

Whither Export Control Reform?

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ASEE Public Policy Colloquium

February 7, 2017

Export Controls: Whither Export Control Reform?

- Goals of ECR: restructured “positive” control lists realigned to facilitate future combination; harmonized tiered licensing policies; Export Enforcement Ctr.; single IT system
- Much accomplished even if not all goals yet achieved **but ITAR Reform Incomplete**
- Many ITAR Items Have Migrated to EAR; Many Terms and Policies Harmonized (e.g. ITAR Bona Fide Employee Exemption Now Also Included in EAR; EAR Definition of “Release” Now in ITAR)

Revised Definition of Terms

- Final EAR Rule issued in June 2016
- Concerns of university community addressed for the most part
- ITAR Rule also Released in June, but most revised definitions postponed
- We are still waiting (not clear if it may be subject to current regulatory freeze)
- Postponed definitions include “heavy lift” items (“Fundamental Research,” “Public Domain,” “Defense Services,” “Prepublication Review”)

Revised EAR Definitions—The Good

- Treats Software Identically to Other Technology Resulting from Fundamental Research
- Previous Educational Exemption Retained (Had Proposed ITAR-like Definition)
- Submissions to Journals or Open Conference Organizers Now Considered “Published”
- Note: “streamlined” definition of fundamental research—university groups did not object

The Not-So-Good (Short List)

- Presumption that University Research is Fundamental Research Removed (Still Stated in Deemed Export FAQs But Not Strongly)
- Encrypted Data May Not Be Intentionally Stored in Country Group D—5 or Russia (Institutions Need to be Aware When Contracting with Service Providers e.g. Cloud Computing)
- Some ITAR Items Migrated to EAR Still Contain ITAR-like Controls (i.e. “600” series)

ITAR Disaster—Prepublication 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 published 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 Issues 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 Obama's Administration's Commercialization and Lab to Market Initiatives as well as harmonization objective of ECR
- University groups strongly objected

Other ITAR Concerns

- Public Domain

- Proposed ITAR Rule states controlled data available to public without government authorization is not in public domain
- The “Snowden” Exception—10,000+ Comments

Defense Services—proposed rule based on knowledge gained through participation in development of defense articles (overly subjective?)

Need for harmonization with EAR of Educational Exclusion and treatment of software resulting from fundamental research

“Catch-all” provision in several USML categories covering all equipment developed with DOD funding (e.g. Military Electronics (Cat. XI (a)(7)) unless identified in contract as developed for both civil and military applications

ITAR “Easy Lift” Definitions

- Adopts Approach Similar to EAR to “Release”
- Inspection of Defense Articles by Foreign Persons Must Reveal Technical Data
- May Be Helpful But Probably Does Not Significantly Alter Access Issues
- Other Changes Relatively Minor

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

- NSDD 189 Provides for No Restrictions on Conduct or Reporting of Fundamental Research
- Proposed EAR and ITAR stated 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)
- Deleted from Final EAR Rule which now states only that information that is not intended to be published is not fundamental research.
- ITAR ??
- Recent NAS report calls attention to conduct issue

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 ECR changes over time would largely have addressed but status now uncertain
- Proposed ITAR exclusion of sponsor proprietary review from fundamental research remains major concern which we hope final rule will address positively
- Hopefully other items of concern will be harmonized with EAR in final ITAR definitions

Links

- Final EAR Rule on Revised Definitions:
- <https://www.federalregister.gov/articles/2016/06/03/2016-12734/revisions-to-definitions-in-the-export-administration-regulations>
- Proposed ITAR Revised Definitions:
- [https://www.federalregister.gov/articles/2015/06/03/2015-12844/international-traffic-in-arms-revisions-to-definitions-of-defense-services-technical-data-and-public.](https://www.federalregister.gov/articles/2015/06/03/2015-12844/international-traffic-in-arms-revisions-to-definitions-of-defense-services-technical-data-and-public)
- Final ITAR “Easy Lift” Definitions:
- <https://www.federalregister.gov/articles/2016/06/03/2016-12732/international-traffic-in-arms-revisions-to-definition-of-export-and-related-definitions>