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Insights

UNIVERSITIES BEWARE: EXPORT CONTROLS MAY BE BROADER THAN YOU THINK

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SUMMARY

On February 2, 2021, the Bureau of Industry and Security (BIS) of the U.S. Department of Commerce announced a settlement with Princeton University to resolve alleged violations of the Export Administration Regulations (EAR) in connection with the unlicensed export of various strains and recombinants of animal pathogens to other research institutions. This settlement highlights the need for research institutions to understand how export control laws apply to their activities and implement plans tailored to their particular risks under export control laws.

As most universities and other research institutions have come to appreciate, the fundamental research exclusion does not mean that all of their activities are excluded from the restrictions of U.S. export control laws and regulations. Similarly, many such institutions and their researchers appreciate that tangible items are subject to U.S. export controls and may require an export authorization when provided to other parties, including other researchers at similar institutions, in other countries. What may be less familiar is that certain restrictions under U.S. export controls are broader than may seem logical or necessary.

In fact, the controls of other U.S. agencies (including the Animal and Plant Health Inspection Service (APHIS) and the Centers for Disease Control and Prevention (CDC)) that impose restrictions on the transfer, storage, and use of the types of items that were the subject of the violations in the Princeton matter control fewer items than do the export controls imposed under the Export Administration Regulations. Specifically, the laws regulating the export or reexport of human, animal, and plant pathogens cover certain viruses, bacteria, fungus, and toxins, as well as genetic elements or genetically modified organisms that contain or code for the genes of controlled pathogens, even if that genetic material is not, itself, pathogenic. Further, the export controls apply to any quantity of such items exported or reexported to any country outside of the United States. The allegations against Princeton include 37 unlicensed exports to other research institutions in countries including Canada, Australia, the United Kingdom, Europe, Israel, India, South Korea, Japan, Singapore, and China.

To resolve the allegations, which the university voluntarily disclosed, Princeton agreed to pay a civil fine of $54,000, double the value of the transactions involved. While the penalty assessed in this case is relatively modest, payment of a penalty alone is often not all that is required to settle an export enforcement matter. In this case, Princeton also agreed to undertake two audits of its export compliance program: one audit of a minimum of twelve consecutive months in 2019 and/or 2020, to be conducted by an independent third party, and another of a minimum of twelve consecutive months starting on or after January 1, 2021, which may be conducted internally. In addition to timely reports of each audit, the institution must also submit to BIS two reports describing enhancements to its export control compliance programs over the next twenty-four months. Princeton's ability to obtain export licenses going forward is contingent on its fulfillment of the conditions of the settlement.

The imposition of penalties against Princeton is a clear sign that BIS will enforce the export control laws against educational and research institutions, even absent allegations of willful violations. "The Office of Export Enforcement will continue to leverage our unique authorities as enforcers and regulators of our nation's export control laws to investigate possible violations by research institutions and hold them accountable when appropriate." Said Jonathan Carson, OEE Special Agent in Charge of BIS's New York Field Office. Added Kevin Kurland, acting Deputy Assistant Secretary for enforcement, "[BIS] strongly encourages research institutions to maintain robust export compliance programs to prevent violations of the EAR." To the extent that BIS defines pathogens and toxins more broadly than other regulators with which research institutions and suppliers may be more familiar, all parties dealing in such materials should implement export control functions tailored to BIS's requirements and include mechanisms for review in order to ensure ongoing compliance and avoid unintentional, but potentially costly, missteps.

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