U.S. Export Controls: Implications for Universities

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Agenda

- Export Controls & the “Deemed Export Rule”
- Exemptions Relevant to Universities
- Limitations - “Red Flags”
- Process/Procedures
  - Non-Sponsored Research
  - Sponsored Research (Research Foundation)
- Visas Mantis Program
- Questions
Overview:
Export Controls & the “Deemed Export Rule”
What are Export Controls?

- Government regulations that control the “export” or “re-export” of goods, software and technologies:
  - **ITAR** – Military/Defense/Space Items
  - **EAR** – “Dual Use” Items

- Export controls require consideration of:
  - **What** is being exported?
  - **Where** it is being exported?
  - **Who** will receive the item (includes “Deemed Exports”)?
  - **How** will the item be used?

- In some cases, **government approval** (e.g., export license) is required before the export takes place.
What is Controlled?

• General Rule: Export controls place restrictions on transactions involving:

  - Controlled Items
  - Restricted Destinations: Embargoed or sanctioned countries
  - Prohibited End-User: Individual or company/organization listed on Government Restricted Party List
  - Prohibited End-Use: Nuclear applications, chemical/biological weapons, rocket systems or unmanned air vehicle applications
  - Prohibited Activity:
    • Knowledge of a violation
    • Antiboycott request
<table>
<thead>
<tr>
<th>EAR</th>
<th>ITAR</th>
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<tbody>
<tr>
<td>• “Dual Use”/Commercial</td>
<td>• Military/Space</td>
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<tr>
<td>• Controlled items appear on Commerce Control List</td>
<td>• Controlled items appear on U.S. Munitions List</td>
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<tr>
<td>• A number of exceptions available</td>
<td>• License typically required for foreign person employees</td>
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<tr>
<td>• Examples of EAR Controlled Items:</td>
<td>• ITAR controlled items:</td>
</tr>
<tr>
<td>• semiconductors/electronics</td>
<td></td>
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</tbody>
</table>
| • telecommunications |   Specifically  
| • high speed computers | • designed  
| • manufacturing equipment | • modified  
| • encryption | • adapted  
| • many others | • configured  

...for military/space application
What is a “Deemed Export”? 

A release or transfer of technology or technical data to a Foreign National in the U.S. 
- Physical export out of U.S. is NOT required 
- Transfer takes place in the U.S. 
- “Release” could occur by providing technical data stored on shared network drives 

“Deemed” to be an export to the Foreign National’s “Home Country” 

May require a U.S. government export license or other approval
How can a “Deemed Export” Occur?

- Providing drawings to a Foreign National employee
- Technical conversations/collaboration with Foreign National
- Telephone conversations
- Technical training
- Working with Foreign National interns or students
- Collaborations w/ foreign located entities
- Access to database that contains controlled technology
Who is a “Foreign National”? 

• Any Person who is not:
  - A U.S. Citizen;
  - A U.S. Lawful Permanent Resident;
  - A Person Granted Asylum;
  - A Refugee;
  - A Temporary Resident granted amnesty.

• Foreign National includes persons with status such as H-1B, H-3, L-1, J-1, F-1 Practical Training, L-1, etc.
EAR License Requirements
(Dual Use/Commercial Technologies)

“Terrorist Supporting Countries”
• Cuba, Iran, North Korea, Sudan, Syria

“Countries of Concern”
• List of 20+ countries, including former Soviet Republics, China, Vietnam

“Friendly Countries”
• All others (Europe, Australia, Central/South America, etc.)
ITAR Licensing Policy
(Military/Space Technologies)

• Policy of Denial
  - State Sponsors of Terrorism
    • Cuba, Iran, North Korea, Sudan, Syria
  - Arms Embargo
    • PR China, Haiti, Liberia, Somalia, Sudan
  - Others
    • Belarus, Iraq, Vietnam

• All Others: Case-by-case review
Implications

• An export license may be required
  - Exceptions/exemptions may apply in university setting

• Lengthy processing times
  - Currently 2-3+ months
  - Denial possible
  - Approval may contain restrictive conditions

• Must curtail or modify activities pending license issuance
Form I-129: Export Control Certification
Form I-129 Overview

- The Form I-129 is a petition used for:
  - Specific types of visas for Foreign National workers:
    - H1-B/H1-B1
    - L-1
    - O-1A
  - New initiations, amendments and renewals

- Numerous changes to I-129 petition
  - New form released to public November 23, 2010
  - Mandatory as of December 23, 2010
  - Export control certification mandatory as of February 20, 2011
Part 6. Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States

(For H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions only. This section of the form is not required for all other classifications. See Page 3 of the Instructions before completing this section.)

