EXPORT CONTROLS

Presented by

The Office of Sponsored Programs

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What are Export Controls?

- Export Controls are U.S. laws and regulations that regulate the distribution of technology, services and information to foreign nationals and foreign countries for reasons including foreign policy and national security.

What are Export Controls continued...

- Export Controls usually arise for one or more of the following reasons: The nature of the export has actual or potential **military applications** or **economic protection issues**.

- Government concerns about the destination country, organization, or individual.

- Government concerns about the declared or suspected end use or end user of the export.

What is an export?

- Any oral, written, electronic or visual disclosure, shipment, transfer or transmission outside the U.S. to anyone, including a U.S. citizen, of any commodity, technology (information, technical data, or assistance) or software/codes.

- Such exports include transfers of items or information to foreign embassies, overseas corporate affiliates, and contractors.

Exports – Actual and Deemed

- "Actual Export." Technology and information leaving the shores of the United States.

- •"Deemed Export." Transmitting the technology or information within the United States to an individual other than a U.S. citizen or permanent resident.

Technical Data
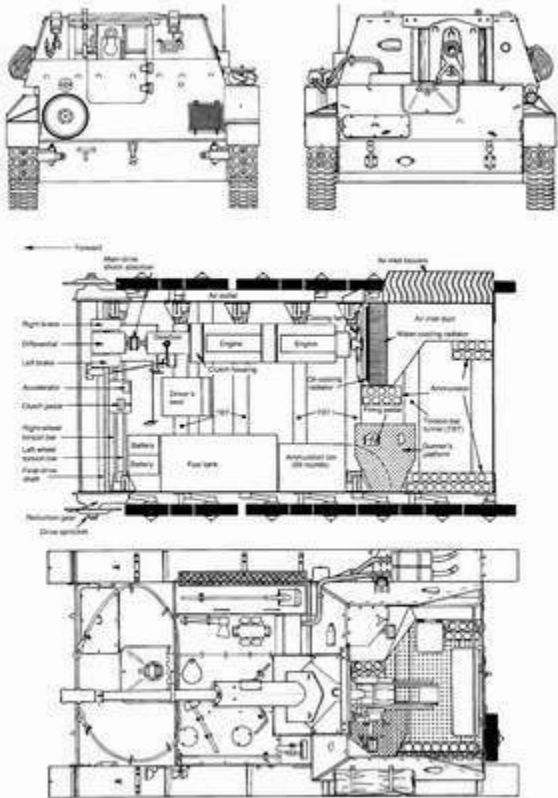
- Technical Data means information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of controlled articles.

- •This includes information in the form of blueprints, drawings, plans, instructions, diagrams, photographs, etc.

US Export Controls and Responsible Agencies

- U.S Department of Commerce: Controls **"Dual-Use" technologies** (primary civil use, but with military application) – Export Administration Regulations (EAR).

- U.S. Department of State: Controls inherently **military technologies** –International Traffic in Arms Regulations (ITAR).

- U.S Department of Treasury, Office of Foreign Assets Control (OFAC): Prohibits transactions with **countries subject to boycotts, trade sanctions and embargoes.**

Export Administration Regulations (EAR)

- Goods and related technology listed on the Commerce Control List (CCL, 15 CFR 774, Supp. 1)
- Lists 10 categories for which a license is required
  - Materials (chemicals, microorganisms, toxins), Materials Processing, Electronics, Computers, Telecommunications, Lasers and Sensors, Navigation and Avionics, Marine, Propulsion Systems, Space Vehicles and Related Equipment

- They have **DUAL USE.**
- Classic examples are lasers, Global Positioning Systems, and computers.
- The release of technical data includes "oral exchanges of information in the United States or abroad" (15 CFR. 734.1(b)(3)(ii)).
- All exports of technical data in this restricted category may require a license prior to export.

EAR 99

- This is an additional "catch-all" category
  - It covers goods/technology "subject to the EAR" as defined in 15 CFR 734.3(a) but not specifically identified on the CCL.
  - These items may or may not require a license, depending on the destination (country and individual).

