GENERAL OVERVIEW OF EXPORT CONTROLS AND EMBARGOES

Introduction

Export control laws are federal laws enforced by both the Department of Commerce (Export Administration Regulations, EAR) and the Department of State (International Traffic in Arms Regulations, ITAR). The objective of ITAR and EAR is to prevent foreign citizens, industry, or governments, or their representatives from obtaining information that is contrary to the national security interests of the United States. Export control laws prohibit unlicensed transfer of technology, software, or technical data related to covered products. This includes shipping technologies overseas to anyone, including U.S. citizens as well as foreign nationals, and sharing information or technology with researchers and others when intent exists to transfer it to a non-U.S. entity or individual, wherever located.

If either the Export Administration Regulations (EAR) or the International Traffic in Arms Regulations (ITAR) classifies an item as a controlled technology, a license must be obtained prior to shipping that controlled technology outside of the United States, but also releasing or sharing restricted data or technology with a foreign national within the United States (“Deemed Export”).

Applying Export Control Regulations to University Research

While export regulations do not apply to most University research efforts, it is essential for faculty to ask questions and contact ORD when one or more of the following apply to their research projects:

• It has actual or potential military applications
• The destination country, organization, or individual is restricted by federal law
• The declared or suspected end use or the end user of the export compromises national security
• Economic protection issues are associated with the destination country

Export Administration Regulations (EAR)

EAR, which is enforced by the U.S. Department of Commerce, governs the restriction of items containing a civil and military use (dual-use). Dual-Use Technologies are catalogued in the Commerce Control List (CCL). The complete text of the EAR and CCL are available online at http://www.access.gpo.gov/bis/ear/ear_data.html. The CCL has ten specific categories of technologies that are controlled:

• Nuclear materials, facilities, equipment research
• Chemicals and toxins
• Materials processing (i.e., making plastics, metals)
• Electronics development
• Computer development and programs
• Telecommunications
• Information security (encryption)
• Sensors and lasers
• Navigation and avionics
• Propulsion systems and space vehicles

International Traffic in Arms Regulations (ITAR)

ITAR governs items containing a military use and is enforced by the U.S. Department of State. Military-use items are catalogued in the U.S. Munitions Control List (MCL), 22 CFR 121. Complete on-line versions of the ITAR and MCL are available online at: http://www.pmddtc.state.gov/reference.htm and include items such as:
• Electronic equipment, or software designed for military, security, and intelligence applications
• Firearms
• Artillery projections
• Ammunition
• Launch vehicles, guided missiles, ballistic missiles, rockets, torpedoes, bombs & mines
• Explosives, propellants & incendiary agents
• Aircraft & associated equipment
• Military training equipment
• Protective personnel equipment
• Military electronics
• Fire control, range finder, optical & guidance & control equipment
• Toxicological agents & equip. & radiological equip.
• Nuclear weapons design & test equipment

Export Transactions

Regulations also specify entities and individuals with which transactions are prohibited. Therefore, parties to export transactions must be checked against the most recent lists maintained by the federal government, including:

• Denied Persons List
• Unverified List
• Entity List
• Specially Designated Nationals List
• Debarred List

Access to Export-Controlled Information

Export-controlled information may be disseminated only to U.S. citizens or permanent residents unless a license has been obtained prior to disclosing export-controlled information. Any discussion with a foreign national in the United States, or a person “acting on behalf of a foreign person,” constitutes an “export” if it reveals technical information regarding export-controlled technology.
Foreign National

A foreign national is defined as a person who is not a U.S. citizen or permanent resident of the U.S. The term also applies to any foreign corporation, partnership, trust, non-profit organization, or any other organization not incorporated to do business in the U.S., international organizations, foreign governments, or diplomatic entities.

Embargos - U.S. Department of Treasury, Office of Foreign Assets Control (OFAC)

In addition to export control laws, Universities must also be aware of trade sanctions managed by OFAC. OFAC restrict exports and imports with specific countries through economic sanctions. While the focus of EAR and ITAR is to protect national security by preventing the transfer of certain technologies, OFAC focuses on advancing the foreign policies of the United States. Therefore, restrictions on exports and imports to and from certain countries may apply to a wide range of items, including payment, travel, services, or anything deemed to be of value (review of scholarly work, survey questions).

Penalties for Violations

Penalties for violating U.S. export control laws (EAR, ITAR) or trade sanctions (OFAC) can be severe. The penalty for unlawful export of items or information controlled under the ITAR is up to two years imprisonment, or a fine of $100,000, or both. The penalty for unlawful export of items or information controlled under the EAR is a fine of up to $1,000,000 or five times the value of the exports, whichever is greater; or, for an individual, imprisonment of up to ten years or a fine of up to $250,000 or both.

Export Controls and University Research – Fundamental Research Exclusion

Export regulations are not new and have always applied to University research. In the early 1980s the university research community responded to proposed rule changes in order to preserve University values of openness and sharing. There was great concern in the research community that foreign faculty and students not be singled out and prohibited from participating in research activities. This conversation resulted in National Security Decision Directive 189 (NSDD 189), which was issued in 1985.