Check Box 1 or Box 2 as appropriate:

With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

- [ ] 1. A license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or

- [ ] 2. A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.
Exemptions
The Basics

- Exemption will alleviate need for export license
- Limited in scope and purpose
- Must review facts on case-by-case basis

*General University Rule:* Accepting restrictions on the publication of information may trigger export control requirements
Exemptions:
Publicly Available/Public Domain Information

- Published Information
- Open Conference/Meeting
- Patents
- Educational Information
- Fundamental Research
Educational Information:
EAR 734.9

Key Elements:

• Information concerning general scientific, mathematical or engineering principles commonly taught in universities

• Includes information that is released by instruction in catalog courses and associated teaching laboratories of academic institutions
Fundamental Research
EAR 734.8

Key Elements:

• Basic and applied research in science and engineering
• Resulting information is ordinarily published and shared broadly within the scientific community

Such research can be distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary reasons
Limitations:

- Must be conducted at accredited institutions of higher learning in U.S.

- May be unavailable if the university or its researchers accept (at the request, for example, of corporate sponsor) restrictions on publication of scientific and technical information resulting from the project or activity.

- Does not apply to defense services or collaboration with foreign located participants.
Exemption Limitations
“Red Flags”
Restrictive Clauses or Conditions

• **Publication or Research Restrictions**: The exemptions may be negated if the employee or college accepts a clause or restriction, including those that:

  - Forbids or restricts the participation of foreign nationals (*i.e.*, U.S. Only)
  
  - Specific item, software or technology designated by a third party as “subject to export controls”

  - Includes a sponsor initiated or Government flow-down export control clause (other than a general statement of compliance)

  - Requires a classified security or similar clearance

  - Gives the sponsor a right to approve publications or patent applications resulting from research (*i.e.*, pre-publication review)

  - Restricts access to or disclosure of research results
International Travel & Collaboration

- **Travel and Collaboration**: The exemptions may not apply to:
  - The shipment or hand-carry of items, materials, equipment or technical data to another country
  - Travel to a country subject to a U.S. embargo or sanction
    
    *Current List*: Cuba, Iran, North Korea, Sudan and Syria
  
  - Research activity involving a foreign location or exchange of technology or technical data with a foreign located collaborator
Ineligible Technology and Software

**Limitations on Technology & Software:** The exemptions may be unavailable for research related to the following:

- Items or software designed, modified, adapted or configured for a military or space application (including commercial satellites)

- Development or production of source code related to encryption

- Development or production of controlled chemicals or bio-agent/toxic materials

- Design or development of scientific equipment used in research activity

- Proprietary or confidential technology or technical data
Compliance Program:
Key Elements
Three Key Compliance Elements

**Foreign National Program**

*Key Participants:*
- Dept. Chairs
- HR/Payroll
- Identify Foreign National employees
- Export License Review
- Monitoring of research activities

**Non-Sponsored Research Activities**

*Key Participants:*
- Faculty
- Dept. Chairs
- Graduate School
- Annual Survey - Key Departments
- Initial review by Chairs or designee
- Training Modules
- Export Compliance Web page

**Sponsored Research Activities**

*Key Participant:*
- Research Foundation
- Review sponsored research activities for potential Export Control issues
- Forms and additional information available on the RF webpage
Procedure:
Non-Sponsored Research Activities
Non-Sponsored Research Activities

• Buffalo State has developed an annual questionnaire to proactively identify “Red Flags”

• The form will be distributed to key departments as part of the Annual Activity

• Form applies to:
  - Non-sponsored & unfunded research activities
  - Research activities conducted outside the Research Foundation
Annual Export Control Review Form: Activity Review

1) Will the unfunded/non-sponsored research have any connection or lead to a possible connection to any of the following:
   a. Military, space or satellite related activities, systems or products

   YES _____    NO _____

   Examples include:
   • Research that feeds into or supports a Department of Defense, DARPA, NASA or related project
   • Research on improvements to satellite hardware/equipment
   • Military simulation or training exercises
Annual Export Control Review Form:
Activity Review

b. Technology or technical data that is considered proprietary, confidential, restricted or subject to publication restriction?

