Summary of University Concerns with Interagency IG Report

The April 16, 2004 report of the Offices of Inspector General of the Departments of Commerce, Defense, Energy, Homeland Security, and State and the Central Intelligence Agency, *Interagency Review of Foreign National Access to Export-Controlled Technology in the United States* (D-2004-062), contains recommendations of serious concern to research universities. Particularly troublesome is the call for reexamination of several federal export license exemptions of critical importance to universities, including the fundamental research and education exemptions. The report also summarizes the recommendations for enhanced compliance with export controls in the State and Homeland Security IG reports, neither of which has been made public. Should the IG recommendations result in narrowing or eliminating the existing licensing exemptions, the effect would be to alter the culture of openness that has been a hallmark of, and critical to, the success of U.S. research universities. Contrary to their intended purpose, such changes could have a substantial negative impact on U.S. national security and economic competitiveness.

The interagency report mostly summarizes the findings of the individual agency IG reports. A summary of the key recommendations contained in the interagency report as well as those referenced in the State report and Homeland Security IG report follow.

**Department of State Report**

- The State IG recommendations for compliance program best practices include: 1) automated export tracking systems, which include information on foreign nationals’ visa and export license expirations and the export-controlled technology the foreign national is exposed to; 2) detailed site visitor request forms, which provide sufficient personal information about the prospective visitor for project managers, export control officials, and security personnel to make informed visitor authorization determinations; 3) unique badging that easily identifies foreign employees and visitors and automatically restricts access to work areas; and 4) automated export control training and testing systems that provide ITAR basic and refresher training with competency scores, remedial testing for failed attempts, automated record keeping, and assurance that tests were completed prior to issuance of access control badges. These recommendations are very much based on a company model, as opposed to a university model. In our view, these practices are inappropriate and impossible to implement in an open research and learning environment characteristic of, and essential to, universities.

**Department of Homeland Security Report**

- The Homeland Security (DHS) IG report points to the fact that the SEVIS system does not screen foreign students and exchange visitors for export control compliance. It notes that, except for Libya, restrictions on course enrollment do
not apply to foreign students or exchange visitors, with the potential effect that “non-Libyan foreign students or exchange visitors may gain access to controlled technology as a result of their participation in coursework at U.S. academic or vocational institutions or in post-graduate training programs.”

- The DHS IG report recommends that SEVIS be modified to incorporate screening for access to controlled technologies. DHS management did not concur with this recommendation, but the report indicates that the IG plans to further discuss with management the resolution of these issues and establishment of corrective measures. While SEVIS now is working considerably more smoothly than in its initial implementation, the system was not designed for this purpose and this recommendation would greatly increase the administrative burden on universities. Moreover, if acted upon, the concern expressed by the DHS IG about coursework is directly counter to and would require changing the current education exemption provided for export control regulations.

**Interagency Report**

- The interagency IG report calls for reexamination of several “broadly applied” license exemptions in the export control regulations (renewing recommendations in a 2000 interagency IG report) on the grounds these exemptions might allow the transfer of sensitive U.S. technology to countries or entities of concern. The exemptions include the publicly available technology, fundamental research, and educational exemptions as well as the exemption for legal permanent residents of the U.S. The interagency report cites the views of the Commerce and Defense IGs that it is necessary again to raise awareness of these issues since the previous recommendations were not addressed, and that Congress and/or the National Security Council should reexamine these exemptions for consistency with U.S. export control laws.

- Under the heading *published or will be published*, the report points to the fact that research that is intended for publication is exempt from the Export Administration Regulations (EAR) regardless of whether it is actually published. Given that “anyone could claim to intend to publish research but ultimately decide not to for various reasons,” the report calls for researchers to “review the subject of their research up front to determine its sensitivity and potential applicability to export controls” (i.e. release of information to foreign nationals). While the report cites as positive the efforts of certain scientific journals to screen publications for the risk of misuse, it states these are “back-end measures that may come too late to protect sensitive… technology if a foreign national from a country of concern was part of the team conducting the research.”

- Under the heading *fundamental research*, the report cites previous concerns that the definition of “fundamental research” may be vague and unclear, and that the decision appears to rest on the publishability of the research and whether publication restrictions exist. The report points to the need to focus on the nature
of the research itself, as opposed to its ability to be published, citing the definitions in OMB Circular A-11. OMB Circular A-11 defines “basic” and “applied” research and “development” based upon the nature of research for the purposes of federal budgeting.

- Under the heading **educational exemption**, the report notes that exemptions for academic coursework are not available for the same information on controlled technologies if taught by companies. The report also cites the Commerce IG report that foreign nationals working in a laboratory who are required to use EAR-controlled equipment to perform the work are subject to licensing requirements for the use of the controlled equipment even in the actual research performed is exempt.

- Finally, under the heading **foreign national with permanent resident status**, the report notes the permanent resident may never become a U.S. citizen, may travel back and forth to the home country, and could transport export-controlled technology without any monitoring by the government. According to the report, the concerns apply less to permanent residents who become U.S. citizens since they “must renounce their citizenship of other countries, thus making a higher commitment to the U.S.”

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