



Conference Report

Impact of Export Controls on Higher Education and Research Institutes

United States

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Australian Government
Australian Trade Commission



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Introduction

The United States' universities and industry have long been subject to legislation and regulation governing the export of goods and services. Export control issues affect universities, clinical research institutes and their industry partners in both the export (or deemed export) of education and research.

As Australian education providers partner with US institutions and government in research and teaching, there are areas in which export controls may impact on collaboration. As Australia too develops its own export controls regime (*Defence Trade Controls Act 2012*, *Industrial Chemicals (Registration Charge-General) Act 1997* and ongoing Department of Foreign Affairs and Trade Autonomous Sanctions Regime compliance), it is timely for education and industry to review the impact of the export controls regimes in the United States.

Association of University Export Control Officers

The Association of University Export Control Officers (AUECO) is the national association for university based export control officers (and other employees of US institutions of higher education) who have responsibility for the administration of export, import and trade sanctions regulations. Their purpose is to provide a forum for exchanging information, advocate for effective regulation and policy, and collaborate on policy and procedure to advance cost effective and efficient compliance.

AUECO hosts an annual conference on the Impact of Export Controls on Higher Education and Scientific Institutions, where policy changes and the reform process is discussed and professional development opportunities provided. This report provides an overview of the discussions at the most recent annual conference of AUECO¹.

Export Controls Regime in the United States

An overview of the regulations

Export control laws are designed to restrict the export of goods and technology that could contribute to the military potential of adversaries; to prevent the proliferation of weapons of mass destruction; to prevent terrorism and to comply with the requirements of trade agreements and sanctions regimes.

US universities and research institutes have compliance obligations in areas of defence-related research both with government and industry, where international students (or foreign nationals) are involved in technology related research, and because failure to comply can result in severe penalties including prison (recent [Roth Case](#)).

Export controls can directly impact universities' ability to:

- › ship items from the US,
- › travel internationally with equipment,
- › collaborate with international colleagues,
- › allow the participation of foreign students or researchers in certain research activities, and
- › provide services (including training in person and online) to international students.

¹ Association of University Export Control Officers <http://aueco.org>

Much of the research work of US universities is protected by three general exemptions – **fundamental research, education information and public information**.

The **fundamental research** exemption applies to any basic or applied research conducted at an accredited institution of higher learning in the United States. It is the result of the first amendment right to the freedom of speech. However, if the research effort is basic or applied and not subject to publication or dissemination restrictions, then the results of the research are not subject to export control restrictions. Note that in accepting restrictions on publication or participation, researchers waive their first amendment right and consequently eligibility for the fundamental research exemption.

Education information refers to any information commonly taught at schools and universities, plus any information listed in course catalogues.

Public information refers to material available in newspapers or libraries, public websites, published patents or presented at trade shows or conferences.

The use of the term 'export' in this context can be confusing as it can occur both in the United States and abroad. That is to say, the release of technology or source code (including in conversation) with a foreign national, regardless of where the release takes place is "deemed" to be an export and as such potentially subject to Export Controls regulation. This can include the provision of training to international students (both on campus and online), and the participation of international students or researchers in non-fundamental research.

Export Control Reform Initiative

"While there is still more work to be done, taken together, these reforms will focus our resources on the threats that matter most, and help us work more effectively with our allies in the field. They'll bring transparency and coherence to a field of regulation which has long been lacking both. And by enhancing the competitiveness of our manufacturing and technology sectors, they'll help us not just increase exports and create jobs, but strengthen our national security as well."

- President Obama, Department of Commerce Annual Export Controls Update Conference, August 30, 2010

The US Government is in the process of reforming the Export Controls regime to both modernise and simplify the regime. It is important to note that this is not a de-control agenda but rather an examination of the efficacy of the regime. Presently it is very complex, with two control lists administered by different agencies under different statutory authorities having different requirements. There are three primary export licencing agencies, all of which operate on separate information technology platforms.

The reform is being achieved through rebuilding control lists, a harmonisation of terms and a final stage proposal of a single control agency, licensing agency, enforcement coordination agency and IT system. Updates on the ongoing progress of the reform process can be found at www.export.gov/ecr.

Various branches of government have responsibility for different aspect of the Export Controls Regime. The key US agencies are the Department of State, Department of Commerce and Department of the Treasury. In some instances compatibility of terminology between departments is clear, in others there is duplication and a lack of consistency in definitions and interpretation. A quick summary of their various responsibilities is included below.

International Traffic in Arms Regulations

The US Department of State includes the Directorate of Defense Trade Controls which has responsibility for the implementation of the International Traffic in Arms Regulations (ITAR).

This covers the export of defence articles and services for the purpose of US national strategic objectives, defence trade policies, arms embargoes and terrorism sanctions. There is a specific ITAR US Munitions list that includes items from firearms through space craft systems and technical data. The ITAR does not include:

- › information already in the public domain,
- › information concerning general scientific, mathematical or engineering principles commonly taught in schools or universities, or
- › basic marketing information on the general description, function or purpose of defence articles.

