What every American university should know about the Deemed Export Rule

Many institutions of higher education may be violating export control laws and not even know it

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Did you know that a product does not have to travel across the U.S. border to be considered an export? In fact, an export need not involve a product at all. Under the rules governing deemed exports, merely exposing a non-U.S. citizen to *information* about export-controlled technology, even on U.S. soil, may be treated as an export. Such a disclosure of information, if made without a proper license, is potentially a violation of federal law that could result in harsh penalties. It is therefore vital that universities researching, or utilizing, export-controlled technology thoroughly understand this rule and how the exemption for "fundamental research" may — or may not — apply.

The Deemed Export Rule is codified in §734.2 (b)(2)(ii) of the Export Administration Regulations (EAR), and it basically states that a release of controlled technology, software or information to a non-U.S. citizen will be considered an export to that individual's home country. This rule covers any activity on the campus, not just sponsored research. However, these provisions generally do not apply to information that is released to individuals holding U.S. citizenship, green cards or status as a "protected individual."

Under the provisions of §734.2 (a)(3), a "release" can occur from something as simple as the following:

- Providing a tour of a facility that uses controlled technology
- Allowing someone to inspect a diagram of controlled technology
- Instructing someone on how to use controlled technology
- Giving a presentation about controlled technology

Therefore, prior to making such a release, universities should first ensure that they have complied with, or are otherwise exempt from, the Deemed Export Rule.

The chief enforcer of the Deemed Export Rule is the Bureau of Industry and Security (BIS), which is part of the U.S. Department of Commerce. This agency is chiefly concerned with regulating the export of "dual-use" items. These are products that were developed for commercial purposes, but that can have military or other applications as well. The BIS has created a Commerce Control List (CCL) that tells which kinds of dual use items are subject to export controls. Each item on this list is given a number — called an Export Control Classification Number (ECCN) — which indicates the type of license that is required prior to the release of any information about that item.

If the item falls under the jurisdiction of the U.S. Department of Commerce but is not listed on the CCL, it is designated as "EAR99" and will generally not require an export license. However, some items that are not listed on the CCL may nevertheless be controlled by another agency. The Department of State, for example, controls the export of defense-related items and services covered by the International Traffic in Arms Regulations (ITAR), the Department of Energy controls the export of technology related to the production of nuclear materials, and the Office of Foreign Assets Control (OFAC), which is part of the U.S. Treasury, administers and enforces economic and trade sanctions based on U.S. foreign policy and national security.

Universities should be aware that U.S. employers petitioning for H1-B visas on behalf of foreign nationals are now required by the U.S. Citizenship and Immigration Services (USCIS) to affirm that they have reviewed the EAR as well as the International Traffic in Arms Regulations (ITAR). This requirement is found in Part 6 of Form I-129. Part 6 of Form I-529 further requests petitioners to indicate whether a license is required from either the Department of Commerce (DOC) or the Department of State (DOS) to release technology or technical data to the beneficiary of the petition. If a license is required, the petitioner must certify that the beneficiary will not access such technology or data until the license has been obtained.

These demands may appear burdensome, especially since a single research project could require a school to obtain multiple export licenses. For example, a given study might involve the collaboration of scientists from several different countries, and it might require the use of many different kinds of technology. And if universities fear being punished for inadvertently failing to obtain the proper export license, they may simply decide that the research project is not worth the risk. Just imagine if a school like Harvard, Stanford or UCLA suddenly stopped seeking a cure for cancer because they were afraid of violating export-control laws. What a tragedy that would be!

Fortunately, there is an exemption under §734.8 of the EAR that allows universities to conduct "fundamental research" without needing to comply with all of the detailed licensing requirements. This provision covers basic and applied research in science and engineering where the resulting information is *ordinarily published and shared broadly in the scientific community*. However, this is not a blanket exemption that applies across the board. For example, research involving certain types of encryption software may not be exempted (see Supplement No. 1 to §774 of the EAR), and proprietary research or industrial development, design, production, and product utilization — the results of which are ordinarily restricted for proprietary or national security reasons, as defined in §734.11(b) — may not be exempted.

It is also important to note that even if a project is exempted, a university can lose the umbrella of protection afforded by the fundamental research exception. If, for example, the school has agreed to allow a corporate sponsor the opportunity to review and withhold some or all of the information provided, the research would no longer be covered by the exemption. Prepublication review is only allowed to ensure that the publication will not compromise proprietary information provided by the company to the researchers, or to preserve patent rights. Prepublication review that allows a business entity to edit the results of the research, or

even if it simply causes a significant delay in publication, could result in the fundamental research exception being nullified by§734.8(d). Such nullification could place the school in violation of export control laws if the proper export licenses were not obtained prior to release.

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