

Space Issues: (Law, Policy, Finance, Management, Ethics...)

Proposed Changes to US “Deemed Export” Law Threaten International Collaboration - Part II

By Rachel Yates

Much has been written about the restrictive nature of the United States' export control regime, particularly the International Traffic in Arms Regulations (ITAR) under the jurisdiction of the United States Department of State (DoS). Less attention has been paid to the similar regulatory scheme administered by the United States Department of Commerce (DoC). Recently, those regulations have been brought into sharper focus, as universities, industry, and governmental agencies all decried changes being proposed by DoC. If adopted, these regulatory changes would require such entities to limit the exclusion from export control for “fundamental research,” making it more difficult for foreign scholars, researchers, and visitors to participate in post-graduate programs or to conduct research in the United States.

Given the broad reach of the proposed regulatory framework, the space community passionately criticized two aspects of the proposal for their chilling effect on science and engineering research: limiting access to use technologies and determining access based on country of birth.

Limiting Access to Use Technologies

Many universities and research laboratories historically relied on the exclusions for publication or fundamental research and did not secure deemed export licenses for their students and researchers. It was a long-held view that the student or researcher could use controlled technologies (such as sensors, high-end oscilloscopes, and carbon nanotubes) without a license, as long as the underlying research was intended for publication or the work was considered fundamental research. For example, at LASP, researchers and students study planetary, solar terrestrial, atmospheric and space plasma physics used a cluster computer system to run large simulations and models. Under the proposal, only some of the researchers would be allowed to use the computer system, even though the fundamental research conducted at LASP poses no direct concerns for US national security. Most of the parties commenting on the proposal advocated an exclusion for fundamental research that extended to the operation of controlled technologies when the “use technology” was limited to basic operational

or maintenance instruction.

Cost estimates of complying with the proposed regulations range from \$1.5 million to \$5 million, depending on the equipment used by the university and work-hours needed to inventory and classify the equipment under the EAR. Because universities acquire new equipment each year, this cost would be incurred annually. More important, this cost does not include the expense of preparing and tracking license applications which, too, would be incurred on an annual basis.

Determining Deemed Export Licenses based on Country of Birth

In addition, the BIS proposed changing its regulations to require US entities to apply for a deemed export license for employees or visitors if they were born in a country where the technology transfer is EAR-controlled, regardless of their most recent citizenship or permanent resident status. Currently, the deemed export licensing policy only recognizes the foreign national's most recent citizenship or permanent residency. With these proposed changes, a federal laboratory would need to inquire into each foreign national's place of birth (even if the person lived in that country only as a child) and apply for a deemed export license if the technologies were EAR-controlled to that country. The University of Colorado Department of Aerospace Engineering Sciences notes that, if GPS equipment were regulated in this fashion, the university would be required either to secure export licenses or to limit its enrollment for courses utilizing GPS hardware and software based on nationality – a concept anathema to the dynamic and open exchange of information that characterizes fundamental research.

The Inspector General asserted that people are likely to attach allegiance to their country of birth, even if they have since established permanent residency or citizenship in another country. No empirical support was given for this assumption, nor did the Inspector General make a persuasive link between such persons and the illicit transfer of technologies to their countries of birth.

Industry disproved the proposition that one's county of birth can be tied to national allegiance. Boeing and a legal professional organization, the American Bar Association's Section of International Law, both submitted data on how countries handle citi-

Rachel Yates has practiced law at the US law firm of Holland & Hart for 15 years. She serves as the Administrative Partner of the firm's Denver Tech Center Office and heads the firm's Space Law working group. At Holland & Hart, Ms. Yates' litigation practice is divided into three areas: oil and gas work; space law; and commercial litigation. **This is the second and final part (the introductory paragraphs are repeated from Part 1)**

zenship or residency requirements. The law organization compiled the nationality requirements of 184 countries and found that only 43 confer citizenship based on either the place of birth or descent through the nationality of one or more parent. The vast majority of countries did not confer citizenship based merely on the place of birth, signifying that the connection between national allegiance and country of birth is tenuous.

Parties commenting on the proposed regulations further explained that the international community will not meekly acquiesce in demands for personal data, such as country of birth. Boeing reported, as an example, that its Australian subsidiary had to seek an exemption from the Australian Government to ask for citizenship information required under the ITAR. The exemption took twelve years of negotiation and only succeeded because that nation's legislation did not consider citizenship as a ground of discrimination, though it does treat country of origin in that category.

