

## International Advisory Services - Training 4/6/2021

### Q & A

Posted 4/19/2021

**Question:** Any specific concerns around advisory services specific to research management? Not conducting research, itself, but advising on how to do research.

**Answer:** These need to be handled separately as a research agreement, not under a general international advisory agreement. We would need to have an internal discussion to determine which office should handle the contract negotiation. We are trying to keep research separate from international advisory service agreements. While international advisory services may be less likely to involve the release of any export-controlled technology than research activities, it is important in both scenarios that we understand if there are any sanctioned countries or parties receiving our services.

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**Question:** Is Chinese PLA hospital considered a “military end user”?

**Answer:** A Chinese PLA-affiliated hospital could potentially be considered a military end user. BIS has issued guidance stating that due diligence is required to determine whether a military hospital in China is a “military end user” for purposes of the military end user/end use rule. Factors to consider in such due diligence include the actual relation of the “military hospital” to the country’s national armed services and the patient population served by the hospital, or whether it is an entity that develops, produces, maintains, or uses military items.

BIS’s Frequently Asked Questions guidance regarding the military end user rule is available here: <https://www.bis.doc.gov/index.php/documents/pdfs/2566-2020-meu-faq/file>.

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**Question:** Could you clarify, if we hired or onboarded someone as a collaborator who used to work at a company on the entity list, why wouldn’t their work that is done in the United States be subject to the fundamental research exclusion?

**Answer:** The applicability of the fundamental research exclusion to a given project is a separate issue from that of restricted parties, as it is based on the nature of the research and not on the nature of the persons conducting such research. Information resulting from fundamental research is not considered subject to the EAR and would not be subject to the Entity List licensing restrictions. "Fundamental research" is defined as research in science, engineering, or mathematics, the results of which ordinarily are published and shared broadly within the research community, and for which the researchers have not accepted restrictions for proprietary or national security reasons. If the project meets these conditions, the fundamental research exclusion would apply to software or technology that arises from such fundamental research, and such software or technology would not be considered subject to the



EAR. However, if in the course of research, a collaborator requires access to input technology or software source code that is subject to the EAR, MGB should assess whether such individual has any remaining ties to a former Entity List employer. If a collaborator individual is no longer affiliated with the Entity List entity and is not working on behalf of that entity, the Entity List restrictions would no longer apply to them (however, if they are not a U.S. Person, other deemed export restrictions under the EAR may still apply based on their most recent country of citizenship or permanent residency and the classification of technology or software to which they need access). If a collaborator individual still has ties or affiliations with the Entity List entity or appears to be acting on behalf of that entity, the Entity List restrictions would apply and MGB cannot provide them with any technology or source code subject to the EAR, even EAR99 items.

BIS's Frequently Asked Questions guidance regarding the Entity List can be found here: <https://www.bis.doc.gov/index.php/policy-guidance/faqs>.

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**Question:** Follow-up question – What should we do if they are still associated in some way with the entity on the entity list? For example, a graduate student enrolled at a university on the entity list but performing fundamental research here in the U.S. under the mentorship of our staff. Would any exceptions or exclusions apply to relieve us of any obligation to obtain a license?

**Answer:** BIS considers a student's enrollment at a university on the Entity List to be a "red flag" requiring additional due diligence, but does not consider such students to be subject to the Entity List restrictions per se. Specifically, BIS takes the position that a student is not an integral part of the university (e.g., does not have fiduciary duty to from the university in the same manner that as an employee, officer, trustee, or person in a similar position in the university would) in which he/she is enrolled and therefore BIS does not include them in the Entity List restrictions specific to the university. Provided the student is not otherwise acting on behalf of the Entity List university or has a stronger affiliation to the university more akin to that of an employee, including a dual employment relationship and provided the student is not providing any items subject to the EAR received from MGB back to the Entity List university, the student would not be subject to the Entity List requirements (such as a license requirement for any technology subject to the EAR). However, MGB would still need to assess deemed export issues relating to the student's access to EAR technology or source code based on the student's country of citizenship or permanent residency.

