MEMORANDUM

TO: Deans, Department Chairs, Laboratory and Center Directors

FROM: Roger D. Sloboda, Associate Provost for Research
       Nancy J. Wray, Director, Sponsored Projects

SUBJECT: Export Control Laws and Regulations – What you need to know

DATE: April 12, 2004

Export control laws, federal laws implemented both by the Department of Commerce through its Export Administration Regulations (EAR) the Department of State through its International Traffic in Arms Regulations (ITAR), and the US Treasury Department through its Office of Foreign Assets Control (OFAC), have been in existence for more than twenty years. They are the law of the land. As such, institutions of higher education and their employees are required to comply with these laws and regulations. Criminal sanctions (including money and/or prison sentences for individuals) can apply in the case of violations.

Following the events of September 11, the export control regulations have become more prominent and scrutiny concerning the level of compliance with these regulations has heightened. It is important that faculty and other researchers in Dartmouth departments, laboratories and centers understand their obligations under these regulations and adhere to them.

The regulations cover virtually all fields of science and engineering. However, the regulations only require a license for the export of certain identified materials or information for reasons of national security or protection of trade, or financial transactions to certain embargoed countries, organizations, or individuals. In the case of academic or research institutions, there is an exclusion for fundamental research, the results of which are or are about to be or, in some cases, ordinarily are publicly available. Understanding three basic concepts related to export controls is essential: (1) the nature of the technology that is export controlled and how it is recognized, (2) the fundamental research exclusion, and (3) what is a deemed export. A few items deserve special emphasis:

(1) Nature of the Technology. The vast majority of exports do not require government licenses. Only exports that the U. S. government considers “license controlled” under the EAR and ITAR require licenses. Exports are usually controlled for one or more of the following reasons:
   o The technology has actual or potential military applications or raises economic protection issues
   o Government concerns about the destination country, organization, or individual, and
   o Government concerns about the declared or suspected end use or the end user of the export

It is important to remember that the term “export” includes not only physical transfer of items, or information, but also disclosure of information, whether written or oral.

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1 See 15 CFR 774, Supplement 1 (EAR) and 22 CFR 121.1 (ITAR).
(2) ** Fundamental Research Exemption.** Even if an export might involve a license-controlled technology or item, generally a license is not required to export fundamental research (i.e. research results) as long as there are no restrictions on publication of the research or other restrictions on dissemination of the information. In some cases, the exemption is applied if the research or information is made public or is intended to be made public.  
*However, keep in mind that, even if no publication restrictions exist, the fundamental research exemption may not apply to the export of licensed controlled tangible items or software or if the export is to an embargoed country or to a national of that county.*

(3) **Deemed Export.** The term “export” can mean not only technology leaving the shores of the United States (including transfer to a U.S. citizen abroad whether or not it is pursuant to a research agreement with the U.S. government), but also transmitting or disclosing the technology to an individual other than a U.S. citizen or permanent resident within the United States. *Even a disclosure to a foreign researcher or student in a Dartmouth laboratory is considered a “deemed export”.*

(4) **Exports Prohibited to Certain Countries.** There are certain countries where it is the policy of the United States generally to deny licenses for the transfer of these items. These countries are currently Afghanistan, Armenia, Azerbaijan, Belarus, Cuba, Iran, Iraq, Libya, North Korea, Sudan, Syria, Tajikistan, and Vietnam.

Clearly most of the research activities in which Dartmouth is involved are excluded from export controls because Dartmouth can assert the fundamental research exclusion. However, when this is not the case (such as when one needs to export a tangible research item, such as a prototype or software or collaborating with certain embargoed countries) it is critically important to begin the process of seeking a license from either the Department of Commerce, State or Treasury (as applicable) early, since it can take as long as 6 months to receive a license after the submission of the license application.

For those departments that are more likely to conduct research subject to export controls, the index for the State Department Munitions list, the Commerce Control List and the current Embargoed Country list are attached. We ask the Chairs to review the lists carefully. Also, attached is additional information that will help in addressing these difficult but critical issues. In addition, there is more explicit general information available on the OSP home page at [http://www.dartmouth.edu/~osp/](http://www.dartmouth.edu/~osp/). For questions or further information, the Dartmouth contact points are Nancy Wray extension 646-3948 or email nancy.wray@Dartmouth.edu or Kevin O’Leary extension 646-2444 or email [Kevin.D.O'Leary@Dartmouth.edu](mailto:Kevin.D.O'Leary@Dartmouth.edu).
United States Export Control Laws

Current export law controls both hardware and information concerning a wide range of technologies in a way that may have a substantial impact on research at Dartmouth College. Federal regulations control the conditions under which certain information, technologies, and commodities can be transmitted overseas to anyone, including U.S. citizens, or to a foreign national on U.S. soil. The following Q&A may help clarify some of the requirements.

