



EXPORT CONTROLS and EMBARGOES: SOME BASICS FOR ALL

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January 27, 2006
Dartmouth College



What are export controls?

US laws that regulate the distribution to foreign nationals and foreign countries of strategically important technology, services and information for reasons of foreign policy and national security.

Export control laws apply to all activities – not just sponsored research projects.



What is an Export?

- Transfer of controlled technology, information, equipment, software or services (ITAR) to a foreign person in the US or abroad by any means; e.g.,
 - actual shipment outside the US
 - visual inspection in or outside the US
 - written or oral disclosure



Definition: Foreign Person

- Any person who is not a lawful permanent resident of the US
- Any foreign corporation or other entity or group that is not incorporated or organized to do business in the US
- Any foreign government



Definition: US Person

- Any US citizen or lawful permanent resident (green card holder)
- Any foreign corporation, society or other entity or group that is incorporated or organized to do business in the US
- Any federal, state or local government entity in the US



Responsible US Agencies

- State Department: Inherently military technologies--International Traffic in Arms Regulations (ITAR)
- Commerce Department: “Dual-Use” technologies (primary civil use) -- Export Administration Regulations (EAR)
- Treasury Department, Office of Foreign Assets Control (OFAC): Prohibits transactions with countries subject to boycotts, trade sanctions, embargoes



Categories – ITAR (military)

- I - Firearms, Close Assault Weapons and Combat Shotguns
- II- Guns and Armament
- III- Ammunition/Ordnance
- IV- Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines
- V- Explosives and Energetic Materials, Propellants, Incendiary Agents and Their Constituents
- VI- Vessels of War and Special Naval Equipment.
- VII- Tanks and Military Vehicles
- VIII-Aircraft and Associated Equipment
- IX- Military Training Equipment
- X- Protective Personnel Equipment



Categories – ITAR (military)

- XI- Military Electronics
- XII- Fire Control, Range Finder, Optical and Guidance and Control Equipment
- XIII- Auxiliary Military Equipment
- XIV-Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment
- XV- Spacecraft Systems and Associated Equipment
- XVI- Nuclear Weapons, Design and Testing Related Items
- XVII- Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated
- XVIII-Directed Energy Weapons
- XIX- Reserved
- XX- Submersible Vessels, Oceanographic and Associated Equipment
- XXI- Miscellaneous Articles



Categories – EAR (dual use)

- 0-Nuclear Materials, Facilities & Equipment (and Miscellaneous Items)
- 1-Materials, Chemicals, Microorganisms, and Toxins
- 2-Materials Processing
- 3-Electronics Design, Development and Production
- 4-Computers
- 5-Telecommunications and Information Security
- 6-Sensors and Lasers
- 7-Navigation and Avionics
- 8-Marine
- 9-Propulsion Systems, Space Vehicles and Related Equipment



Implications of Export Laws

- No effect on most university research
- **Potential** impact on
 - Ability of foreign students or researchers to participate in research involving a controlled technology (mostly under ITAR)
 - Ability to provide services (including training in the use of controlled equipment) to foreign persons (ITAR, EAR, OFAC)
 - Ability to send controlled equipment to foreign countries (ITAR, EAR, and OFAC)



Disseminating Information

aka “Deemed Exports”

- In the absence of an exclusion, a license must be obtained from Commerce or State to share controlled technical information with a foreign person in the U.S. or abroad.
- Methods of disclosure include
 - Fax
 - Telephone discussions
 - E-mail communications
 - Computer data disclosure
 - Face-to-face discussions
 - Training sessions
 - Tours which involve visual inspections



Exclusions or Exceptions

A license is not required to disseminate information if one of three exclusions applies:

- Fundamental Research Exclusion (ITAR, EAR)
- Employment Exception (ITAR only)
- Education Exclusion (ITAR, EAR)



Fundamental Research Exclusion

- No license is required to disclose to foreign persons information that is “published and which is generally accessible or available to the public [through, for example,] fundamental research in science and engineering at universities where the resulting information is *ordinarily published and shared broadly in the scientific community.*”



The Fundamental Research Exclusion is Destroyed if

The university accepts any contract clause that:

- Forbids the participation of foreign persons;
- Gives the sponsor a right to approve publications resulting from the research; or
- Otherwise operates to restrict participation in research and/or access to and disclosure of research results.



Fundamental Research Exclusion Violation

“Side deals” between a PI and Sponsor destroy the fundamental research exclusion and may also violate university policies on openness in research.



