

Sponsored Research, Technology Transfer & Licensing Issues - Training 3/29/21

Q & A

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Question: I am working on a technology that is licensed to a Chinese company for incorporation into vehicles. Do we need to restrict sales/license of the technology to the Chinese government via the license?

Answer: Any export restrictions on the provision of the technology to the Chinese government would depend on the export classification of the specific technology and the nature of the specific Chinese government entity. MGB would need to classify the technology under the appropriate Export Classification Control Number (“ECCN”) and determine if there are any export licensing requirements for that ECCN to China.

If no license is generally required to export the technology to China based on its ECCN, you would then need to conduct restricted party screening on the Chinese company and the Chinese government entity involved to ensure that they are not subject to any additional restrictions. Such review should include screening against restricted party lists including the Entity List and SDN List, as well as due diligence to confirm that the Chinese counterparties are not military end-users or military-intelligence end users in China.

Question: Would a Chinese university with known defense research projects be considered a military end user? Can we collaborate with researchers from this university?

Answer: As a preliminary matter, the military end user rule applies only to certain items subject to the EAR listed in Supplement No. 2 to Part 744 of the EAR. If you are providing only EAR99 items in your engagement with the Chinese university and its researchers, or if you are providing services only (no items), your transaction would not be subject to the military end user rule.

If you are providing items subject to the military end user rule, a Chinese university conducting known defense research projects could potentially be considered a “military end user,” and you would need to conduct additional due diligence to determine whether the specific department and researchers that you are engaging with are considered to be military end users. The military end user rule defines a military end user to include “any person or entity whose actions or functions are intended to support 'military end uses'.” BIS has issued guidance in its [FAQs](#) stating that if you are engaging with a university department solely for civil research, but knows that other parts of the university conduct research for the military, this knowledge must be taken into account along with information regarding the specific department of the university that the you are engaging with (see FAQ 14). If the specific department or researchers that you are working with are not engaged in any activities to support military end uses, it may be possible to determine that such department and its researchers are not military end users under the rule.

Question: Often items/information we include in a technology license are: biological materials (proteins, cell lines, mice) or unpublished patent rights/patent correspondence). While our technology licensee may not be on any list, our licensee may do agreements with purchasers/end users or sublicenses in the future. How do we assess the risk for these types of transactions when our direct licensee is not a restricted party?

Answer: If the technology you license is controlled under the EAR (i.e., it is not published or the result of fundamental research and therefore exempt from the EAR), you should implement risk mitigation measures to address transactions by your licensee that would provide such technology to other third parties. For high risk jurisdictions such as China or Russia, it is best practice to request end-user certifications from your counterparties to understand the nature of the end users of any technology you are licensing. You should also be including template trade compliance language in your agreements with licensees that requires licensees not to provide any technology to any restricted parties or entities located in sanctioned countries or to otherwise violate U.S. export control or sanctions regulations in relation to the items/technology received from MGB.

Question: Any guidance on how often end-user/end-use certifications should be performed?

Answer: You can structure the end user certification to be renewed on an annual basis, or a longer period if the applicable contract or agreement is longer. You should also include language in the certification requiring the counterparty to notify you if any representations made in such certification are no longer accurate.