This directive clarified the definition of fundamental research and stated that fundamental research was NOT subject to the license requirements of export control regulations. It affirmed the long-standing policy of the U.S. government and the Department of Defense not to restrict publication and public presentation of unclassified, federally funded fundamental research results. In effect, under NSDD 189, the only way to restrict dissemination of research results is to classify the project.

Fundamental Research Definition

Fundamental research is defined in NSDD 189 as “basic and applied research in science and engineering in an accredited institution of higher learning in the United States where the resulting information is ordinarily published and shared broadly within the scientific
community. Fundamental research is distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.”

The Fundamental Research Exclusion can be lost, however, if a university accepts restrictions on access to or dissemination of information. This includes accepting:

- prior approval or restrictions of publications from research sponsors
- limitations or restrictions on access to information by foreign nationals in an agreement
- restrictions on participation by foreign nationals in an agreement
- prohibitions that restrict results or deliverables from being disclosed or delivered to any country or persons
- the need to use information from a third party that is subject to nondisclosure obligations
- the possibility that equipment or encryption software will be required as a project deliverable

This does not, however, include the reasonable delay of publication for sponsor review in order to protect the disclosure of its own proprietary information, or allow time to file patent application.

**Export License**

If the fundamental research exclusion is lost and the technology is controlled, a license must be obtained from the cognizant agency (EAR-Commerce Department or ITAR-State Department) before export, including “deemed exports,” can occur.

**Embargos**

The Fundamental Research Exclusion never applies to the import and export of items restricted by an embargo. As stated earlier, OFAC, the Office of Foreign Asset Control, U.S. Department of Treasury, oversees adherence to these particular trade sanctions. Embargoes may prohibit travel, payment, services, or anything of value to specific countries, individuals, or entities within a country.

While embargoes vary from country to country, six countries have been identified as state sponsors of terrorism and have substantial restrictions on activities. The countries, informally referred to as the T6 countries, include:

- Cuba
- Iran
- Libya
- North Korea
- Sudan
- Syria

Additional countries listed by OFAC as having embargoes include:

- Balkans
- Burma (Myanmar)
- Iraq
- Liberia
Zimbabwe

In addition to country sanctions, embargoes exist relating to:
  - Diamond Trading
  - Narcotics Trafficking
  - Nonproliferation

Sanctions change quite often, so it is necessary to read actual sanction overviews provided on the OFAC website.

**EXPORT CONTROL REVIEW PROGRAM**

Eastern Michigan University (EMU) is committed to implementing and maintaining procedures in order to comply with all export control regulations and embargos.

EMU is committed to disseminating results of its research to the widest possible public audience. It is therefore the practice of the University to accept only research projects that fall within the definition of fundamental research as set forth in NSDD-189. Contractual or program requirements that restrict the use of foreign nationals on grant or contract agreements are inconsistent with the university philosophy of openness of research and non-discrimination. Therefore, such provisions will not generally be accepted.

**Export Control Review Committee**

The Export Control Review Committee (ECRC) will be established to provide oversight and guidance regarding export control compliance. The committee membership will include one General Counsel representative, two Office of Research Development representatives, one Office of International Students representative, one Business & Finance representative, and two faculty representatives. Members of the committee will be appointed by the Provost and Vice President for Academic Affairs from nominations submitted by heads of the represented units. The Associate Vice President for Graduate Studies & Research or his/her designee will serve as authorized institutional official with authority to secure export licenses when needed.

The committee will review, approve, and monitor technology control plans developed for research that may be export controlled. The committee will also determine when an export license is required or if exception to the law applies. The committee will be responsible for informing all parties of any licensing requirements or prohibitions.

**Review Procedures**

The Office of Research Development (ORD) will screen all grant and contract proposals and awards for the following:
  - Restrictions on publishing research results
  - Restrictions on foreign nationals from performing or accessing research results
  - Restrictions on deliverables or results from being disclosed or delivered to any country or individuals
  - Requirement to use third-party information that is subject to nondisclosure obligations
• Deliverables that include equipment that may be controlled by export regulations or encryption software

If one or more of these items apply, the fundamental research exclusion does not apply. Further review by ORD together with the project director is required to determine if the technology is controlled.

It is important to note that export control laws and embargos apply to all activities undertaken by EMU faculty, staff, and students whether sponsored or not. ORD must be contacted if there are any questions regarding the applicability of export controls or embargos to non-sponsored research.

If the technology is controlled, a compliance plan must be developed that addresses the following issues:
• How will the persons working on the project be precisely documented and controlled?
• How will unauthorized persons be restricted from accessing research data? How will those gaining access to research data be tracked and documented?
• What physical measures will be implemented to prevent access to the project by unauthorized persons?
• Is there a compliance person in place who can answer questions about export regulations, controls, and processes?

This plan will be submitted to the ECRC for review and approval, and forwarded to the Project Director, Department Head, and Dean for approval.

Obtaining an Export License

If it is determined that a research topic is a controlled technology, a license may be required before the technology can be shared, disseminated, or exported. This requirement applies to research results as well as tangible items. The processing time for a license is normally four to six months after the application is submitted.

Export Control Compliance Training

The ECRC will be responsible for export control compliance training, informing researchers and administrators about export restrictions and procedures for compliance. A training module will be available on EMU’s Responsible Conduct in Research web site.