Similarly, under the European Union (EU) General Data Protection Directive and the EU Directive on Privacy and Electronic Communications, entities collecting national origin data may be required to comply with regulations governing the accuracy, maintenance, and use of such data. Data cannot be transferred to another country (e.g., the US) unless that country ensures “an adequate level of protection” for the data. At this point, the EU does not consider US laws to provide the necessary protections and will not allow such data to be transmitted without certain other procedural requirements. Few academic institutions are prepared to adhere to such regulatory obligations and therefore face an untenable dilemma of running afoul of American and international laws or shunning international support for research projects subject to the EAR.

NASA's comments revealed its concern that international collaboration would be unworkable if it were required to solicit country of birth information:

[T]he fact that a Syrian-born permanent resident of the United States is treated as a U.S. person under U.S. export control regulations, but a Syrian-born citizen of Canada should be treated as a Syrian person under those same regulations may raise questions of international comity – upon which the

success of multilateral export control efforts must ultimately depend....[I]n the context of Government-to-Government cooperation, the suggested revisions would create a duty to inquire about the country of birth of a foreign government partner's employees, to which inquiries the foreign government may be unable or unwilling to respond, due to foreign privacy laws. Ultimately such a change could impair intergovernmental agency relations and missions.

The Government of Canada's Export Control Division of International Trade echoed the regulatory threat to collaborative missions:

This impediment could materially result in program delays and affect the ability of entities to deliver on commitments in certain areas or even in program loss. This impact would be felt by all Canadian-U.S. partnerships....

The Aerospace Industries Association of Canada remarked specifically on the impact to the aerospace industry, finding that the regulations would "hinder the ability of US and Canadian companies to work in partnership to advance the leading-edge technologies demanded by next generation commercial, defence and space platforms." A result would be the "designing-out" of US-origin technology from Canadian aerospace solutions and the shifting of the supply chain to other nations. Such a response would

not be unprecedented given the continued proliferation of ITAR-free systems.

An Unwieldy Export Control Program Would Result

Because of regulatory uncertainties and the stiff fines and penalties levied for violation of the law, many commentators anticipated that industry and universities would file for licenses on every foreign national, rather than risk a regulatory misstep. BIS statistics show that, before these proposed changes, the total number of deemed export license applications increased by almost 20% in 2004. The Council on Governmental Relations (an association of 160 American research universities, hospitals and institutes) calculated that license applications for its universities alone might increase by six-fold if the proposed regulations were adopted. The Massachusetts Institute of Technology figured that, under the proposed regulatory scheme, the total number of deemed export licenses for BIS to process could easily exceed 100,000. Because the deemed export licenses typically last no longer than one year, the applications would need to be resubmitted and reconsidered annually.

BIS currently requires between sixty and seventy-five days to complete its review of new applications. With the increased number of deemed export license applications, another commenter estimated the BIS's processing time would exceed two years or more. In the university context,

half the semester or more would have expired before the research could even begin. Given the transient character of graduate students and visiting researchers, this timetable would not be workable.

Counterproposal for Export Controls

Instead of imposing an arbitrary regulatory framework on the space community, the US should develop the resources needed to improve the visa system. The DoC should work with the DoS and other federal agencies to control entry into the US more effectively on the front end, rather than expecting universities and industry to police activities of people lawfully admitted to the country.

A more tailored approach to protection of valuable data would be secrecy classifications or trade secret restrictions. Because the DoC-controlled commodities lists are so broad and often outdated, they no longer provide a logical basis on which to restrict technological access.

Finally, in light of the confusion and concern created by the Inspector General's recommendations and the APNR, the regulations or guidelines should make clear that "use technology" in the context of fundamental research encompasses only information that is not generally available to the public in the US. Further, mere access to or operation of equipment on the controlled commodities lists does not constitute the export of technology required for use of that equipment. <<<

Subscribing is easy!

ISR aims to bring the international space community together by providing a platform for views and reviews of groundbreaking developments in all space-related disciplines - from space science and

www.dsairpublications.com/ISR

- Space Policy
- Law
- Ethics
- Technical