DEEMED EXPORT COMPLIANCE 101

TUESDAY, OCTOBER 23, 2012
2:00 PM - 3:00 PM EDT

Hosted By:

Webinar Presenters:

Wendy Epley
Export Compliance Officer
University of Miami

Bob Roach
Chief Compliance Officer
New York University

Anthony Hardenburgh
VP of Global Trade Content
Amber Road
The Deemed Export Rule

The “deemed export” rule is, “an export of technology or source code (except encryption source code) is ‘deemed’ to take place when it is released to a foreign national within the United States.”

What is “technology”? “Technology” is specific information necessary for the “development,” “production,” or “use” of a product.

What is a “release” of technology? Technology is “released” for export when it is available to foreign nationals for:

- Visual Inspection (such as reading technical specifications, plans, blueprints, etc.)
- When technology is exchanged orally, or
- When technology is made available by practice or application under the guidance of persons with knowledge of the technology.
Non-Compliance with export control laws and regulations is costly to both the individual as well as the university / institution.

- Criminal and/or Civil penalties, which may include imprisonment, steep monetary fines, deportation, loss of licensure, disbarment, etc.

- As a result, the violations can also result in loss of research contracts, governmental funding, and the ability to export items.
The Deemed Export Rule

It’s Fundamental Research!
In order for research to fall under the FRE, the following conditions must be met:

- No publication restrictions have been accepted as part of the associated sponsored research agreement or outside of the sponsored research agreement either verbally or in writing.
- No foreign national restrictions have been accepted as part of the associated sponsored research agreement or outside of the sponsored research agreement either verbally or in writing.
- The scope of the project constitutes either basic or applied research.
- The scope of the project does not constitute development.
- The research project must be conducted at an accredited institution of higher learning in the United States.
- Export Controls may still apply to actual materials, items or technologies involved in or resulting from the research.

Bureau of Industry and Security (BIS) –15 CFR 743.3
Compliance Within The University

University Activities Affected

- Hiring of foreign nationals (I-129 Attestation)
- Observers and Visiting Scholars on campus
- Allowing foreign students to work on research
- Traveling overseas on university business
- Research collaboration with foreign nationals
- Providing professional services – internationally or to restricted persons
- Sponsored research to an embargoed or sanctioned country
- Purchasing of high-technology equipment, chemicals, software, etc.
- Drug testing on humans (FDA, 21 CFR 312.110)
- Visits or tours of labs / research facilities by foreign nationals
- Research in International Waters
- Machine Shop fabricating a prototype
- Distance Learning
- Dissertation Committee activities
- International campuses
- Faculty-sponsored Research
Doing Your Due Diligence

- How do you ensure that you are not engaging in transactions with “restricted parties” – persons who represent restricted countries, are involved in terrorism and narcotics trafficking, are known to be importing and exporting illegally, or may not know the end use for the export?
- Is screening against 2 or 3 lists enough?
- Did you consider the deemed export licensing requirement?
- How are you keeping track of everything?
The Export Compliance Program at the University of Miami

You TARred What, Exactly? There’s 99 EARs where?

May 2009
- UM becomes aware of export control regulations.
  - No one understands what it is or how it affects the University
  - One person trying to figure it out – part time

June 2011
- Leadership and staffing changes
  - Candidate search begins

November 2011
- UM’s first Export Compliance Officer arrives!
  - B.S. – Global Business
  - Certified Export Compliance Professional – EAR & ITAR
  - 25 years across several industry leaders such as:
    - Honeywell Aerospace, Caremark Rx, Schering-Plough
    - Pharmaceuticals, Arthur Andersen LLP, Florida Department of Corrections
Poll Question
Complying with export control laws and regulations is not a “walk in the park” – it’s more like a triathlon!
UM’s Export Compliance Program

What to attack first?
- No Enterprise Resource Planning system in place
- Each campus with different processes
- Policies copied from various universities

Restricted Party Screening

**ORIGINAL SCREENING SYSTEM**
- Screening was limited to 3-users
- System only screened against 60 lists
- Details of restriction were absent
- Results were difficult to interpret
- All entries were ad-hoc; no auto-screening
- Tool was not user-friendly
- Web-based only

**AMBER ROAD SYSTEM**
- Unlimited Users
- Screen against 215 lists (and counting)
- Details of restriction available
- Results are clear and concise
- Ad-hoc and Auto-screen capability
- Very user friendly
- Web-based and ‘integrateable’
- Expandable
Since Amber Road Launched...

Restricted Party Screening is being done by:

- Export Compliance Office
- Purchasing
- HR / Faculty Affairs
- Security
- Sponsored Programs
- Billing Compliance
- College of Engineering
- Conflict of Interest
- General Counsel

- Most users conduct ad-hoc screening
- Purchasing utilizes auto-screening for vendors
- Auto-Screening to be adopted by Billing Compliance office

Future plans...to integrate!