University Strategy

Protect fundamental research exclusion by negotiating the elimination of all contractual clauses that restrict university control over publications or limit access to or participation in research.



Employment Exemption (ITAR)

- No license is required to share controlled technical information with a foreign person who
 - Is a full-time, bona fide university employee
 - With a permanent address in the US while employed *provided that person is*
 - Not a national of certain countries and
 - Is advised in writing not to share controlled information with other foreign persons.



Education Exclusion

- No license is required to share with foreign persons “information concerning general scientific, mathematical or engineering principles commonly taught in universities or information in the public domain.”
- Foreign students using controlled equipment to conduct research should be registered for a research credit class.



Equipment Use Exclusions?

There are **no express** exclusions that allow foreign persons to use controlled equipment or software without a license.

Most universities nonetheless rely on

- The fundamental research exclusion on the ground that using equipment is part and parcel of conducting fundamental research and/or
- The education exclusion when the program of instruction requires using equipment.



Equipment Use Exclusions?

However, there are no exclusions that allow foreign persons to use controlled equipment which requires the access to company/mannufacturer proprietary manual or instructions for the use.

Should be treated as using another parties export controlled material.



“Use” and the 2004 IG Report

- Use of controlled equipment versus controlled “use” of technology
- Use of export controlled equipment is not a deemed export. Deemed export occurs only if controlled technology is transferred.
- Clarification of “use” technology and effect on fundamental research at universities under discussions with Government and universities



Providing Services to Foreign Persons

- ITAR and EAR prohibit assisting & training foreign persons anywhere in the design, development, use, testing etc. of controlled equipment without a license from Commerce or State
 - Ex. Fermenters having a capacity of at least 20 liters



Providing Services Under OFAC

- In general, OFAC programs prohibit the provision of services to countries subject to US sanctions, boycotts, etc. w/o a license.
- Services include:
 - Conducting surveys and interviews in boycotted countries
 - Providing marketing & business services to persons in boycotted countries



Providing Services cont'd

- Creating new information materials at the behest of persons in a boycotted country
- Engaging the services of persons in a boycotted country to develop new information materials

Note: Restrictions vary by country



Countries Under Boycotts

- Examples: Cuba, Iran, Iraq, Libya, Liberia, Sudan, Syria, North Korean
- For complete and current listing of countries subject to OFAC sanctions and descriptions of prohibited activities, visit OFAC website:

<http://www.treas.gov/offices/eotffc/ofac/sanctions/index.html>



Shipping Controlled Equipment Abroad

- A license is required to ship equipment controlled by **ITAR** to **any** foreign country (few exclusions or exceptions).
- A license **may** be required to ship equipment controlled under the **EAR** out of the US depending on what the equipment is, where it is being sent and whether an exception applies.



Shipping Equipment cont'd

- The process to classify equipment under the EAR is tedious, detailed and time consuming.
- It may take *months* to obtain a license from State or Commerce.

Note: A license may be required to ship software out of the US.



Shipping Equipment cont'd

There is a presumption under **OFAC** sanction programs that any and all shipments of equipment and provision of services to countries under sanction or persons in those countries are **ILLEGAL**.



Examples of Application to University Research

- Export of research products
 - Underwater research vehicle could require ITAR license if designed for military applications; would require Commerce Department authorization if designed for civilian purposes
 - Specially designed electronic components could be controlled
- Temporary transfer of research equipment abroad
 - Carrying scientific equipment to certain destinations for research may require authorization (e.g., Iran, Syria, China, etc.)
- Software development
 - Software that is provided to the public for free may not require licenses, but proprietary software of controlled technology could require licensing
 - Encryption technology could require licenses or could be prohibited for transfers to certain foreign nationals/countries



License Example

University archeologists desire to take GPS systems to France to use in research project with foreign colleagues:

- GPS equipment is covered by EAR Category 7, Navigation and Avionics, under ECCN nos. 7A005, 7A105, and 7A994. Two of those entries redirect the exporter to ITAR.
- The exporter must evaluate the EAR entries and ITAR Category XV, Spacecraft Systems and Associate Equipment, to identify the appropriate licensing authority and classification.



