



International Business & Trade Law Alert

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The Roth Case and Export Controls: The Government Sends a Message to the Academic Research Industry

Export control laws and regulations have been on the books for decades, but the government has stepped up enforcement in a number of areas — including the area of academic research. The recent conviction of Professor J. Reece Roth of the University of Tennessee serves as a timely cautionary tale.

Roth, a 72-year-old professor of electrical engineering is awaiting sentencing later this month after being convicted of illegally exporting military technical data without a license from the U.S. Department of State. He may be sentenced to up to 78 months in prison and may have to pay more than \$1 million in fines. The professor was convicted on charges that he, together with Atmospheric Glow Technologies (AGT), violated the Arms Export Control Act by allowing a Chinese national graduate student to work on a project to develop technology for use on military drones. He was also found to have illegally disclosed, to an Iranian graduate student, information on the project and to have taken materials related to it in his laptop on a visit to China.

Traditionally, the U.S. has been very hospitable to foreign students looking for challenging scientific research. The U.S. has the means, structure, and culture to support scientific research, and foreign scholars have been very attracted to that environment. That partnership seems to have worked in the past — and can still work provided certain lines are not crossed. For example, it is a violation of U.S. export control laws under the so-called “deemed export rule” to disclose to a foreign national technical data or technology that is controlled for export by the Department of Commerce or the Department of State. The government considers such a disclosure within the U.S. to constitute an export to the foreign national’s country of citizenship.

Many research laboratories and other entities involved in scientific work covered by the export control regulations are aware of these risks and have taken measures to protect against violations. To avoid serious and costly problems, your organization may want to consider the following steps:

- First, determine whether any of the information with which you are working is controlled for export by the Commerce Department¹ or State Department.² This step is essential but, often, the assessment as to whether your data is or is not controlled is complex and not readily determined. When in doubt,

(Footnotes)

¹ The Commerce Department controls certain technology that may be used for civil and military applications (dual use technology). The Commerce Control List is found at 15 C.F.R. Part 744, Supp. 1.

² The State Department controls technical data that relates to defense (military) items. The list of items (U.S. Munitions List) is found at 22 C.F.R. Part 121.

ask for advice from counsel with experience regarding export controls. Understanding the complexities of the export control laws or knowing how to seek advice from the agency potentially controlling the kind of data you work with is often the key to obtaining an accurate answer.

- Second, examine your research team. It is critical to know the nationality and visa status of all foreign nationals working on projects which involve controlled equipment, technology or technical data. All foreign nationals are subject to the “deemed export” rule unless they have been granted permanent residence (i.e., a Green Card) or have otherwise been granted status as a protected person under 8 U.S.C. §1324b(a)(3) (related to certain political refugees and political asylum holders). If your research involves controlled technical data or technology and you believe that a foreign scholar’s contribution to the project will be important, request a license from the appropriate government agency.
- Third, if your research involves controlled data, establish strict controls on access, so that unwitting “deemed exports” do not occur. Do not carry controlled research data overseas and be very conscientious about what you carry in your laptop or pen drive. Both the Commerce Department and the State Department control the export of technical data/technology that is not otherwise already available to the public. This data need not be considered classified. Unclassified information is also controlled for export.
- Fourth, with respect to ongoing research projects, immediately conduct an internal audit to ensure compliance with export control laws.

The *Roth* case will certainly serve as a wake-up call to universities and researchers and was intended as such by the agencies involved. In an atmosphere of academic freedom and collaborative effort, professors may not think about possible export control problems and, therefore, may not be attuned to their legal obligations. It must be understood, however, that, from a legal perspective, it is irrelevant whether a foreign national had the intent to pass on controlled information to his country. A violation occurs the moment the foreign national has access to the controlled technology/technical data, even if he/she simply stores it in a drawer and never touches it again.

To minimize the risk of enforcement actions, universities and other entities involved in potentially controlled research areas must assess and carefully monitor their collaborations with foreign students, scientists, and scholars. If potential problems are identified and the proper licenses are obtained, the chances are good that the work involved can be completed with a minimum of delay or disruption and that penalties can be avoided. If your organization does not have a compliance program in place to deal with these issues, we urge that you seek qualified advice to establish one.