1. **What is an export?**

   The export regulations define an export as:
   - Any oral, written, electronic or visual disclosure, shipment, transfer or transmission outside the United States to anyone, including a U.S. citizen, of any commodity, technology (information, technical data, or assistance) or software/codes
   - Any oral, written, electronic or visual disclosure, transfer or transmission to any person or entity of a controlled commodity, technology or software/codes with an intent to transfer it to a non-U.S. entity or individual, wherever located (even to a foreign student or colleague at Dartmouth)
   - Any transfer of these items or information to a foreign embassy or affiliate

   It is important to emphasize that only exports for which the U.S. government requires a license are those that are listed on the export controlled lists. The vast majority of exports do not require the prior approval of the U.S. government.

2. **Who controls exports?**

   There are three agencies that control exports:
   - The Department of Commerce through its Export Administration Regulations (EAR), Title 15, sections 730-774 of the Code of Federal Regulations. For a list of controlled technologies, see 15 CFR 774, Supplement I.
   - The Department of State (which controls the export of “defense articles and defense services”) under the International Traffic in Arms Regulations (ITAR), 22 CFR 120-130. For a list of controlled technologies, see 22 CFR 121.1.
   - The Treasury Department Office of Foreign Assets Control (OFAC) administers and enforces economic and trade sanctions and, based on U.S. foreign policy and national security goals, Title 31 Chapter V of the Code of Federal Regulations

   A complete on-line version of the EAR, ITAR and OFAC (including the critical technology list) is available or hard copies are available for review at OSP.

3. **What is considered fundamental research?**

   Fundamental research, as used in the export control regulations, includes basic or applied research in science and/or engineering at an accredited institution of higher learning in the United States where the resulting information, in some cases, is ordinarily published and shared broadly in the scientific community and, in other cases, where the resulting information has been or is about to be published. Fundamental research is distinguished from

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research that results in information that is restricted for proprietary reasons or pursuant to specific U.S. government access and dissemination controls. University research will not be deemed to qualify as fundamental research if (1) the university or research institution accepts any restrictions on the publication of the information resulting from the research, other than limited prepublication reviews by research sponsors to prevent inadvertent divulging of proprietary information provided to the researcher by the sponsor or to insure that publication will not compromise patent rights of the sponsor; or (2) the research is federally funded and specific access or dissemination controls regarding the resulting information have been accepted by the university or the researcher.

4. **What is considered published information as used in question 3?**

The EAR and the ITAR approach the issue of publication differently. For the EAR, the requirement is that the information has been, is about to be, or is ordinarily published. The ITAR requirement is that the information has been published.

Information becomes “published” or considered as “ordinarily published” when it is generally accessible to the interested public through a variety of ways. Publication in periodicals, books, print, electronic or any other media available for general distribution to any member of the public or to those that would be interested in the material in a scientific or engineering discipline. Published or ordinarily published material also include the following: readily available at libraries open to the public; issued patents; and releases at an open conference, meeting, seminar, trade show, or other open gathering. A conference is considered “open” if all technically qualified members of the public are eligible to attend and attendees are permitted to take notes or otherwise make a personal record (but not necessarily a recording) of the proceedings and presentations. In all cases, access to the information must be free or for a fee that does not exceed the cost to produce and distribute the material or hold the conference (including a reasonable profit).

5. **What is public domain and why is it important?**

Public domain is the term used for “information that is published and generally accessible or available to the public” through a variety of mechanisms. Publicly available software or technology is that which already is, or will be, published. To fall under this exclusion, there are a number of conditions which demonstrate public availability which are enumerated in the EAR.

6. **What if I am doing research in one of the embargoed countries?**

Dartmouth may have to apply for a license from the US Treasury Dept in order to be authorized to perform certain categories of transactions that would ordinarily be prohibited by law. Prohibited transactions are trade or financial transactions and other dealings in which U.S. persons may not engage unless authorized by OFAC. For Dartmouth, examples could be funding collaborators or paying field workers in embargoed countries.

Currently Dartmouth has a Cuban license to allow academic related travel to and exchanges with Cuba.

7. **If a license is needed, what is the process?**

Dartmouth has designated Nancy Wray as its “empowered official” for export control issues. She will arrange for appropriate support both within the Institute and, where necessary, outside the Institute to address export control and license issues. Unless there is an urgent
need for expedited review and approval, it normally takes 4-6 months to secure a license to export controlled materials from the U.S. or to transmit them to a non U.S. citizen or permanent resident within the U.S.