Deemed Export Advisory Committee Report

Federal Demonstration Partnership
January 10, 2008

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Background

• Deemed Export Advisory Committee (DEAC) established by Commerce as FACA Committee in May 2006 to review deemed export licensing policy, prompted by concerns raised in responses to Commerce ANPR
• Chaired by Norm Augustine; half of the membership were academics
• DEAC held six public regional meetings Oct. ’06-Sept. ’07, half of them hosted by universities
• Total of 45 formal presentations were made, followed by facility tours and closed discussions
DEAC Report

• Report dated 12/20/07 submitted to Secretary of Commerce
• Report entitled *The Deemed Export Rule in the Era of Globalization*
• Contains 7 numbered findings; two recommendations; some additional observations and an implementing construct
Selected Report Quotations

• “It is a reality that the United States no longer holds the dominant position in science and technology that it recently enjoyed.”
• “Leadership in science and technology today is a globally shared and highly interdependent perishable asset.”
• “In this new world order, a nation that attempts to build a “wall” around its scientific and technologic communities simply denies itself the opportunity to fully benefit from the vast body of knowledge being accumulated elsewhere—and thereby virtually assures itself of an inferior competitive position in the knowledge world.”
Basic Premise

• “Those few highly sensitive technologies having significant military applications can and should be protected with high walls—rather than diffusing our efforts in the impracticable attempt to build high walls around large bodies of knowledge.”

• Report calls for an entirely new approach to Deemed Exports (and perhaps exports in general)
Fundamental Finding

• Report recognizes that at the time the U.S. deemed export regulations were established, the related commercial and national security environments were vastly different from today.

• Most notable changes are evolving non-nation state security threats; decline in U.S. scientific preeminence; global and multi-dimensional creation of scientific knowledge; and vital dependence of U.S. scientific enterprise on foreign-born individuals.
Conclusions

• Consequence of establishing barriers to transfer of knowledge to foreign nationals is to make the U.S. a less desirable partner in the global S&T community and assign U.S. to the fringes of the world’s creative enterprise.

• Erection of high walls around large segments of the nation’s S&E knowledge base not only impracticable but counterproductive both to U.S. commercial prowess and ability to defend itself.
Specific Findings

1. Current deemed export regulations increasingly irrelevant to prevailing global realities
2. Current Commerce Control List (CCL) too all-encompassing
3. Existing regs excessively complex and vague (e.g. products of vs. knowledge used in conducting fundamental research)
4. Many regulated organizations either unaware of deemed export rules or have found ways around them
Specific Findings--continued

5. Many “escapements” to the existing regulatory regime (e.g. foreign-born U.S. citizens or green card holders)

6. Logical inconsistencies in regulations (e.g. what if two individuals collude to get around “and/or” distinction?)

7. Superficial criteria for assessing threats posed by individuals (i.e. current citizenship without reference to full background)
Recommendations

1. Replace current Deemed Export licensing process with a simplified new process that will *both* enhance national/homeland security *and* strengthen U.S. economic competitiveness.

2. Extend Commerce/BIS outreach program to address highly uneven distribution of deemed export license applications.
Implementation Requires:

- Higher fences around fewer items
- Establishing a category of “Trusted Entities” involving both academia and industry
- Expanding national affiliation determinations of potential licensees
- Annual “sunset” review of CCL by outside experts
Implementation should moot:

- distinction between research products and knowledge of equipment used to conduct the research
- “ordinarily published” definition of fundamental research (new criteria?)
- “and/or” approach to equipment use evaluations
Additional Observations

• More substantive involvement of intelligence community in Deemed Export license determination process would strengthen the process

• Need for harmonizing control lists both among U.S. agencies and allies

• Need for interactive, web-based self-teaching programs
Implementing Deemed Export Decision Construct--steps

1. Assess probable loyalty of individual
2. Determine whether information is classified
3. Determine whether military application of the knowledge is substantive and truly significant ("high walls around small fields")
4. Determine whether knowledge is readily available from non-U.S. sources
5. Determine whether activity is fundamental research (possible definitional change)
6. Determine if organization is a Trusted Entity
7. Determine risk/benefits of any remaining adverse consequences to releasing the information
Rejected Alternatives

- Rely solely on security classification system for determining if technology is releasable
  - does not take into account commercial competitiveness
- Rely solely on visa process for assessing individual trustworthiness
  - visa personnel are overburdened and not equipped to make judgments on commercial and security implications of cutting-edge technologies
AAU/COGR Recommendations to DEAC

• AAU/COGR 9/10/07 Statement to DEAC
  1. Clarify that: classification is the appropriate means to protect research and that FRE extends to both conduct and results of research
  2. CCL should be revised and narrowed with sunset provisions (with assistance of university experts) and there should be a shorter list for deemed than for physical exports
  3. Clarify definition of technologies that are “publicly available” (to include information readily available overseas) and “proprietary” (exclude from control if involves only private and not security interests)
  4. Deemed export license process should be streamlined and existing export rules harmonized
Many Positives

• Clearly states that the current system is “broken” and needs to be fixed
• Recommends simplification and streamlining of the licensing process
• High fences around a narrow set of items
• Annual review and sunset provision
• No distinction between conduct of research and research results
• Rejection of major IG recommendations including “and/or” matter relating to use technology
Issues

• Individual loyalty assessments

Step 1 of recommended deemed export decision construct calls for overall assessment of the probably loyalty of the individual, “including consideration of the time and character of past and present foreign involvements.”

-loyalty tests raise significant policy questions and challenges for universities

-how could/would Commerce actually implement such a loyalty test?

-would this actually be applied to universities?
Issues--continued

• **New Fundamental Research Definition**

  *Report proposes more conventional definition of fundamental research e.g. “curiosity-driven research seeking new knowledge” or “not precluded from publication” (by contract or regulation)*

  – may raise more questions than answers
  – “not precluded” could encourage proliferation of additional restrictions and troublesome clauses
Issues--continued

• Security Classification

*Report rejects dependence on security classification because of a) concerns about potential for over classification, and b) because it does not take into account commercial competitiveness.*

-- Increased classification vs. increased publication restrictions (neither is a good outcome)

-- Purpose of export controls is supposed to be national security and “dual use” items -- not economic competitiveness
Issues-continued

• Visa system

Report rejects use of visa system as sole control, partly on grounds of further burdening the system

– If the visa system is broken we should fix it, rather than putting burden of individual loyalty determinations on universities
– our consistent position has been that once admitted to the U.S. for research/education purposes, individuals should be able to freely participate
AAU/COGR Views

• Report has many positive aspects for universities and reflects many of the AAU/COGR recommendations
• Does not appear that recommended decision construct is intended to be sequential (report specifically leaves implementation details to Commerce)
• Some of our issues with report could go away depending on Commerce response
• We need to encourage Commerce to move forward with the DEAC recommendations we like and convey our concerns regarding remaining issues
• Be careful not to “throw the baby out with the bath water”
Questions and Challenges

• Commerce wants help of university community in streamlining and annual sunset reviews of CCL—how can we effectively respond?
• Is proposed “Trusted Entity” concept appropriate for universities? Do we think it will be helpful?
• We continue to believe primary reliance should be placed on visa system and security classification for controls, but may not be able to win that battle
• Successful implementation of any of the positive recommendations in the report
Questions/Comments?

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