Export Administration Regulations

The US Bureau of Industry and Security, Department of Commerce has responsibility for implementing the Export Administrative Regulations (EAR) and has responsibility for the Commerce Control list (dual use items and technologies) and country-based licensing schemes. The Commerce Control list includes items from nuclear materials through to propulsions systems for space vehicles. Again, these restricted lists do not include published information, information conveyed in courses listed in course catalogues, or information resulting from fundamental research.

Foreign Assets Control Regulations

The US Department of the Treasury houses the Office of Foreign Assets Control (OFAC) which has responsibility for the Foreign Assets Control Regulations (FARC).

OFAC has responsibility for the sanctions regime which includes comprehensive sanctions against Cuba, Iran, Sudan, North Korea and Syria as well as list based sanctions against a further dozen or so countries. These lists fluctuate over time however, universities applying for a license for an international student to participate in research subject to export controls can expect to be refused when requesting licences for these countries. In addition to the export and sanctioned countries list, restrictions can also be extended to entities and individuals. There are commercially available software packages that can help with screening for sanctioned companies and individuals (Visual Compliance and Amber Road were the two packages recommended by the conference panellists) given the complexity of multiple and frequently changing lists.

Massive Open Online Courses

While US institutions have been subject to export controls regulation for many years, the emergence of Massive Open Online Courses (MOOCs) has created new areas of concern for regulation and compliance. It is the “open” aspect of these online courses that creates concern, wherein students can come from any country without having to meet an entrance requirement to enrol. Where the course teaches or provides information on matters subject to export controls (for example a space engineering program) there is a possibility that the course content or information raised in forum discussions is restricted for students from sanctioned countries, or for named individuals on sanctions lists. Excluding students with an ISP address from a sanctioned country may partially contribute to meeting obligations, but this can be circumvented by individuals with access to certain technology.

US institutions and MOOC platform providers are exploring avenues to ensure compliance. Options include securing a license from the relevant government agency to permit an activity that is otherwise prohibited under the legislation, or restricting enrolment of students from sanctioned countries. MOOC providers such as EdX have sought and obtained specific licenses to deliver MOOCs in Cuba, Sudan and Iran (these exclude advanced STEM courses) and more general licenses for Iran and Syria which remain valid provided the courses remain free.

However this is a slow process and there remains a grey area in what is considered advanced STEM (undergraduate and introductory science is considered to meet compliance obligations but more advanced STEM subjects may not). Further as the business model for MOOCs develops and optional fees are introduced for some aspects of courses (e.g. credentials or badges on course completion), then licenses granted under one set of circumstances (free tuition) may no longer hold validity as the model evolves.

A complicating factor for MOOCs is that the course content is generally supplied by universities, but that the platform is provided by a third party provider such as EdX or Coursera. There are questions as to which party is culpable in the event of inadvertent release of sanctioned information; whether it is the university who provided the material or the platform provider who facilitated its release.

The ambiguity about what is and is not possible within the sanctions regime can cause delays in delivering programs as both universities and MOOC platform hosts seek to ensure compliance to prevent inadvertent breaches.

The attention given to MOOCs is ensuring that universities are also reviewing the export controls implications of their more traditional online offerings.

Future Steps

As Australian universities and research institutions continue to engage with both the US and Australian national security and export regimes, maintaining contact with US counterparts (including AUECO leadership) will enable Australia to learn from US experience and leverage policy and implementation insights. The rise of on-line delivery and particularly MOOCs may raise compliance questions during the pilot phase of the Australian Defence Trade Controls legislative regime. This is a particular area in which Australia can learn from the experience of US colleagues and legislators.

Universities may consider establishing an organisation similar to AUECO to foster excellence and shared experience in export controls and research compliance issues. This may be an option for the Australasian Research Management Society (ARMS) to consider as a special interest group of their membership as an alternative to a standalone organisation.

Austrade Key Contact

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Appendix 1- Sources of Information

Export Control Reform Initiative: <http://export.gov/ecr/>

Association of University Export Control Officers: <http://aueco.org/>

Second Annual Impact of Export Controls on Higher Education and Scientific Institutions Conference, 5–7 May 2014, Georgia Tech, Atlanta, Georgia.

Complying with U.S. Export Control Regulations: a University Perspective, Elizabeth Pelos, Associate Vice Provost/ Associate Vice President, Research Services, University of Pennsylvania, 6 August 2013

<http://www.universitiesaustralia.edu.au/ArticleDocuments/343/ec%20for%20australia%20pilots%20August%202013.pptx.aspx>

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Why You Need To Know About Foreign Bribery and its Implications:

Bribing, attempting to bribe or facilitating bribery of a foreign public official is a serious crime and amendment to the Australian Criminal Code in 1999 makes acts of this nature overseas punishable in Australia.

Companies can also be held criminally responsible for the acts of their agents.

The extraterritorial nature of these penalties reflects the serious criminal nature of bribery and the detrimental effects it has on Australian trade and reputation, and international governance.

It is no defence that such acts may be common practice in some countries. You must be aware of the types of activities that are legal and illegal when interacting with foreign officials. The offence applies regardless of the outcome or result of the bribe or the alleged necessity of the payment: companies and individuals may be held liable regardless of whether or not the bribe obtains the advantages sought and whether or not the bribe was considered necessary to do business.

Refer to Attorney-General's Department Foreign Bribery website: <http://www.ag.gov.au/foreignbribery>