International Traffic in Arms Regulations (ITAR)

- Regulates Defense articles, defense services, related technical data on the US Munitions List (USML) at 22 CFR 121.

- Items "deemed to be inherently military in character."

- Categories include equipment, software, algorithms, and technical data and services directly related to the items specified.

- The USML lists 21 categories which require a license.

- The List includes weapons, chemical and biological agents, vehicles, missiles, equipment and all satellites.

Office of Foreign Assets Control (OFAC)

- Prohibits transactions with countries, entities, and individuals subject to boycotts, trade sanctions, and embargoes and enforces economic and trade sanctions based on U.S. foreign policy and national security goals.
- Targets foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction.
- Prohibits transactions with Specially Designated Nationals and Blocked Persons.

SINCE 9/11

- The higher education community has increased its efforts to remove university research from the scope of export control regulations.

- There is an increasing applicability of these regulations to university research.

- The government has recently audited several university research programs, checking for compliance.

Implications of Export Laws

- No effect on 90% of university research
- **BUT** there is potential impact on: Ability of foreign nationals (students, faculty, visiting scholars etc.) to participate in research involving a controlled technology (primarily ITAR)
  - Ability to provide services (including training in the use of controlled equipment) to foreign nationals and foreign countries (ITAR, EAR, and OFAC)
  - Ability to send controlled equipment to foreign nationals or countries (ITAR, EAR, and OFAC)

- Impact can be lessoned if a license is available or if license exceptions (EAR) and/or exemptions (ITAR) apply.

How could export controls affect Research?

- Publication of research results would be severely restricted or controlled, contrary to University policy.
- Foreign national participation would be strictly prohibited.
- Secure facilities with restricted access may be required.
- Special rules for controlled toxins, bio-agents, and chemicals may be invoked.
- An export license may be required by Commerce or State if information, technology, items or services are **controlled**. Obtaining an export license may be costly and result in considerable delays.

How are Research Grants and Contracts Impacted?

- Strategic Federal funding opportunities (Homeland Security, NIH, DOD) directly linked to export control regulations.
- Restrictions on publication and access by foreign nationals invalidate the fundamental research exemption.
- Corporate sponsors may not clearly identify "protected technologies" in contract.
- Intellectual Property – involvement of foreign nationals.

Dissemination of Information

- The regulations prohibit the disclosure of controlled technical information by any method to a foreign national in the U.S. or abroad without a license from Commerce or State.

- Methods of disclosure include:
  - Fax
  - Telephone discussions
  - E-mail communications
  - Computer data disclosure
  - Face-to-face conversations
  - Training sessions
  - Tours which involve visual inspections

Other Examples of Restrictions

- Conferences and meetings where previously unpublished research will be presented (web-based, abroad or in the U.S.).
- Teaching foreign collaborators how to use **controlled** items in research (defense service).
- Transfers of research equipment abroad.
- Sharing/Shipping Encryption Source Code Abroad
- Travel To/Transactions With OFAC Sanctioned Countries

Exceptions and Exemptions

- Fundamental Research.
- Public Domain.
- Transfer of general scientific, technical, or engineering information.
- ITAR Bona Fide Employees.
- Information and technology taught in catalog courses- Educational Exemption
- Laptop use in Fundamental Research

Fundamental Research Exemption

- The "fundamental research" exclusion applies for basic and applied research in science and engineering performed or conducted at an accredited institution of higher learning in the United States where the resulting information is ordinarily published and shared broadly in the scientific community so long as that research is carried out <u>openly and without restrictions on publication or access to or dissemination of the research results.</u>

- It applies essentially to "**deemed exports**."

- Fundamental research is distinguished from research that results in information that is restricted for proprietary reasons or national security reasons (EAR) or pursuant to specific U.S. government access and dissemination controls (ITAR).

