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Export Controls 101
A Primer For Colleges and Universities

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What Are Export Controls?

- U.S. laws that regulate the transfer of items, technology, software, and services

- Apply to all activities with foreign persons and foreign countries – not just sponsored research projects

Why Does This Matter?

- Stepped up enforcement in the area of export control

- Need to comply to avoid potentially severe criminal and civil penalties

  - Civil penalties up to $500,000

  - Criminal penalties including fines of up to $1 million and imprisonment

  - Debarment

- Supports the government's objective of protecting national security

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Why Does This Matter?

- Universities are particularly vulnerable

  - Relatively easy target for the government

  - Many schools don't have the robust export control management of the private sector

  - Professor Reece Roth

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Why Does This Matter?

- The revised Form I-129 attestation: on November 28, 2010, U.S. Citizenship and Immigration Services published a revised form I-129, the Petition for Nonimmigrant Worker

- Part 6 of the form requires a petitioner seeking H-1B, H1B1, L1, of O-1A visas to review U.S. export control regulations and certify:

  - a license is not required to release controlled technology to the beneficiary; or

  - if an export license is required, it will not release controlled technology to the foreign worker until it has received a license or other U.S. Government authorization to do so.

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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.

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Technology Controls

- The licensing requirements affect only a very small percentage of I-129 petitioners because most types of technology are not controlled for export or release to foreign persons.

- The technology and technical data that are controlled for release to foreign persons are identified on the EAR's Commerce Control List (CCL) and the ITAR's U.S. Munitions List (USML).

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Examples of Controlled Technology

- Pharmaceuticals

- Nanotechnology

- Quantum Computing

- Advanced Materials

- Communications and Encryption Technology

- Weapons Systems yet unclassified

- Biotechnology

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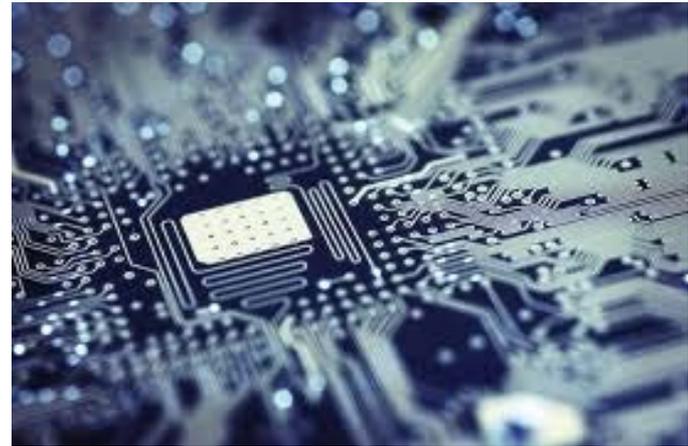
The Quandary

- How can universities and colleges accomplish their research goals and simultaneously stay compliant with the export regulations?

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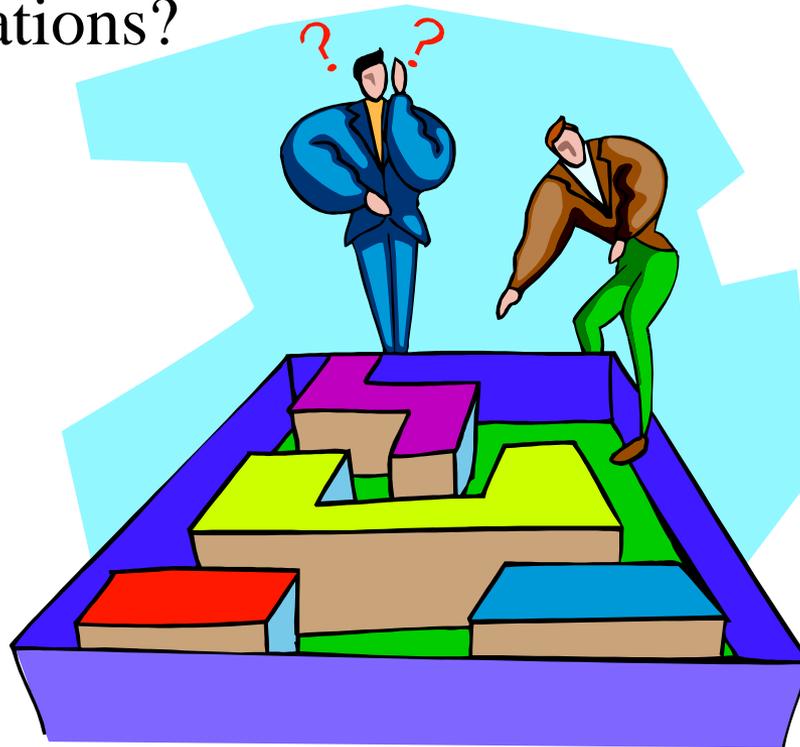
The Laws

- What laws are we addressing?

