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**June 2016 COGR Meeting Report and Summary**

**Excerpt from COGR Report**

**Revised Export Control Definitions Issued**

On June 3 the Commerce Department/Bureau of Industry and Security (BIS) issued a final rule containing revised definitions for the Export Administration Regulations (EAR). On the same day the Department of State /Directorate of Defense Trade Controls (DDTC) issued an interim final rule containing certain revised definitions for the International Traffic in Arms Regulations (ITAR).

An addendum to the COGR May 2016 Update indicated that at the Association of University Export Control Officers (AUECO) conference earlier in May, State/DDTC indicated that the revised final ITAR definitions would be issued in two stages. The first would be what was characterized as “easy lift” items. Those definitions were to be issued shortly. The “heavy lift” definitions will not be issued until sometime after the first of the year. The revised fundamental research definition is considered a “heavy lift.” There would be another opportunity to comment on both sets of rules.

The June 3 ITAR interim rule is consistent with this understanding. The ITAR interim rule does not address any of the items that were the focus of our concerns with the proposed ITAR rule issued last year (Prepublication Review, Fundamental Research, Defense Services, Public Domain).

These are “heavy lift” items for which the revised definitions have been postponed. It adds a potentially helpful definition of “release” for deemed export purposes similar to the EAR. The rule clarifies that for a “release” to occur, technical data must be revealed to a foreign person (120.50). Access to inspect a controlled defense article that does not reveal technical data is not a “release” for these purposes.

As discussed in a message to the COGR listserv on June 3, the final EAR rule responds positively to our two biggest concerns with the revised EAR definitions that were proposed last June. Software is treated the same as other technology resulting from fundamental research (734.8(a)). The original wording of the educational exemption from the EAR also is retained (734.3(b)). The final EAR rule also contains a helpful addition to information considered as Published. It now includes submissions to journal editors or reviewers and to open conference organizers (734.7(a)(5)). The rule also contains clarifications to the section on the status of technology or software subject to USG access or dissemination controls, as we had suggested.

Unfortunately the EAR rule does not retain the presumption that university research is fundamental research. Commerce/BIS states that the presumption continues to exist, but will be stated in an FAQ on its website rather than stated in the rule. (Note: the presumption is included in the “Deemed Export FAQs,” but is not strongly stated). The EAR rule also contains a revised definition of fundamental research somewhat shortened from the previous (NSDD-189) definition (734.8(c)). We did not object to the revised definition when it was proposed last year.

There are extensive changes in the sections dealing with export of encryption source code and software (734.17) and cloud computing (734.18). While we and others had questioned the requirements to follow NIST standards (FIPS 140-2), the final rule adopts them. Sending controlled technology or software using secured end-to-end encryption or FIPS 140-2 standards is not considered an export (734.18(a) (5)). However, while we suggested that vendor notification be sufficient for cloud storage compliance requirements, the final rule did not adopt this suggestion. It states that encrypted data may not be intentionally stored in Country Group D: 5 countries and Russia without authorization. These may be issues for institutions to consider when contracting with cloud service providers.

The EAR rule is a final rule, although public comments are welcome on a continuing basis. The ITAR rule has a 30-day comment period. We have not identified any concerns with the rule and do not plan to submit comments. However, the ITAR rule contains an interesting justification for the different treatment of deemed exports (120.19(b)) from the EAR. The ITAR continues to treat deemed exports to a foreign person as an export to all countries in which the foreign person

has held citizenship or permanent residency (rather than the most recent country of citizenship or permanent residency as in the EAR). It is justified as an example of “higher walls around fewer items” which was the purpose of export control reform, now that most items have been moved to the Commerce list. We note that a similar justification could be used for treatment of any item differently from the EAR, such as the definition of “fundamental research.” We hope this approach is not adopted for the “heavy lift” items that will be the subject of the future ITAR revised definitions.

**Possible New OFAC General License for Scientists to Attend Conferences in Iran**

The Iranian Transaction and Sanctions Regulations (ITSR, 31 CFR pt. 560) permit individual travel to Iran; however, many activities undertaken while in Iran must be licensed by the U.S. Treasury Office of Foreign Assets Control (OFAC), which is responsible for administering and enforcing the ITSR. While existing general licenses authorize certain narrow educational activities and transactions directly related to publishing, OFAC views the attendance of a U.S. institution faculty member at a conference in Iran (even if not presenting) as an activity requiring a specific license granted on a case-by-case basis. Such licenses typically take several months to obtain. That delay can inject an element of significant uncertainty into plans to attend academic events in Iran.

After hearing concerns from the university community about this interpretation of the ITSR, at the recent AUECO conference a senior OFAC official indicated a willingness to consider arguments for issuing or amending a general license to authorize attendance at conferences in Iran. COGR will be participating in developing a whitepaper on this topic for possible presentation to OFAC.