Fundamental Research Exemption

- EAR 15 CFR 734.8
  - Basic and applied research in science and engineering, where the resulting information is ordinarily published and shared broadly within the scientific community
  - Distinguished from proprietary research and industrial development, the results of which are ordinarily restricted for proprietary reasons or national security reasons.

- ITAR 22 CFR 120.11
  - Public domain: information which is published and which is generally accessible to the public
  - Through fundamental research; basic and applied research in science and engineering at accredited institutions of higher education in the US where the resulting information is ordinarily published and shared broadly within the scientific community.

Public Domain/Publicly Available

- It is published and generally accessible to the public through unlimited and unrestricted distribution, or

- It is "fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community"

- EAR 734.8; ITAR 120.11(8).

ITAR Employee Exemption

- The following additional exemption (set forth in ITAR 125.4(10)) also is particularly relevant to universities:
  - Disclosures of unclassified technical data in the U.S. by U.S. institutions of higher learning to foreign persons who are their bona fide and full time regular employees.

- This exemption is available only if:
  - The employee's permanent address throughout the period of employment is in the United States;
  - The employee is not a national of a country to which exports are prohibited pursuant to Section 126.1 (of the ITAR); and
  - The institution informs the individual in writing that the technical data may not be transferred to other foreign persons without the prior written approval of the Directorate of Defense Trade Controls.

Educational Instruction Exemption

- Generally, a license is not needed for classroom/lab teaching to foreign nationals in U.S. Universities.
- Authorizes the disclosure of educational information released by instruction in catalog courses or general scientific, mathematical, or engineering principles commonly taught in colleges and universities without a license from the Department of Commerce or State
- Students in degree programs, using controlled equipment to conduct research need to be registered for a research credit class
- (EAR 734.9:ITAR 120.10(5).

Laptop Exception
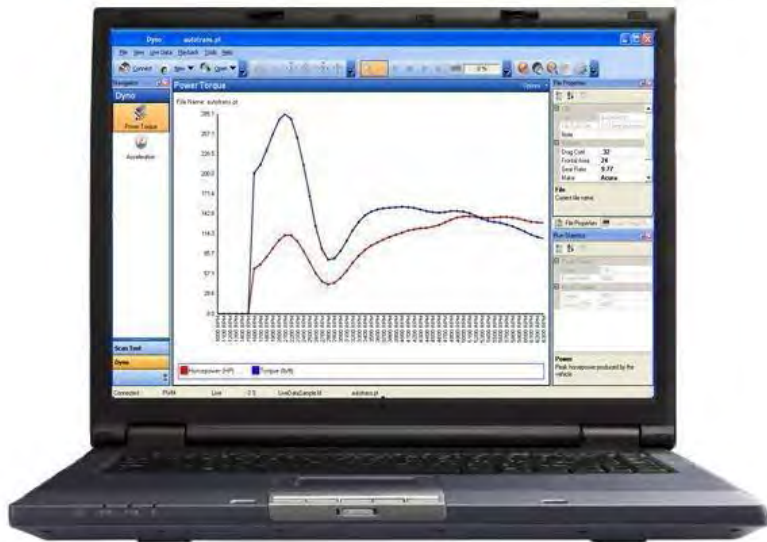
- <u>Excluding embargoed countries, faculty who wish to take their laptops out of the country to use in a university project that qualifies as fundamental research may be able to do so under the license exception for temporary export (TMP).</u>
- <u>•If the laptop meets the requirement for "tools of trade" and is under control of the faculty member.</u>
- <u>•15 CFR Part 740.9</u>

Red Flags!

- Shipments of equipment to a foreign country
- Training or collaboration with foreign nationals
- Research activities performed in or traveling to an embargoed country
- Reference to export controlled technologies in an award document
- Restrictions on publication rights
- Restrictions on foreign participation

- Grant/Contract terms & conditions limiting access to or dissemination of research results
- Sharing/Shipping Encryption Source Code Abroad
- ANY Item, Information or Software that is:
  - Designed or modified for a military use
  - For use in outer space
  - Suspected use in/for a weapon of mass destruction (nuclear, chemical, biological, missiles

Questions to Ask-Research Projects

- Does the award contain any terms or conditions that would restrict the disclosure or dissemination of the research results?