    - EAR: Export Administration Regulations

    - ITAR: International Traffic in Arms Regulations

    - OFAC regulations

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BIS/EAR

- Bureau of Industry and Security ("BIS") controls and enforces:

    - exports of "dual-use" goods, technology and software (including encryption items)

    - Export Administration Regulations (EAR) and the Commerce Control List (CCL)

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DDTC/ITAR

- Directorate of Defense Trade Controls (DDTC)

  - In accordance with the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR), DDTC is charged with controlling the export and temporary import of defense articles and defense services covered by the U.S. Munitions List (USML)

  - ITAR controls defense articles, defense services and related technical data, including most space and satellite-related articles which appear on the USML

- ITAR controls items that are specifically:

  - designed

  - modified

  - adapted

  - configured

  …for military/space application

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OFAC

- Administers and enforces economic embargoes and trade sanctions against certain countries

  - Transfer/export of controlled technology to these sanctioned countries may be banned or limited

- Maintains the SDN List

Office of Foreign Assets Control

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What Is An Export?

- Any item that is sent from the U.S. to a foreign destination

    - To anyone outside the U.S., including U.S. citizens

    - To foreign entities, individuals, embassies or affiliates at any location, including the US

    - "Items" include commodities, software, or technology, such as clothing, building materials, circuit boards, automotive parts, blueprints, design plans, retail software packages and technical information.

What Is A Deemed Export?

- What is a "Deemed Export"?

  - A release or transfer of technology or technical data to a foreign national **in the U.S.** is "deemed" to be an export to the foreign national's home country

  - Physical export out of U.S. is **NOT** required

  - Applies to foreign or visiting faculty, research assistants, and students

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How Can A Deemed Export Occur?

- Participation by foreign national in scientific or engineering research

- Providing drawings, blueprints to a foreign national

- Conversations with foreign persons, whether face-to-face or via telephone, email

- Collaboration or day-to-day working with foreign persons/interns/consultants

- Access to shared network drive that contains controlled technologies

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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, *etc*.

The Compliance Obligation

- To know whether a release of technology is lawful or may require a license, one must first determine if the technology to be released to the foreign person is

  - controlled by either the EAR or the ITAR and, if so,

  - whether the EAR or the ITAR requires a license to export or otherwise release it to the foreign person's country or countries of nationality.

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Licensing

- Export controls require consideration of:

  - What is being exported?

  - Where it is being exported?

  - Who will received the item?

  - How will the item be used?

- This analysis applies to deemed exports as well

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EAR License Requirements

EAR License Requirements (Dual Use/Commercial Technologies)

- **"Terrorist Supporting Countries" = HIGHEST EXPORT CONTROL**

  - Cuba, Iran, North Korea, Sudan, Syria

- **"Countries of Concern"**

  - List of 20 + countries, including former Soviet Republics, China, Vietnam

- **"Friendly Countries" = LOWEST EXPORT CONTROL**

  - All others (e.g., EU, Australia, Japan, Brazil, etc.)

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ITAR Licensing Policy

- 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

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Key Issues And Risks for Universities

- Participation by foreign nationals in scientific/engineering research - deemed exports

    - Does the research fit within the fundamental research exclusion ("FRE")?

    - What about non-sponsored research?

- Use by foreign nationals of sophisticated scientific equipment

- Shipping and payments to foreign persons outside the U.S.

- Travel

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EXEMPTIONS

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The Basics

- An exemption will alleviate need for an export license

    - Limited in scope and purpose

    - Must review facts on case-by-case basis

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Exemptions

- Exemptions
  - Educational information
  - Publicly Available/Public Domain Information
  - Patents
  - Fundamental Research
  - Bona fide employee

Educational Information

- 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

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Public Domain

- The EAR and the ITAR do not control, respectively, "technology" or "technical data" defined as "publicly available" or in the "public domain"


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Public Domain

- Information that is published and generally accessible or available to the public:

  - Through sales at bookstands and stores

  - Through subscriptions available without restrictions

  - At libraries open to the public

  - Through patents

  - Through unlimited distribution at a conference, meeting seminar, trade show, generally accessible to the public in the U.S.

  - Includes technology and software that are educational and released by instruction in catalog courses and associated labs and universities

  - Through fundamental research

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Fundamental Research

- 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
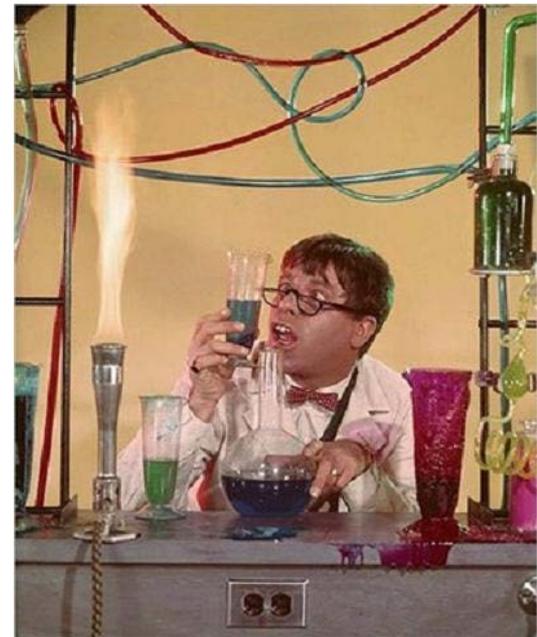
Never Forget!

