contrary to the interests of the U.S. The objective of the sanctions is to deny financial and material support to these nations and persons. The scope of the sanctions is much broader than the EAR or ITAR and can vary widely depending upon the nation or activity involved. In the case of embargoed nations such as Cuba, Iran, and Sudan, virtually all transactions between U.S. citizens and the governments and citizens of these nations are prohibited. Even humanitarian support to an embargoed nation can require approval of the federal government. This does not mean that foreign students from embargoed nations cannot attend a university in the U.S. Generally, transactions with citizens of Iran, Cuba, and Sudan who are lawfully present in the U.S. are permissible so long as the activities are within the scope of a validly issued visa and take place inside the U.S. However, no activities may take place outside the U.S. or outside the intended scope of the visa. For example, a student from Iran may attend a U.S. university under a valid student visa, however, no funds such as a refund from an overpayment may be sent to the student's parents or a bank account in Iran. The payments would have to be made to the student in the United States. In addition, an analysis of the student's proposed activities should be conducted under the EAR and the ITAR to determine whether any export license is required. The sanctions administered by OFAC can change from time to time and should be reviewed each time a specific matter arises.

Interactions are also prohibited between U.S. citizens and specific parties and individuals who are named on various governmental lists as being involved with terrorism, drug-trafficking, or other prohibited activities. The names of restricted parties and individuals are contained in several lists that should be checked whenever new personnel are hired or new projects are proposed. The lists include obvious names of famous terrorists but also include names that would not ordinarily raise suspicion. The U.S. Department of Commerce maintains a webpage with links to many of these lists at www.bis.doc.gov/complianceandenforcement/liststocheck.htm.

Anti-Boycott Restrictions

Another issue related to interactions with foreign colleagues involves the anti-boycott restrictions of the U.S. Government. American citizens and organizations (including overseas affiliates) are prohibited from participating in any boycott that is not sanctioned by the U.S. government. The primary boycott of concern under this restriction is the Arab League boycott of Israel. The Arab League is an organization of Middle Eastern and African nations that implemented a boycott against the state of Israel. The U.S. government has opposed the Arab League boycott and prohibits U.S. citizens from participating. Prohibited conduct includes: (i) agreeing to refuse or actually refusing to do business with or in Israel or with "blacklisted" companies, (ii) agreeing to discriminate or actually discriminating against persons based on race, religion, sex, national origin or nationality, (iii) agreeing to furnish or actually furnishing information about business relationships with or in Israel or with "blacklisted" companies, and (iv) agreeing to furnish or actually furnishing information about a person's race, religion, sex, or national origin. Any requests to comply with an unsanctioned boycott received by U.S. citizens and organizations must be reported to the federal government quarterly. Penalties for violating the anti-boycott restrictions include fines of up to \$50,000 and imprisonment. In addition, the Ribicoff Amendment to the 1976 Tax Reform Act denies certain tax benefits to U.S. organizations that participate or agree to comply with the boycott. The Tax Reform Act also requires taxpayers to report any requests received by the taxpayer to comply with an unsanctioned boycott. It also requires taxpayers to report any operations in, with, or

related to a boycotting country or its nationals. The Treasury Department maintains a list of countries that participate in unsanctioned boycotts.

Requests to comply with an unsanctioned boycott are not always obvious. Unintentional violations can occur when U.S. organizations sign documents and contracts or agree to seemingly innocuous requests during negotiations. For example, it can be a violation of U.S. antiboycott restrictions to certify that goods do not contain any materials of Israeli origin or that a shipping company is permitted to enter Arab ports. Often, these terms may appear in boilerplate language or letters of credit. The U.S. Department of Commerce website contains helpful information from the Office of Antiboycott Compliance including many examples of prohibited boycott requests and other helpful information about reporting requests to comply with an unsanctioned boycott.³

Export control laws are extremely complex and fact-specific depending upon the circumstances of each situation. In fact, Professor Roth at the University of Tennessee was well aware of export control laws. Unfortunately, he may not have understood the exact application of those laws to his specific situation. At Vanderbilt, we now have Marcia Williams in the Division of Sponsored Research, and she can assist anyone on campus with questions about export controls. Therefore, whether you are collaborating on a research project with a foreign graduate student here on campus or planning an overseas conference or even just traveling overseas with your work on your laptop, you need to contact Marcia Williams in the Division of Sponsored Research first to determine whether your plans raise any concerns under export control laws.

This Note is for informational and educational purposes only.
It states general propositions and is not intended to
and should not be viewed as legal advice from
the Office of the General Counsel.

³ Available at www.bis.doc.gov/antiboycottcompliance/oacrequirements.html.