Overview

- Potential Export Areas in a University Setting
- Export Controls: Definitions
- Regulations:
  - Department of State
  - Department of Commerce
  - Department of Treasury
Areas for Export Review

- Deemed Exports – may occur during meetings, telephone calls, conversations, facility inspections, email, fax, etc.
- Foreign Visitors, H1B1, J-1 visiting scholars, and B visas – Deemed Export Attestation on I129 Application
- Foreign Travel – employees/students traveling with hardware, software, and/or technical data.
- International Collaborations – exchange of proprietary information, sending samples, technical data, or other tangible items on certain projects.
- ITAR – access to regulated items/technology by a foreign national/person.
- Foreign National access to research labs under certain conditions and/or access to certain items.
- Network Access – controlled technical data on a network accessible to foreign nationals.
- Shipping items off campus – whether within or outside the U.S., denied parties?
- Military Proposals, STTR/SBIR Flow Thru Clauses, Non-Disclosure Agreements, Material Transfer Agreements.
- Non-Sponsored Activities
- Conferences – is the conference “open” as per the federal regulations?
What are Export Controls?

U. S. laws that regulate the distribution of items, technology, services, and information, including items and technology used in research, for reasons of foreign policy and national security.

*Export controls cover all fields of science and engineering.*
Laws and Regulations

- Department of State
  - International Traffic in Arms Regulations “ITAR”
- Department of Commerce
  - Export Administration Regulations “EAR”
- Department of Treasury
  - Sanction Programs, commonly referred to “OFAC”

Other federal agencies also regulate export, re-export or re-transfer of certain items and technologies: Nuclear Regulatory Commission, U.S. Department of Energy, Center for Disease Control, Food and Drug Administration, Drug Enforcement Agency.
What is an Export?

“Export” means an actual shipment or transmission of items out of the United States.

“Deemed Export” means release of an item (usually technology or software) to a foreign national within the United States. Can be through visual inspection, oral exchange, electronic/digital exchange or made available by practice/application (e.g. training).

“Reexport” means an actual shipment or transmission of items from one foreign country to another foreign country; or release of technology or software to a foreign national outside the United States.
Who is a Foreign Person/National?

The federal definition of a foreign national is a person who is **NOT**:

- Granted permanent U.S. residence, as demonstrated by the issuance of a permanent residence card, i.e., a "Green Card"
- Granted U.S. citizenship
- Granted status as a "protected person" under 8 U.S.C. 1324b(a)(3), e.g., political refugees, political asylum holders, etc.

The term for export regulations also includes:

- Foreign corporations, businesses, associations, or other entity or group that is not incorporated or organized to do business in the U.S.
- International organizations, foreign governments, and agency/subdivision of foreign governments
International Traffic in Arms Regulations

- **Department of State**
  
  Administered by: Directorate of Defense Trade Controls “DDTC”
  
  Regulations: International Traffic in Arms Regulations “ITAR”
  
  Controlled Items: United States Munitions List “USML”
  
  Applies to: Defense Articles, Defense Services, and Technical Data
NO article on the USML can be exported without a license or exemption.

- **Defense Articles**
  

- **Defense Services**
  
  Examples – teaching someone how to use software that is a defense article; training a foreign person using militant data even if the data is in the public domain.

- **Technical Data**
  
  Examples – data/deliverables from research subject to ITAR or for a restricted program; data provided to a university (seed data from the government or a company).

  - **Software**
What is NOT Technical Data

This definition does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain as defined in § 120.11.

It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.
Public domain (22 CFR 120.11)

**NOT SUBJECT TO ITAR**

- Information which is published and which is generally accessible or available to the public:
  - Through sales at newsstands and bookstores;
  - Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;
  - Through second class mailing privileges granted by the U.S. Government;
  - At libraries open to the public or from which the public can obtain documents;
  - Through patents available at any patent office;
  - Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States;
  - Through public release (unlimited distribution) after approval by the cognizant U.S. government department or agency;
  - Through **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.
Fundamental Research
subset of public domain

Basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls.
When is it NOT Fundamental Research

University research will **NOT** be considered fundamental research if:

(i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or

(ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.
Penalties

- **Criminal Penalties (for willful violation):** entity of up to $1,000,000 for each violation; individuals may be subject to a fine of up to $1,000,000 or imprisonment of up to ten years, or both, for each violation.

