

EXPORT CONTROLS

INTERNATIONAL SEMINAR

Three principal U.S. regulatory regimes govern the export of items and technology to a foreign country or a foreign national. These regulations are designed to ensure that: (1) we do not export materials or technology that the United States has determined to be sensitive; and (2) we do not deal with individuals or entities that the United States has determined pose a security threat.

1. The Regulatory Schemes

First, the export of items or technologies that are commercial or “dual-use” in nature (*i.e.*, have both civil and military applications) is subject to the Export Administration Act of 1979 (“EAA”), and its implementing regulations, the Export Administration Regulations (“EAR”), 15 C.F.R. Pt. 730 *et seq.* The EAR are administered by the Department of Commerce, Bureau of Industry and Security (“BIS”). Items subject to the jurisdiction of BIS are listed on the Commerce Control List (“CCL”) found in the EAR.¹ The link to the CCL can be found at http://www.access.gpo.gov/bis/ear/ear_data.html. The vast majority of Harvard’s activities involve items or technologies subject to the EAR.

Second, the export of defense articles – items or technology that is “inherently military” in nature as well as articles designed for intelligence and space-related purposes – is governed by the International Traffic in Arms Regulations (“ITAR”), 22 C.F.R. Pt. 120 *et seq.* The ITAR are administered and enforced by the Department of State, Directorate of Defense Trade Controls (“DDTC”). Items subject to the DDTC are listed on the U.S. Munitions List (“USML”) found in the ITAR.² If an item is on the USML, it will be regulated by the State Department, and you need not worry about securing a license from the Commerce Department, as well.

Third, the Office of Foreign Assets Control at the Department of the Treasury (“OFAC”) regulates all transactions abroad with prohibited parties, such as terrorists and countries subject to U.S. embargoes (hereinafter, “prohibited end-users”). Other agencies, including the Commerce Department, also impose restrictions on our dealing with certain individuals or entities. The individuals, entities, and embargoed countries

¹ The CCL covers such things as materials, chemicals, microorganisms, and toxins; materials processing; electronics; computers; telecommunications and information security; lasers and sensors; navigation and avionics materials; marine-related materials; and propulsion systems, certain space vehicles, and related equipment.

² The Munitions List covers such things as guns and armaments, ammunition, launch vehicles and missiles, explosives and other incendiary agents, vessels of war, tanks and military vehicles, aircraft, military training equipment, protective personnel equipment, fire control equipment, auxiliary military equipment (including cameras and cryptographic devices, software, and components), toxicological agents, spacecraft systems, nuclear weapons, and classified articles as well as technical data and services that relate to the enumerated categories.

maintained by all the relevant agencies of the government can be found at the following links:

www.ustreas.gov/offices/enforcement/ofac/sdn/index.html
<http://www.bis.doc.gov/DPL/thedeniallist.asp>
http://www.bis.doc.gov/Enforcement/UnverifiedList/unverified_parties.html
<http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf>
www.ustreas.gov/offices/enforcement/ofac/sdn/index.html
<http://www.pmdtc.org/debar059.htm>

In many cases, it will not be possible to transfer controlled goods or technology to end-users identified on these lists although, in limited cases, taking additional steps prior to shipment, including obtaining licenses, may still permit transfers to go forward.

2. What Is Restricted and What Is Exempted?

U.S. export-control laws and regulations generally impose the same restrictions on the export of items from universities that would apply to other exports from the U.S. Thus, if you are shipping a product to another country, you must make sure that the proposed shipment complies with the export-control laws, that you do not need a license to send the item, and that, if you do, you have secured one before the shipment has been sent. By the same token, if you are traveling abroad and want to bring certain items with you – materials relating to your work, encryption products, computers – again you need to make sure that you are not violating these laws by bringing items with you that are subject to licensing requirements.

In addition, under U.S. export control laws and regulations, the release or disclosure of technology to a foreign national is deemed to be an export to that foreign national's country of origin and could be subject to licensing requirements. Because foreign nationals work at and with Harvard, and because Harvard activities may involve the disclosure of such technology, we are developing policies and procedures about how to apply to the issue of "deemed exports" to foreign nationals.

Much of the controlled technology that foreign nationals have access to on campus at Harvard will not require licensing because of the exception for "fundamental research" or "educational information" under the relevant regulations. If basic and applied research that is taking place on-campus is free from restrictions on publication and involves information that is not subject to any access or dissemination controls, it generally qualifies for the "fundamental research" exemption. The information is deemed to be in the public domain, and no license is necessary for access to this information by foreign nationals. Similarly, there is an exception for educational information that is released by instruction in catalog courses and associated teaching laboratories of academic institutions.

Although the fundamental research exemption (coupled with the educational information exemption) may be broad, it generally does not authorize the transfer of goods outside of the U.S. In addition, the fundamental research exemption does not

generally apply to work abroad, even if such research is being conducted at an institution that is affiliated with Harvard. Thus, if you are engaging in an international collaboration, the sharing of materials as well as technology with your colleagues abroad may require a license.

There has been much discussion lately within in the academic community because the Inspector General of the Commerce Department has recommended that Commerce amend its regulations to require universities to seek licenses to allow foreign nationals access to certain sensitive technology relating to equipment on campus. In other words, even though the fundamental research exemption allows the exchange of information on campus – as long as the information has no access or dissemination controls on it – it does not necessarily allow access to technology relating to very sensitive equipment.

This issue – the extension of the deemed export rules and the concomitant watering down of the exemptions that normally apply to research on campus – has not thus far resulted in any changes to the current regulatory regime. President Summers, along with a number of other University presidents, has persuaded the Commerce Department to seek input from the university community before changing the rules instead of implementing interim rules and seeking comments to the revisions. We are comfortable that we are in compliance with the current regulatory regime regarding deemed exports.

3. The Penalties

In the event of a violation of U.S. export control laws, both the exporter and individual employees involved may be subject to severe administrative, civil, and criminal penalties. For example, “knowing” violations of the EAR are punishable by a fine of up to five times the value of the exports involved, or \$50,000, whichever is greater. “Willful” violations can result in penalties of up to \$1 million per violation. Exports are subject to a strict liability standard, so even negligent exports can trigger fines of \$10,000 to \$120,000 per violation. In addition to fines and imprisonment, penalties can include the denial of export privileges and debarment from contracting with the federal government. Almost all enforcement actions are public.

4. Contact Information

If you have any questions about export controls, please call Ellen Berkman in the Office of the General Counsel at (617) 496-1108 or e-mail her at ellen_berkman@harvard.edu.