Laptop Exception (EAR)

- *Excluding countries under sanction, faculty who wish to take their laptops out of the country to use in a project that qualifies as fundamental research may be able to do so under the license exception for temporary export (TMP) if the laptop meets the requirement for "tools of trade" and faculty retain control of the laptop at all times.(15 CFR Part 740.9).*



Accepting Export Controlled Information

- In deciding whether to accept an award that requires the institution to receive export controlled information, consider whether the information is
 - Central to the project (probably rendering the entire project export controlled) or
 - Tangential in that the PI needs the information but not others working on the project.



Accepting Export Controlled Information cont'd

- If you decide the information is tangential
 - Execute a nondisclosure agreement
 - Require that the information be clearly marked “export controlled,” and
 - Work with the PI to safeguard the information and have the PI sign a statement accepting responsibility for protecting the information



Accepting Export Controlled Information cont'd

- Material received under Material Transfer Agreements (MTA) need to be reviewed.
- Check if your libraries have accepted controlled information or signed DoD form DD2345 (Militarily Critical Technical Data Agreement). Acceptance creates compliance issues for individuals and the university.



Liability and Violations

- Liability is personal and institutional and may take the form of:
 - Administrative penalties
 - Monetary fines
 - Jail time
- Voluntary disclosure of violations *may* serve as a “mitigating factor” in deciding penalties.



Administrative Penalties

- Termination of export privileges (EAR and ITAR and/or
- Suspension and/or debarment from government contracting (EAR and ITAR).



Penalties for EAR Violations

- Criminal (willful) violations:
 - Up to \$1 million for a university or company
 - Up to \$250K per violation for individuals and/or up to 10 years in prison
- Civil violations:
 - Up to \$12k per violation for individuals, a university or company



Penalties for ITAR Violations

- Criminal (willful) violations:
 - Up to \$1 million for a university or company
 - Up to \$1 million per violation for individuals and/or up to 10 years in prison
- Civil violations:
 - Up to \$500k per violation for individuals, a university or company



Penalties for OFAC Violations

- Criminal (willful) violations:
 - Maximum fine of \$100k for individuals (including corporate officers) and/or 10 years imprisonment
 - Maximum fine of \$1m for a university or company
- Civil penalties:
 - Maximum fine of \$55k per violation



Developing a Compliance Plan

The Federal Government expects every institution to have a basic compliance program/plan in place which includes screening of use of technology by foreign persons.

(Not to be confused with a Technology Control Plan which must be in place to safeguard controlled technology developed or received and is not subject to an exclusion or exception.)



Plan Elements

- Inform/educate key university administrators of legal requirement to implement a compliance plan.
- Designate a responsible (“empowered”) person (RO)
- Designate person/office to serve as the point person for researchers and government agencies on export control issues (if not RO).
- RO should have legal support – internal counsel and/or possibly outside counsel.



Plan Elements cont'd

- Educate key academic administrators (including deans and chairs) about export control laws and issues.
- Establish a training program for research, tech transfer, procurement and shipping administrators.
- Establish an awareness program for faculty and other researchers.



Plan Elements cont'd

- Establish written procedures for reviewing proposals and awards; e.g.,
 - Add questions to internal proposal routing form.
 - Develop a check list for contract/grant administrators.
 - Develop and implement processes for deciding if a project is controlled and whether an exclusion applies.



Plan Elements cont'd

- Decide who has authority to accept projects that require a license (and may violate university academic policies) and under what circumstances the institution will accept a project that requires a license.
- Document all export control decisions.



Plan Elements cont'd

- Develop an export control information website that includes:
 - A description of your compliance plan
 - Summaries of the applicable laws
 - FAQs
 - Forms and checklists
 - Links to EAR, ITAR, OFAC....
 - The name of the Responsible Officer



Relevance for Faculty

- Sponsored research terms & conditions
- Keeping software proprietary
- Non-sponsored research
- Consulting work
- Projects in their garage
- Attending “closed” meetings
- Faculty start up company use of university IP
- Keeping research results/software proprietary
- Providing services (not research)



Does Your Project Involve Export Controls?

Some **red flag items**:

- Shipping equipment to a foreign country?
- Collaborating with foreign colleagues in foreign countries?
- Training foreign persons in using equipment?
- Working with a country subject to a US boycott?



Red Flag List , cont'd

- Do the terms of the RFP/BAA or award require:
 - Sponsor approval rights over publications?
 - Sponsor approval of the participation of foreign persons?
- Is the RFP or SOW marked “Export Controlled”?
- Accepting another parties proprietary information?



The End

for Now

but

Stay Tuned.....