

Export Controls @ UF



Export Control Reform Has Finally Arrived— Now What?

Since the announcement of the Export Control Reform initiative in 2009 there has been much talk as well as releases of proposed rules but not much real action.

On April 16, 2013 this all changed with the release of the first set of final rules moving certain defense articles from the United States Munitions List (USML) under the ITAR to the Commerce Control List (CCL) under the EAR. Specifically items in USML Categories VIII (Aircraft), XVII (Classified Articles), XIX (Gas Turbine Engines) and XX (Articles Not otherwise Enumerated). Additionally the reciprocal Final Rule under the EAR as well as the export control reform initial transition procedures were released.

Shortly following the release of the April 16th rule, a second set of final rules was issued on July 8th which addressed additional transition procedures and moved defense articles in USML Categories VI (Surface Vessels of War and Special Naval Equipment), VII (Ground Vehicles), XIII (Materials and Miscellaneous Articles), and XX (Submersible Vehicles) from the ITAR to the EAR.

The US Government has announced that additional final rules will be released throughout the 2013 calendar year with most if not all of the category revisions being completed by the end of 2013.

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A Message from the UF Empowered Official



*Irene M. Cooke, D.V.M Ph. D.
Assistant Vice President
and Director Division of
Research Compliance*

Hi everyone and greetings from the new Empowered Official. I formally accepted this position from Dr. Walsh in March 2013. He leaves big shoes to fill but I look forward to meeting and exceeding the expectations for this position.

As you may be aware, the regulatory requirements for the export controls are complex and I have appreciated Brandi Boniface's help, guidance and technical expertise as I get familiar with the campus' program needs.

In this issue of Export Controls @ UF, you will find information on the Export Control Reform Initiative. Export reform which has been under discussion for almost 4 years has finally come to fruition with the first final rule issued on April 16th.

As always, please feel free to contact Brandi Boniface or the Division of Research Compliance at 352 294-1632 with any questions you may have regarding this newsletter or export controls in general.

Sincerely,
Irene

Research Compliance

Why is export compliance important?

Export control violations can result in penalties and fines which may apply to an individual, the institution or both.

- Administrative Penalties include loss of export privileges or suspension and debarment from government contracting;
- Monetary fines can be up to \$1 million per violation; and,
- Jail time can be up to 20 years per violation.

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Export Control Reform Has Finally Arrived...(cont'd)

The 2013/2014 Schedule of UF EC Working Group Meetings:

- **October 10, 2013**
- **January 9, 2014**
- **April 10, 2014**
- **July 10, 2014**
- **October 9, 2014**

All UF EC Working Group meetings will take place from 10–11 in 264 Grinter Hall.

Although the Export Control Reform final rules were released on April 16th and July 8th, the US Government has provided the exporting community with a 180 day transition period and as such the rules will not be implemented until October 15, 2013 and January 6, 2014 respectively. This gives the University of Florida and other parties subject to the regulations 180 days to evaluate existing portfolio, processes, and procedures to determine what changes need to be made in order to be in compliance with the new regulations.

Although the exporting community has been provided with a 180 day transition period for each final rule there has been no grandfathering of existing efforts or determinations. Each party subject to the export control regulations needs to use the 180 transition period to determine if any existing projects, products or other efforts have moved from the

ITAR to the EAR or potentially from the EAR to the ITAR. UF will be conducting this analysis over the next few months and may need to contact faculty concerning projects that have already been reviewed.

As indicated above the export control reform initiative has led to some substantial changes to both the ITAR and the EAR regulations including, but not limited to:

1. Changes to section 120.3 of the ITAR;
2. The new EAR 600 series; and,
3. DoD funded developmental items under the ITAR.

You will find a brief discussion on each of these changes within the pages of this edition of Export Controls @ UF. Future editions of the UF export control newsletter will address additional regulatory changes resulting from export control reform.

Changes to Section 120.3 of the ITAR under Export Control Reform: Design Intent vs. Performance Parameters and Function

Section 120.3 of the ITAR provides the US Government policy on designating or determining what constitutes a defense article or defense service on the U.S. Munitions List (USML).