YES _____  NO _____

Examples include:
- Request to execute a Non-Disclosure Agreement or similar confidentiality document
- Request to remove certain information prior to publication
- Notification or marking that indicates information is subject to export controls
- Request to treat information as subject to export controls
Annual Export Control Review Form: Activity Review

c. Design or development of any of the following:
   - Equipment that will be used to conduct research activities
   - Encryption source code
   - Controlled chemicals or bio-agent/toxic materials

YES ____  NO ____
Annual Export Control Review Form:
Activity Review

d. Collaboration with a foreign country? This includes activities such as research, technical data exchange, and shipment of equipment/components or systems.

YES _____  NO _____
“Deemed Export” License Determination

• If “no” to all questions – end review
  - Future activities continue to be monitored through Sponsored and Non-Sponsored research reviews
  - Notification if circumstances change

• If “yes” to any of the questions:
  - Case-by-case evaluation of the technologies, projects, and contracts
  - Determine the export classification of the technology
  - Determine license requirements based on “home country”
Procedure:
Sponsored Research Activities
Sponsored Research Activities

• Managed by the Research Foundation of SUNY at Buffalo State College

• Policy: Requires that all employees complete a web-based export controls evaluation and follow all applicable procedures:
  - External funding for sponsored programs
  - Research Foundation funding for travel or projects

• Review: If the evaluation results indicate the possibility that an export control license may be required, the employee shall work with the Research Foundation Campus Export Controls Officer to complete the license review and, if needed, the licensing process
Case Study:
The Professor Roth Case
The Roth Case

Retired University Professor Sentenced to Four Years in Prison for Arms Export Violations Involving a Citizen of China

“John Reece Roth, 72, of Knoxville, Tenn., was sentenced to 48 months in prison for violating the Arms Export Control Act by conspiring to illegally export, and actually exporting, technical information relating to a U.S. Air Force (USAF) research and development contract.”

Source: U.S. Department of Justice, Press Release, Wednesday, July 1, 2009
The Roth Case

- DoD contract with Atmospheric Glow Technologies (AGT) to develop advanced plasma technology for use on U.S. Air Force Unmanned Air Vehicles (“drones”)
  - Contract was subject to the ITAR
- AGT entered into a subcontract with Prof. Roth/University of TN
- Prof. Roth used University facilities and hired Foreign Nationals (China and Iran) to serve as graduate assistants
- University Export Compliance Officer informed Prof. Roth that Foreign Nationals could not receive ITAR Technical Data under the contract
Visas Mantis Program
Visas Mantis Reviews

- Initiated at U.S. Consulates Abroad
- Review for Technology Alert List ("TAL") Activity
- If TAL Activity -
  - **Mandatory Review:** Cuba, Iran, North Korea, Sudan, Syria
  - **Likely Review:** China, Russia
  - **Discretionary Review:** If reason to believe entry will result in violation of U.S. export control laws
  - **I-129 Review:** May be triggered if selecting Box 2 (license required)
Technology Alert List (last published version)

- Conventional Munitions
- Nuclear Technology
- Rocket Systems
- Rocket System and Unmanned Air Vehicle Subsystems
- Navigation, Avionics and Flight Control
- Chemical, Biotechnology, and Biomedical Engineering
- Urban Planning
- Remote Sensing, Imaging and Reconnaissance
- Advanced Computer/Microelectronic Technology
- Materials Technology
- Information Security
- Laser and Directed Energy Systems
- Sensors and Sensor Technology
- Marine Technology
- Robotics
Resources: Export Compliance Webpage
EXPORT CONTROLS

Background:

The United States federal government has enacted laws that regulate the distribution of specific technology, information and services to foreign nationals and foreign countries for reasons of national security and foreign policy. These laws are applicable to U.S. persons and are relevant to the university community, especially in respect to travel and research conducted by individuals alone and/or in affiliation with the university.

These laws are referred to as “export controls” and apply to the export and re-export of “controlled” items and technologies, as well as, deemed exports. In recent years, penalties have been enhanced to impact not only individuals, but also institutions. Thus, universities have implemented export control programs to educate their employees and to facilitate the export control license application process when necessary and appropriate.

In addition, many universities have adopted policies to assure that research activities meet the criteria of “fundamental research,” to increase the chance that faculty research will not require an export controls license. Refusal to develop compliance mechanisms could severely hurt colleges’ ability to run its programs, and individuals who do not participate in the compliance processes could be held personally liable for criminal offenses.

Penalties for Violating Export Controls: Enforcement of U.S. export control regulations continues to increase, including fines up to the $1,000,000 and 20 years imprisonment in the most egregious cases.