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Meet Paul Fiorelli
Co-Director of the Cintas Institute for
Business Ethics at Xavier University

Understanding the compliance risks of deemed exports

By Anthony Hardenburgh

Every year I attend a number of industry conferences focused on global trade compliance. I speak with a lot of different people at these events, and they hold a range of job responsibilities, with varying degrees of trade compliance expertise. One of the questions I am frequently asked is: What trade regulations should I be concerned about that I may not be aware of today?

Regulations that govern deemed exports immediately come to mind. According to the Export Administration Regulations (EAR)¹ the release of certain sensitive technology or source code that has both military and civilian applications to a foreign national within the United States is deemed an export to the home country of the foreign national. Specifically, a deemed export occurs when US technology is made available to foreign nationals by verbal communication, visual inspection, or in practical use within or outside the United States.²

There are numerous situations when this could occur, making the Deemed Export rule one

of the most difficult to comply with. Because of the close relationship between the government and academia for important and often sensitive research, an academic environment is high risk for deemed export violations. The fact that openness and information sharing are part of academic culture naturally increases that risk. However, deemed exports can occur in many situations, so it is important to recognize when there is risk and what you can do about it.

Recognizing deemed export risk

Within the Department of Commerce, the Bureau of Industry and Security (BIS) maintains the Commerce Control List (CCL), which covers trade items (e.g., commodities, software, technology) that are subject to the agency's export control and licensing authority. Most of the technologies at risk for deemed export are on that list, in categories like nuclear materials and equipment, electronics, computers, sensors and lasers, telecommunications,



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navigation and avionics, and propulsion systems.

Work that is considered “fundamental research” is excluded from the Deemed Export rule. Fundamental research is defined as comprising basic and applied research in science and engineering, the results of which “ordinarily are published and shared broadly within the scientific community,” such as in peer reviewed publications.

Although the fundamental research exclusion is meant to provide some flexibility to academic and research facilities, compliance officers must still be aware that a deemed export can happen just about any time a foreign national and sensitive technology are in close proximity. For example, it is not a deemed export if a foreign graduate student has access to your iPod – the technology in an iPod is commercially available. But, if a foreign graduate student has access to electronics included in

the CCL, then a deemed export has occurred.

Activities that seem natural in an academic setting, such as discussing research with a colleague, presenting a paper at a conference, or traveling with a laptop, can be openings for violations of the Deemed Export rule if sensitive technology and foreign nationals are also involved. Similarly, activities that might seem natural in a corporate setting may pose a risk, depending on the nature of the work at that facility. It could be as simple as a visitor tour, conference call, or e-mail to a foreign national.

Taking appropriate action

If you are a compliance officer in a high-risk setting for deemed export violations, what can you do? As with most compliance issues, the best approach is prevention. Preventive steps involve education, communication, and adherence to a formalized export compliance program. Understanding the nature of the work at your institution is important, but it is also unlikely that you will know about (or understand) everything happening in every lab in every department. Therefore, it is critically important for you to educate researchers, staff, and students about their responsibility to recognize and prevent potential violations.

If your commercial organization has a foreign national working

in proximity to sensitive technology, you may be required to obtain an export license before information can be revealed to that employee in the normal course of business. Similarly, a university researcher conducting a project involving a foreign student may be required to obtain an export license before sharing knowledge with that student relating to equipment or technology that might also have a military application (i.e., dual use).

Under both the International Traffic in Arms Regulations (ITAR)³ and EAR, it is the exporter's responsibility to identify whether a proposed export requires a license or is eligible for a license exception. These determinations are made based on the item's EAR classification or ITAR listing, the export's destination and, sometimes, the end user. The export regulations are statutorily based and apply whether the recipient receives funding via a grant, cooperative agreement, or contract, and whether or not the EAR or ITAR are cited explicitly in the award document.

Securing a license is generally a complex undertaking, and an institution unfamiliar with the export license application process may want to seek legal assistance. If the technology is subject to export controls and requires a license, the next step is to see whether the technology is destined for one of the countries on the US

embargo or restriction of trade list. If this is the case, the policy of the United States is to deny licenses or other approvals for shipment to these countries.

Consequences of deemed export violations

Although it may be tempting to shrug off deemed export controls or downplay their importance in the day-to-day affairs of a university, research institution, or commercial organization, the reality is that compliance is not optional. There are severe administrative and criminal penalties for violations of export control regulations.

Under the 2007 International Emergency Economic Powers Enhancement Act, a penalty amounting to the greater of \$250,000 or twice the value of the transaction may be imposed for each violation for administrative cases. Administrative penalties may also include the denial of export privileges, which prohibits an exporter from participating, in any way, in any export transaction subject to EAR. For a university or research facility, this could mean the loss of federal contracts and grants.

More seriously, for criminal cases, violators may be fined up to \$1 million and/or be imprisoned for up to 20 years. For example, J. Reece Roth, a Professor Emeritus at the University of Tennessee,

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was sentenced to 48 months in prison and two years of supervised release for allowing foreign students access to export-controlled research. In this case, the University of Tennessee was not indicted, primarily because the institution had an export compliance program in place. Roth's compliance officer had repeatedly instructed him that he could not expose his foreign students to the materials associated with the project and could not take any project-related items on his laptop during a trip to China.⁴

Final thoughts

Depending on the type of technology you develop or the research your organization conducts, you may need to pay more attention to the issue of deemed exports. Especially in an academic or business environment where foreign nationals are present, deemed export is a real and critical consideration for the way daily activities are conducted.

As a compliance officer, you'll need to educate your colleagues on how to identify and avoid deemed export violations. They'll also need to understand which technologies may require export licenses and how to safeguard those technologies from entities who are not permitted to see them. A comprehensive export compliance program, with emphasis on frequent communication and consultation with researchers and

faculty, is the best way to protect your institution from the pitfalls of the Deemed Export rule. *

Notes:

- 1 The EAR database is no longer supported. The Department of Commerce encourages users to access EAR regulations (Title 15) through the Electronic Code of Federal Regulations (eCFR). Available at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=36b69ea812722a27c646d1f6fb059888&c=ecfr&tpl=/ecfrbrowse/Title15/15tab_02.tpl
- 2 The Deemed Export Advisory Committee report: The Deemed Export Rule in the Era of Globalization. December 20, 2007. Available at <http://tac.bis.doc.gov/2007/deacreport.pdf>
- 3 US Department of State, Directorate of Defense Trade Controls: Consolidated ITAR. Available at http://www.pmdtc.state.gov/regulations_laws/itar_consolidated.html
- 4 Jamie Saterfield: "Ex-University of Tennessee Professor Sentenced to Prison." *Knoxville News Sentinel*, July 2, 2009. Available at <http://www.knoxnews.com/news/2009/jul/02/prison-for-ex-ut-professor/>

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