Prior to the implementation of export control reform the USML under the ITAR was for the most part based on design intent and not based on the function and/or performance parameters of the defense article or service itself.

One of the tenets of export control reform is to make the USML a positive list based on function and performance and not design intent. In order to accomplish this Section 120.3 (a) of the ITAR was revised **from:**

- (a) Is specifically designed, developed,

configured, adapted, or modified for a military application, and

- (i) Does not have predominant civil applications, and
- (ii) Does not have performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications.

to read as follows:

- (1) Meets the criteria of a defense article or defense service on the U.S. Munitions List; or
- (2) Provides the equivalent performance capabilities of a defense article on the U.S. Munitions List.

The main implication of this change is that one can no longer rely on the military intent behind the research and development of an item, infor-

mation or activity. One now has to vet the USML to see if the item, information or activity currently under research and/or development is positively identified on the USML.

Prior to export reform a router developed under a DoD contract would likely be ITAR controlled whereas a router developed under an NSF grant would be controlled under the EAR irrespective of the specific function or performance parameters of the routers.

With the changes to section 120.3 as well as other sections of the ITAR this is no longer the case and an NSF developed item meeting the functional and performance parameters of a USML listed defense article would now itself be a defense article.

Please join us in welcoming Karen Priola to the Export Controls @ UF Family. Karen joined the Division of Research Compliance in May 2013 as a Program Assistant supporting both Export Controls and Conflict of Interest.

What I need to Know About the EAR 600 Series?

What is the CCL 600 Series

The 600 series is a new Export Control Classification Number (ECCN) series added to the Commerce Control List to accommodate **most** items moving from the ITAR to the EAR. The main exception being Category XV Spacecraft Systems and Related Articles. Category XV defense articles moving to the EAR will be placed in a different newly created 500 series.

The move from the ITAR to the EAR for the new 600 series items will provide the exporting community with some relief. However it will not be the panacea originally hoped for as there are some 600 series specific changes to the EAR that could be problematic. Note: Based on the Category XV proposed rule these issues are also expected to also apply to the new 500 series.

'Use' Definition

The first issue associated with the new 600 series is the implementation of the term 'Use'. The EAR defines the term 'Use' as "Operation, installation (including on-site installation), maintenance (checking), repair, overhaul **and** refurbishing." The word and is very important in this definition as the US Department of Commerce interprets this to mean that all elements of 'Use' must be present before an activity is subject to licensing under the EAR.

However, under the 600 series the information controlled does not list 'Use', but instead lists all of the elements of 'Use' such that anyone element alone becomes licensable. Based upon the 600 series implementation of 'Use' providing information or technology on how to operate a

600 series item becomes a licensable activity if any portion of the information or technology is not publicly available.

The implication for UF is that we will need to start identifying EAR controlled items under the 600 series and verify with the manufacturer, vendor and/or PI that all of the information pertaining to anyone of the 6 elements of 'Use' are publicly available. This may require UF to start tracking, on a case by case basis, some of the 600 series items in the same manner we currently track ITAR controlled items.

If any of the information is not publicly available, it will need to be kept secure whether in hardcopy or electronic format. Further we will need to ascertain if a license is needed prior to sharing the information with a non US person whether a student, staff, faculty or visitor.

Proscribed Countries

Which brings us to another problematic issue associated with the 600 series...proscribed countries. The list of 26 proscribed countries found on the ITAR have been incorporated into the EAR under the new Country Group D:5 (D:5). D:5 countries (i.e., those subject to a US arms embargo) are not eligible for many of the exceptions found on the EAR and limits the applicability of other exceptions as they pertain to 600 series items. Further a subset of the D:5 countries (Cuba, Iran, Syria, Sudan, North Korea and **China**) are not eligible for licenses or exceptions under the EAR as it pertains to 600 series items. For persons from all other D:5 countries a license may be possible as each decision to issue a license would be on a case by case basis.