- Are there any restrictions on access to or dissemination of information the sponsor or others will furnish for use on this project?

- If the answer to 1 or 2 is yes, does the research project fall under one of the export-controlled technologies?

Questions to Ask-Research Projects

- Does this project involve training specific personnel for a special purpose? If so, could it be considered a defense service? If yes, how can you proceed?

- Will the university need to apply for an export license?

Questions to Ask-Restrictions

- Are there restrictions that will limit who can do or see the research? If so, it likely is not "fundamental" and the full requirement of export controls may apply.

- If it is not fundamental research, and foreign nationals will be involved, not only will the government export licensing requirements become applicable, but the government licensing entity may determine that foreign involvement is prohibited.

Protecting the Safe Harbor

- In order to ensure that the university's work stays within the "safe harbor" of the Fundamental Research Exemption,

    ❖ Make sure there are no restrictions of any kind on your ability to publish (limited sponsor review for proprietary or patentable information may be OK); and

    ❖ Assuming the source of support is the federal government, make sure there are no restrictions on the personnel that may be used on the project or restrictions on those who may have access to the research.

Why Screen?
Sponsored   Programs/Research Compliance

- To ensure that there are no foreign nationals on any government "watch" lists and to ensure that they are not from a **sanctioned** or **embargoed** country.

Why Screen?
International Programs/Passport Office

- To ensure that there are no foreign nationals on any government "watch" lists and to ensure that they are not from a **sanctioned** or **embargoed** country.

Why Screen?
Admissions/EnrollmentManagement

- The government screens all individuals before VISA's are issued, but it is still necessary to screen since the lists constantly change. You will also want to ensure that a student does not get registered if they have defaulted on a previous student loan at your University or any other.

Why Screen?
Legal Counsel/Internal Auditing

- To avoid legal exposure & ensure no U.S. laws or regulations are violated as it relates to export compliance. There is a need to establish policies, plans, procedures to ensure laws and regulations are met. It is also important to assess and evaluate the risk factors associated with operations and functions of the University and its related organizations.

Why Screen?
Purchasing/Procurement/Post   Office

- Screen all vendors & equipment suppliers to ensure that they are not on any government lists. There are also certain lists that U.S. citizens are on that no one is permitted to deal with. It is important for whomever is responsible for the actual shipments of equipment and samples for researchers to determine whether or not an export license is required.

Why Screen?
Administration/Human   Resources

- Screen all existing and incoming faculty and staff to ensure no one is on any government lists. (ie. Police, FBI, Terrorist).

Export Controls Management Plan

- Not just Sponsored Research
- Other departments and areas of the university are involved:
  - Contracts and Grants, Graduate Studies, Enrollment Management
  - Technology Transfer, Information Resources
  - Legal Counsel, Internal Auditing
  - Purchasing, Procurement, Post Office
  - Human Resources, Finance Administration
  - International Programs/Services, Passport Office

Violations and Penalties

- Criminal penalties (including fines and/or prison sentences for **individuals**) and civil sanctions.

- May affect future research opportunities.

- **Fines of up to $1,000,000 per violation for individuals and/or the University.**

- Prison sentences up to 10 years.

Summary

- Complicated and confusing
- Check web sites for updates on regulations, countries, etc.

  ❖ **EAR:** https://www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear

  ❖ **ITAR:**   https://www.pmddtc.state.gov/regulations_laws/itar.html

  ❖ **OFAC:**   https://www.treasury.gov/about/organizational-structure/offices/pages/ office-of-foreign-assets-control.aspx

- Don't allow publication restrictions
- Penalties severe
- Get policy out and train faculty, staff and administrators

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