BIS's Frequently Asked Questions guidance regarding the Entity List can be found here: <https://www.bis.doc.gov/index.php/policy-guidance/faqs>.

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**Question:** Related to Huawei, we understand that some of our China clients are considering Electronic medical records or other HIS services which may utilize Huawei technology. Any concerns on this related to advisory work or telehealth?

**Answer:** We are concerned. We had a meeting with leadership and are beginning to work through this issue to develop some guidance and rules around this that will hopefully be available shortly. Huawei is a party on the Entity List subject to elevated restrictions so if they're providing a platform on which you might store export-controlled technology or software that you're providing to another party that comes from MGB that would be an export controls transaction requiring a license if Huawei is able to access that information. There are also concerns from the government contracting perspective, including Section 889 of the National Defense Authorization Act, which prohibits the U.S. government from contracting with entities that use products or services that use prohibited telecommunications equipment or services, including those provided by Huawei.

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**Question:** One of our longstanding non-U.S. clients has a senior advisor who is retired senior military and he may join this new hospital's board at some point. Is this an issue?

**Answer:** The mere fact that the senior advisor was previously affiliated with the military does not make them a military end user and his role on the board would not subject the client to military end user restrictions solely based on this fact. MGB should conduct appropriate restricted party screening and due diligence review of the senior advisor to ensure that he is not a restricted party. MGB should also conduct appropriate diligence to ensure the client is not considered a military end user based on other additional circumstances (for example, if the board was comprised primarily of military-affiliated persons or if the defense entity owns or directs the client's activities).

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**Question:** What is considered deep enough due diligence? For example, companies often have 'shell' companies, corporate structures hidden, SEO (state owned ownerships) are hidden. How best to navigate?

**Answer:** The U.S. government does not specify exact requirements for adequate due diligence but expects U.S. organizations to take measures that are reasonable given the circumstances. The extent of reasonable due diligence is therefore dependent on the facts of the particular transaction under review, including the whether the project would involve the release of EAR technology, countries or regions involved, the types of items involved, and whether any restricted parties are involved. With regard to transactions in a higher risk country such as China, the government would likely expect more than just automated restricted party screening and a cursory internet search, and would expect diligence regarding the ownership and affiliations using Chinese language resources, information services and databases, and review of publicly available information on websites and in news articles. If red flags are identified

from initial review (such as restricted party affiliations), the government would expect that MGB investigate such red flags further before proceeding with any transaction.

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**Question:** Who are considered our MGB Export Controls Officers?

**Answer:**

Brigham and Women's Hospital (BWH)

Lisa Griffin | 617-525-8833 | [LGRIFFIN11@BWH.HARVARD.EDU](mailto:LGRIFFIN11@BWH.HARVARD.EDU)

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McLean Hospital (McLean)

Kimberlee Roselando | 617-855-2160 | [KROSELANDO@PARTNERS.ORG](mailto:KROSELANDO@PARTNERS.ORG)

Spaulding Rehabilitation Hospital (SRH)

Monica Baggio Tormey | 617-952-5991 | [MBAGGIOTORMEY@PARTNERS.ORG](mailto:MBAGGIOTORMEY@PARTNERS.ORG)

Mass Eye and Ear (MEE)

Ryan Schlimgen (acting) | 857-282-1799 | [RSCHLIMGEN@PARTNERS.ORG](mailto:RSCHLIMGEN@PARTNERS.ORG)

Mass General Brigham (MGB)

Ryan Schlimgen (acting) | 857-282-1799 | [RSCHLIMGEN@PARTNERS.ORG](mailto:RSCHLIMGEN@PARTNERS.ORG)

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**Question:** What about past licenses and agreements? When do we need to go back and see if they are compliant with MEU?

**Answer:** MGB should review its existing licenses and agreements to confirm compliance with the military end user and military-intelligence end user rules. To the extent that any of these licenses and agreements are not compliant with these rules, MGB may need to consider options to ensure compliance including seeking amendments to the agreements, termination of agreements, or applying for licenses. The military end user rule went into effect June 29, 2020, and the military-intelligence end user rule went into effect March 16, 2021. MGB would not need to go back prior to those dates in its review.