“Resistance is futile.” – The Borg
Overview

- New York University (NYU) takes a risk-based approach to deemed export compliance
- Overview of NYU – internal and external compliance context
- Using Export On-Demand to manage deemed export compliance risks
Why Risk-Based Approach?

1. Recommended by government agencies
   a. GAO Report
   b. OFAC [http://www.treasury.gov/resource-center/sanctions/Pages/regulations.aspx](http://www.treasury.gov/resource-center/sanctions/Pages/regulations.aspx)

2. “Occasional” lack of clarity in regulations:
   a. Fundamental research exemption [EAR 734.8(a)-(d)]
   b. Application of “Deemed Exports” rule in fundamental research (in particular, transfer of “use” technology)

3. Best way to serve mission and goals of your institution and to maximize limited resources
According to BIS:

1. “Confusion exists over the scope of fundamental research. Some research entities believe fundamental research regulatory language provides relief from all export licensing consideration.”

2. “Fundamental research only applies to information that ‘arises during or results from’ the research. There is no ‘blanket exemption’ for all information that is transferred in the context of such research. If there is preexisting export controlled technology required to conduct the research then deemed export licensing implications must be considered.

Note: “Use” is defined as operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing.

But see GAO Report re: NIH deemed export licensing
Sense of the U.S. Senate
Use Technology and Fundamental Research

It is the sense of the Senate that the use of technology by an institution of higher education in the United States should not be treated as an export of such technology for purposes of section 5 of the Export Administration Act of 1979 (50 U.S.C. App. 2404) and any regulations prescribed thereunder, as currently in effect pursuant to the provisions of the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), or any other provision of law, if such technology is so used by such institution for fundamental research.
Steps in the Risk-Based Approach to Compliance:

1. Consider the Context of Your Organization
   a. Internal Context: (The nature of your organization, its mission and goals)
   b. External Context (Risk Events, Enforcement)

2. Assess risks that arise in your academic and business operations
New York University Internal Context

- Over 2 Billion in revenue
- Over $350 million in funded research
- 15 Campuses in US, South America, Europe, Africa, Middle East, Asia and Australia
- Degree granting campuses in Abu Dhabi, UAE and Shanghai, China (with research involving engineering and other applied sciences)
- 17,000 employees (including large number of foreign nationals)
- 50,000+ students (including a large and increasing number of foreign nationals)
What are the external risks?
GAO Report (February 2011)

1. **I-129 was designed to make it easier for government agencies to:**
   a. Bring deemed export enforcement actions
   b. Prove “willful intent” to violate the export control laws, thus facilitating criminal and civil prosecutions

2. **Enhanced Enforcement Activity**
   a. ICE Projects; FBI and Homeland Security on campus
   b. Export Enforcement Coordination Center
Mitigation Strategy Export On-Demand

1. Integrated into key business/academic processes
   a. to avoid “red tape” and extra work

2. Functions automated to increase efficiency and reduce human error:
   a. Vendors
   b. Students
   c. Employees (faculty, staff, foreign guests)
Build in Phases

Phase One:

a. All vendors world-wide (160,000)

b. All employees in Abu Dhabi (including faculty and staff)

c. All students and prospective students

d. Screen against all relevant US and international trade sanctions lists (including UN, EU, and other relevant country lists)

e. Customize EOD to screen for possible deemed exports and allow for documentation/audit trail (including I-129 compliance documentation)
Build in Phases

Phase Two:

a. All foreign employees in the US. (Note: screening from database protects against OEO/I-9 issues)
b. All foreign students
c. Customize and add relevant debarment lists for Medicare/Medicaid compliance at NYU Langone Medical Center, Colleges of Dentistry and Nursing
Build in Phases

Phase Three:

a. Currently planning integration of Export On-Demand into new software platform for Shanghai Campus

b. Planning to automate screening of vendor, student and employee transactions for compliance with China sanctions and export controls

c. Planning for screening for compliance with UAE export controls
Poll Question
Trade Automation vs. No Automation

- **No automation**
  - Manual process
  - Monitoring numerous agencies
  - Requires additional staffing

- **Automation**
  - Screening Engine
  - Trade Specialists
  - Less chance for errors
Global Trade Management Software

Governments

- Publish regulations
- Monitor sources and collect data
- Interpret data and apply to real world situations
- Define compliance logic
- Build logic into software

Customer end-users

Software

Operationally enabled, up-to-date

Frequency of Updates

\[ t^0 \rightarrow t + v \text{ days} \rightarrow t + w \text{ days} \rightarrow t + x \text{ days} \rightarrow t + y \text{ days} \rightarrow t + z \text{ days} \]
Things To Consider

- Do I have deemed export concerns?
- What other drivers are there?
- Do I have budget?
- Who is “the real” decision maker?
- Do I have Senior Management Buy-In?
More Questions?

Contact Amber Road:

www.AmberRoad.com

Wendy Epley
wepley@med.miami.edu

Bob Roach
robert.roach@nyu.edu

+1-201-935-8588

Solutions@AmberRoad.com

GTM Best Practices Group

/gtmbestpractice