Export Control

What are export controls?

- Refers to US laws that regulate the distribution to foreign national and foreign countries strategically important products, technology, services, and information for reasons related to foreign policy and national security.

Export control laws have been in existence and enforced for many years

National Security Decision Directive (NSDD) 189, National Policy on the Transfer of Scientific, Technical and Engineering Information issued 9/21/85 established national policy for controlling the flow of such information produced in federally funded fundamental research at colleges, universities and laboratories.

Export Statutes and Regulations

EAR (Export Administration Regulations)

- Oversight by the US Department of Commerce – Bureau of Industry and Science
  - Regulates “dual use” technology; some defense items.

ITAR (International Traffic in Arms Regulations)

- Oversight by US Department of State
- Regulates technology related to defense/military application/space

Foreign Asset Control

- Oversight by US Department of Treasury Office of Foreign Assets Control (OFAC)
- Regulates transfers to embargoed (prohibited) countries, organizations, and individuals

What is subject to EAR?

- Generally any technology or information that has a dual use – both military and civilian
- Includes deemed exports, shipments of commodities into or from the US, including while “In transit” and re-exports.

What is a Commodity under EAR?

- Nuclear Materials, Facilities and Equipment
- Materials, Chemicals, Microorganisms and toxins
- Materials Processing i.e. Making plastics, metals
- Electronics Design, Development and Production Computers
- Telecommunications and Information Security
- Sensors and Lasers
- Navigation and Avionics
- Marine
- Propulsion Systems and Space vehicles

Note: See ECCN 2B352 – 5 level classification system

Export also includes:

- Sending or taking a defense article out of the US
- Disclosure or transfer of a defense article to any foreign government in the United States
- Disclosure or transfer of covered technical data to a foreign person in the US or abroad
- Performing a defense service on behalf of or for the benefit of a foreign person in the US or abroad

Deemed Export :

- Means Disclosure or transfer of covered technical data to a foreign person in the US or abroad
- Applies to disclosure to research assistants, students, visiting foreign researchers, in the US
- Applies to US citizens visiting a foreign country
- Does not apply to US citizens, permanent residents, and those with US asylum protection.

Note: A foreign person includes organization, and includes foreign governments and their agencies

What is a defense service?

- Providing a defense service on behalf of or for the benefit of a foreign person in the US or abroad
- Providing training or assistance in developing defense articles is not permitted even if publically available information is used
- Includes Training

Examples:

- Any service to an embargoed country
- Military or space projects
- Services related to encryption software or commodities

OFAC Regulations cover payments, services, or travel to countries with special controls

- Balkans
- Burma
- Cuba
- Iran
- Iraq
- Liberia
- Libya
- North Korea
- Sierra Leon
- Sudan
- Syria
- UNITA Faction in Angola
- Zimbabwe

Some activities have special controls:

- Diamond Trading
- Narcotics Trafficking
- Proliferation of WMD
- Terrorism

Allowability of an export to a foreign person is made on a case by case basis upon review of the following factors:

Technology classification

- Activity
- Country/Destination of technology
- Status of recipient/End-User Organization/Person
- Intended/expected End Use of the technology
- Conduct of both parties

- Visa status alone is not the determinant of whether an export can be made to a foreign person.
- Persons who are legally in the US for educational and research purposes may still be restricted from participation in certain activities or receipt of certain information.

Exclusions from ITAR and EAR

- Publically available information: Includes information arising from or resulting from Fundamental Research

- Course Content: Information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges, and universities

- Fundamental Research done in the US by an accredited colleges or university is exempt from export controls.
  - Science and engineering fields
  - Resulting information ordinarily published and shared broadly in the scientific community
  - Covers both basic and applied research

University based research is not considered Fundamental Research if the university or its researchers accept:

- Restrictions on publication of scientific and technical information resulting from the project or activity (e.g. at the request of an industrial sponsor)
- “Pass through” export restrictions from sponsors
- Restrictions on participation by foreign nationals
- “Side Deals” agreeing to any of these restrictions

Review process generally:

- Step 1 – review the proposal and the RFP to determine if the type of technology or science being developed or activity being conducted is subject to export controls or sanctions
- Step 2 – Determine if export regulations apply
- Step 3 – Determine if an exclusion or exemption applies
- Step 4 – Determine if the project can be rewritten to avoid export regulations
- Step 5 – Seek internal approval for exceptional cases

Export Issues can also appear in the following university settings:

- Nondisclosure agreements
- Materials Transfer Agreements
- Facilities Access agreements
- Purchasing Agreements
- Physical shipment of goods
- Web transfers of information

Technology Control Plans

You will need a TCP if export controlled information, technology is received with confidentiality or access restrictions – such as from a sponsor under a NDA:

- Technical Information
- Materials
- Devices
- Equipment
- Software

TCP Factors

- How will information be received –verbal, paper, electronic
- How will information be stored/accessible? In your head, physical portable medium (paper/disc/chip), on personal computer, on server?
- Who needs the information/access? How will the information be used?

Helpful Hints:

- Limit activity to “fundamental research”
- Use publically available information
  - Avoid use of proprietary information
- Avoid contract restrictions on dissemination of results, and/or who can participate
- Define scope of project to avoid or limit export issues

- Seek alternative implementation where export control cannot be avoided
- Avoid ITAR if possible – EAR has more exceptions and fewer services are controlled under EAR
- Separate controlled tasks from uncontrolled
- Minimize time and resources for controlled tasks
- Minimize impact on education and careers
  - PIs and students

Penalties for violations are severe and include:

- Civil fines and forfeitures
- Criminal fines and incarceration for individual violators
- Loss of export privileges
- Bad publicity