Escaping Earth’s Orbit but not Earthly Regulations: A Discussion of the Implications of ITAR, EAR, FCC Regulations and Title VII on Interplanetary CubeSats and CubeSat Programs

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Disclaimer ...

This presentation provides an overview of current developments in export control regulations for the purposes of fostering a discussion of national policy. Viewers are advised many topics discussed are still in a process of change and that this material may become obsolete almost immediately. Viewers are advised not to rely on the information herein for decision making and are urged to conduct their own research or seek competent guidance.
Overview

A Bit of Background
- Small Spacecraft Regulation Under ITAR
- Problems Created
- Confusion Created

What’s Changing
- Items are Moving from ITAR to EAR
- Not everything that a developer needs is necessarily moving to the EAR
- Other sections of ITAR (beyond category XV where the spacecraft items were) may still ITAR-constrain projects

Conclusion: Are Things Getting Better?
Small spacecraft regulation under ITAR
  ◦ **Important topics:** basic research exemption, public domain exemption, bona fide export, deemed export, exclusion of foreign nationals from access to non-exempt items without license

FCC Regulations
  ◦ **Important topics:** License the use of communications frequencies in orbit (and, possibly, beyond), coordinates use with International Telecommunications Union and other national agencies

Title VI and VII of the Civil Rights Act of 1964
  ◦ **Important topics:** Prohibits discrimination on the basis of protected characteristics in employment, educational and other activities
Many developers qualified (or at least believed / asserted that they qualified) for a basic research exemption
  ◦ The exact scope of this exemption has been interpreted differently by various parties

Other developers took the approach of excluding foreign nationals from their programs
  ◦ ‘ITAR controlled’ labs, etc.
  ◦ May have resulted in exclusion of foreign nationals from non-controlled activities
The Title VI/VII requirement for inclusiveness combined with the ITAR requirement for exclusion (or licensing) for ITAR-controlled elements created a rock-and-hard-place situation

- Unclear whether entities covered by Title VI/VII might be required to seek licenses to allow the participation of foreign nationals when it was reasonable to presume that the license would be granted
- Misstep / incorrect interpretation / incorrect implementation could result in penalties

The scope of the so-called basic research exemption is a subject of disagreement between interpretations
Inconsistent understanding of regulations
Inconsistent application of restrictions
Fear of penalties
Perhaps needless exclusion of foreign nationals from some activities or wrongful inclusion, depending on how developer interpreted ITAR
What’s Changing

- Per Federal Registrar (Vol. 78, No. 101), many items from USML category XV will soon be regulated under the EAR.
- A New 500-series ECCN category is being created for their regulation.
- Not all spacecraft items will be moved, those still with a military purpose or providing particular U.S. advantage will be ITAR regulated.
- Other regulations (e.g., USML Categories XI, XIII) may still regulate key components.
- FR Vol. 78, No. 101 describes a proposed rule which may be changed based on public comments, etc.
Lots of things are staying the same:

- EAR still has the concept of a deemed export (15 CFR §734.2)
- EAR still has the concept of a fundamental research exemption (§734.3/§734.8)
- EAR has a publication exemption closely mirroring ITAR’s public domain exemption (§734.3/§734.7)
- Licensing is still required for non-exempt items
What’s different

- Explicit exemption for educational materials (§734.3/§734.9)
- In many cases no regulation of foreign-made items just because they happen to be in the United States (exceptions apply, see §734.3)
- De Minimis U.S. content rules may allow integration in the U.S. of foreign hardware with limited U.S. hardware and software (see §734.4 for a number of relevant rules)
- Different enforcement agency
Confusion

- This process is ongoing
- Many rules are either not issued or are in a “proposed rulemaking” state
- These rules are not law until enacted and their effective date
- ITAR regulation for some (many) projects may remain for limited components that are still on the ITAR list
- Access requirements for partially controlled or dual (ITAR + EAR) controlled projects remain unclear
Conclusion: Are Things Getting Better?

The Good:
- Attention to / recognition of issues
- Movement to reform the USML and remove items from a more restrictive to a less restrictive regulatory regime

The Bad:
- Uncertainty as to what the final rules and their implementation will be
- Uncertainty as to the enforcement approaches and internal processes of the new regulator with items they didn’t previously regulate
- Uncertainty as to item classification (particularly in the short term)
- A need to wait for initial cases to establish judicial interpretation of new laws and regulations
Thanks & Any Questions?