- **Civil Penalties:** entity up to $500,000 for each violation; individuals may be subject to fines of up to $500,000 for each violation. In addition, suspension or debarment from government contracts; seizure or forfeiture of the item; and/or revocation of export privileges.
Export Administration Regulations

Department of Commerce

Administered by: The Bureau of Industry and Security “BIS”

Regulations: Export Administration Regulations “EAR”

Controlled Items: Commodity Control List “CCL”

Applies to: Commercial and “dual use” (commercial and military/security applications) commodities, technology, and software.
WHAT - the item
WHERE - the destination
WHO - the end user
WHY - the end use

All exceptions must be clearly documented and kept on file in accordance with federal record keeping regulations. Current regulations require records be kept for five (5) years from the date of the transaction.
WHAT? The item

The CCL regulates the following types of items:

- **Products that have a commercial or “dual use” application (DUAL USE – have both a commercial and a military/security application)**

  Examples: bayonets, biologics and viruses, stun guns, night vision goggles, submersible vehicles, global positioning systems, high speed computers, microprocessors, lasers, cameras, amplifiers, chemicals, underwater equipment, telecommunications equipment, information security equipment.

- **Technology: Specific information necessary for the “development”, “production”, or “use”* of a product. The information takes the form of “technical data” or “technical assistance”.

  Technical data. May take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories.

  Technical assistance. May take forms such as instruction, skills training, working knowledge, consulting services. May involve transfer of technical data.

- **Software**

  Examples: Information security equipment software, information security software, information technology support software, recovery of source code software, security equipment information software, telecommunications equipment software, CAD software for semiconductors and integrated circuits, chemical production process control software, acoustic beam forming software.
Commercial items not included on the CCL are designated and generally may be exported without a license “EAR99” **BUT REQUIRE A LICENSE** when exported to Cuba, Syria, Sudan, Iran, and North Korea or end users/end uses of national security/foreign policy concerns).
Items NOT Subject to the EAR

- Information Resulting from Fundamental Research (15 CFR 734.8)
- Published Information and Software (15 CFR 734.7)
- Educational Information (15 CFR 734.9)
- Information included in certain patent applications (15 CFR 734.10)

Excludes certain encryption software – see ECCN 5D002
Information Resulting from Fundamental Research

Basic and applied research in science and engineering, where the resulting information is ordinarily published and shared broadly within the scientific community.

- Research conducted by scientists, engineers, or students at a university normally will be considered fundamental research;

*NOT FUNDAMENTAL RESEARCH if university accepts restrictions on publication or accepts specific security controls as part of a research project or activity sponsored by the U.S. government.*
Published Information & Software, Educational Information, and Patent Applications

Published Information and Software:
Information is “published” when it becomes generally accessible to the interested public in any form, including:
- Publication in periodicals, books, print, electronic, or any other media for general distribution to the public or persons interested either for free or at a price that does not exceed the cost of reproduction and distribution;
- Readily available at libraries open to the public or at university libraries;
- Patents and open (published) patent applications available at any patent office;
- Release at an open conference, meeting, seminar, trade show, or other open gathering.

Educational Information:
Released by instruction in catalog courses and associated teaching laboratories of academic institutions.

Patent Applications:
Certain patent applications including: Information contained in a patent application, or an amendment, modification, supplement or division of an application, and authorized for filing in a foreign country in accordance with the regulations of the Patent and Trademark Office.
Where? The destination

- Different restrictions apply to different countries.

- The regulations include:
  - List of items controlled
  - List of various reasons for control
  - List of countries indicating if controls are applicable to the country
    - An X indicates that a license is required
## Commerce Country Chart

### Reason for Control

<table>
<thead>
<tr>
<th>Countries</th>
<th>Chemical &amp; Biological Weapons</th>
<th>Nuclear Nonproliferation</th>
<th>National Security</th>
<th>Missile Tech</th>
<th>Chemical, Biological &amp; Toxin Weapons</th>
<th>Regional Stability</th>
<th>Firearms Convention</th>
<th>Crime Control</th>
<th>Anti-Terrorism</th>
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Export Administration Regulations | Bureau of Industry and Security | July 23, 2012
Who? The end-user

**Restricted Parties:** Certain individuals and entities are prohibited from receiving U.S. exports, even EAR99 designated items and deemed exports, without a license.