Export Control Contacts @ UF

General Information, Restricted Party Screening and Training:

Brandi Boniface, MIBS, CRA
Phone: 352-392-2369
E-mail: boniface@ufl.edu

Or

Mike Scian, MBA, JD
Phone: 352-846-3533
E-mail: scianm@ufl.edu

Export of Equipment or Materials:

Biologics, Chemical, etc.

Karen Gillis (EHS)
Phone: 352-392-1591
E-mail: kgillis@ufl.edu

University Assets

Sherry Adams
Phone: 352-392-2556
E-mail: sadams@ufl.edu

Other Items

Brandi Boniface, MIBS, CRA
Phone: 352-392-2369
E-mail: boniface@ufl.edu

Travel to Embargoed or Sanctioned Countries:

David Sammons, Ph.D.
UF International Center
Phone: 352-273-1356
E-mail: sammons@ufl.edu

General Counsel's Office

Amy Hass
Associate Vice President and
Deputy General Counsel
Phone: 352-392-1358
E-mail: amhass@ufl.edu

As a public institution of higher education, UF employs foreign nationals, collaborates with international partners on research, education and services, and hosts foreign visitors in connection with international exchange programs, international students, and other business and collaboration agreements. It is the intent of UF to employ foreign nationals, collaborate with foreign nationals and host international visitors, both long and short term, in the most welcoming manner possible while also assuring compliance with U.S. laws and regulations governing the export of certain items and technical data.

Research Compliance

Developmental Items Funded by DoD

The export control reform initiative is transitioning the USML from a list based on design intent to one based on function and performance. There are however exceptions to this transition. One of the most notable being developmental items funded by DoD.

Many (though not all) USML categories released as final rules under the export control reform initiative include as a subcategory developmental items funded by DoD. Per this subcategory, developmental items that are funded by DoD under a contract, grant, or any other type of funding agreement are ITAR controlled.

Before a march on Washington is initiated I would like to point out that are two avenues of relief:

1. Have an official Commodity Jurisdiction

(CJ) from State which places the developmental item on the EAR; or,

2. Have the DoD agreements officer specify in the agreement that the results have both a civil and a military application.

Note: the regulations provide a grace period of 1 year to modify any existing agreement or to ensure that any new agreements have the appropriate language.

Word of Caution: Per the regulations if an item is already specifically listed on the USML neither option above applies. For example, if DoD issued a grant for development of swarming technology it would not be sufficient for the agreement officer to specify in the agreement that there are both military and civil applications as swarming technology is listed in USML Category VIII.



460 Grinter Hall
P.O. Box 115500
University of Florida
Gainesville, FL 32611-5500

Phone: 352-392-3526
Fax: 352-846-1839
E-mail: boniface@ufl.edu

Wassenaar Arrangement, Australia Group and Missile Control Technology Regime

Wassenaar Arrangement

The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies' (WA) is a multilateral export control regime that addresses the transfer of conventional weapons and dual use goods and technologies. The United States is one of 41 countries that participate in the WA. For more information see (www.wassenaar.org/introduction/index.html).

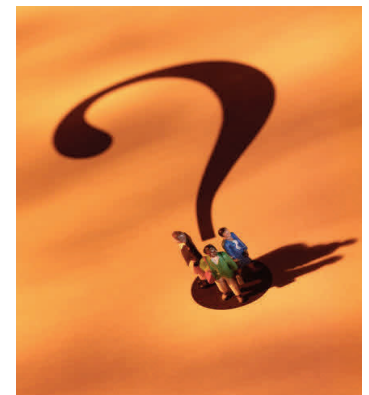
Australia Group

The purpose of the Australia Group (AG) is to develop non-binding export control measures that member countries can implement to safeguard against contributing to

the proliferation and development of chemical and/or biological weapons. AG membership is comprised of the United States and 40 other member countries. (www.australiagroup.net/en/index.html).

Missile Technology Control Regime

The Missile Technology Control Regime (MTCR) is a multilateral organization comprised of 34 countries, including the United States, whose purpose is to curb the proliferation of missiles and other unmanned systems with potential use in weapons of mass destruction. The MTCR decisions are non-binding on its member nations. For more information see (www.mtc.info/english/index.html).



QUESTIONS

Call us at 352-392-3526