- Restricted parties are not limited to foreign entities and can include US persons.
- They change and are updated routinely.
- Designation is not based upon nationality but instead is based upon previous behavior or action.

**Obligation:** Must screen recipients against various U.S. government lists.

*There are over fifty lists issued by governmental agencies that restrict transactions with specific individuals, groups and entities.*
Why? The end-use

Even if no license is required for the destination and the end-user is not a prohibited party, a license still may be required for the transaction:

Part 744 of the EAR – Control Policy: End-User and End-Use Based

- Prohibits exports, re-exports and transfers (in-country) of items subject to the EAR to defined nuclear, missile, and chemical and biological proliferation activities.

OBLIGATION: Need to know ultimate end-use.
License Exceptions (15 CFR 740)

**TMP – Tools of the Trade**

**Tools of trade.** Usual and reasonable kinds and quantities of tools of trade (commodities, software, and technology) for use in a lawful enterprise or undertaking of the exporter. A laptop, PDA, cell phone, data storage devices are generally an exception to the EAR. However, this exception is **NOT automatically allowed:**

A license is required when the device with controlled research data or encrypted/proprietary software is hand-carried or shipped abroad to a restricted country and/or to a denied person/entity.

Example: A laptop being hand-carried to any country with research data on a genetically modified organism will currently require a license as genetically modified organisms are controlled items for chemical, biological and anti-terrorism reasons and there are no applicable license exceptions.

When hand-carrying a laptop, PDA, cell phone, data storage devices outside the U.S under the TMP Exception:

- **you MUST** retain exclusive control of the equipment at all times
- **you MUST** not let the equipment be used by anyone in the foreign country
- **you MUST** not intend to keep these items in these countries for longer than one year
- **you MUST** verify that no government licenses are required
Penalties

Criminal Penalties (for willful violation): may result in the institution paying a fine of up to $1,000,000 or five times the value of the exports (whichever is greater) for each violation; and the individual may be fined up to $250,000 or be imprisoned for up to ten years, or both, for each violation.

Criminal Penalties (for knowing violation): may result in the institution paying a fine of up to the greater of $50,000 or five times the value of the exports for each violation; and the individual may be fined up to the greater of $50,000 or five times the value of the exports or be imprisoned for up to five years, or both, for each violation.

Civil Penalties: include $12,000 for each violation, except that the fine for violations involving items controlled for national security reasons is up to $120,000 for each violation; suspension or debarment from government contracts; seizure or forfeiture of the item; and/or revocation of export privileges.

Additionally, for each violation, any or all of the following sanctions may be imposed:
- The denial of export privileges; and/or
- The exclusion from exporting practice; and/or
- Loss of federal funds
- Seizure/Forfeiture of goods.
Department of Treasury

Administered by: Office of Foreign Asset Controls “OFAC”

Regulations: Foreign Assets Control Regulations (FARC).
- The Trading with the Enemy Act
- International Emergency Economic Powers Act
- Specially Designated Nationals and Blocked Party List
Currently, OFAC administers 23 sanction programs, the Specially Designated Nations, and Blocked Party List.

Sanction Programs are usually financially based, but can include import/export of goods, technology, or services.

Sanction Programs are both list-based and country-based.

*Transactional based – need to review the transaction in relation to the sanction program for a license determination.
Penalties


- Civil penalty: may result in the institution paying a fine of up to $250,000 per violation or twice the transactional value whichever is greater; and the individual may be fined up to $250,000 per violation or twice the transactional value whichever is greater.
- Criminal penalty: may result in the institution paying a fine of up to $1,000,000 per violation; and the individual may be fined up to $1,000,000 or twenty years incarceration, or both per violation.

Additionally, for each violation, any or all of the following sanctions may be imposed:

- The denial of export privileges; and/or
- The exclusion from exporting practice; and/or
- Seizure/Forfeiture of goods.

Trading with the Enemy Act (TWEA) Penalties (Cuba and North Korea)

- Civil penalty: $65,000 per violation
- Criminal penalty: $1,000,000 per violation and up to 10 years incarceration
Resources

International Traffic in Arms Regulations
http://pmmddtc.state.gov/regulations_laws/itar_official.html

Export Administration Regulations
http://www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear

Office of Foreign Assets – Sanctions Programs
http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx

International Travel Information