- Unless the fundamental research exception applies, a university's transfer of controlled (on the CCL or the USML) technology to a non-permanent resident foreign national may require a license from the government and/or be prohibited!

- General rule for colleges and universities: accepting restrictions on the publication of information may trigger export control requirements

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Fundamental Research Exception

- Can be lost if….

  - A PI accepts restrictions on the publication of the results of the project

    - Pertains to many industry contracts and testing agreements

  - If the PI has made a "side deal"

    - Could take place via a non-disclosure agreement

  - The government contract/grant involves an ITAR project with access and dissemination of information controls

  - The agreement requires sponsor approval prior to publication

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Bona Fide, Full-Time Employees

- ITAR – 22 CFR 125.4(b)(10) Exemptions of general applicability.

  - Access to unclassified technical data in the U.S.

  - By U.S. institutions of higher learning to

  - Foreign persons who are bona fide, full-time, regular employees, only if

    - Employee's permanent abode throughout employment is in the U.S., and

    - Employee is not a national of a prohibited country.

- The EAR does **NOT** provide such an exemption!

- Visa restrictions may preclude regular employment status by requiring the visa holder to maintain a foreign residence.

- Many researchers, particularly post-docs and students, cannot qualify for the exemption as they are not full-time employees.

Use Technology

- Use of EAR/CCL items equipment by a foreign national in the U.S. is not controlled by the export regulations.

- However, the transfer of technical information relating to the use (i.e., operation, installation, maintenance, repair, overhaul <u>and</u> refurbishing) of equipment may be controlled in certain circumstances.

- In sum, the export regulations allow foreign students, researchers and visitors to "use" (and receive information about how to use) controlled equipment, as long as the technical information about the controlled equipment qualifies as "in the public domain" or "publicly available" or use does not amount to "use technology."

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Software/Software Development

- Software provided to the public for free may not require licenses, but proprietary software of controlled technology could require licensing

- Encryption technology could require a license or could be prohibited for transfers to certain foreign nationals and countries

Do I need to be concerned about export controls in this research?

Column 1:

1. Public domain, and
   a) No equipment, encrypted software, listed-controlled chemicals, bio-agents or toxins, or other restricted technologies are involved, and
   b) Information/software is already published, and
   c) There is no contractual restriction on export, or
2. Fundamental Research
   (note definitions and caveats associated with this exemption)

NO

Column 2:

1. Equipment or encrypted software is involved, or
2. Technology is not in the public domain, and
3. Technology may be exposed to foreign nations (even on campus) or foreign travel is involved, and
   a) The equipment, software or technology is on the Commerce Control List, or
   b) Information or instruction is provided about software, technology, or equipment on the CCL, or
   c) The foreign nationals are from or the travel is to an embargoed country
4. The contract has terms *e.g.* a publication restriction that effect the Fundamental Research Exemption

Probably
(further review is required)
License May Be Required

Column 3:

1. Equipment, software, chemical, bio-agent, or technology is on the US Munitions List (ITAR), or
2. Equipment, software, chemical, bio-agent or technology is designed or modified for military use, use in outer space, or there is reason to know it will be used for or in weapons of mass destruction, or
3. Chemicals, bio-agents or toxins on the Commerce Control List are involved, or
4. The contract contains a restriction on export or access by foreign nationals

YES
License Will Be Required

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BEST PRACTICES

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Best Practices

- Have a robust export control compliance program

- Conduct training

- Keep good records

- Communication is key

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The Value of an Export Compliance Program

- Reduces the risk of criminal and civil liability

- Is a mitigating factor should there by a violation

- Well-designed export compliance programs identify issues before they become problems

- Improves businesses relationships

- Strengthens University's reputation

Elements of an Effective Export Control Program

- Management commitment

- Risk assessment audit

- Export control policy statement

- A written export control policy

- Compliance training

- Recordkeeping

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Risk Assessment/Audit

- Need to determine where you have risk – identify University departments that conduct scientific/engineering research

- Does each department have written procedures related to export compliance?

- Personnel at all levels of the University should be interviewed to compare written procedures with actual practices

- Write audit report summarizing findings and recommendations

- Conduct post-audit briefing with each department

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Export Control Policy Statement

- Issued from the Office of the University President

- Affirm University's commitment to export compliance

- Clarify basic principles of export controls

- Mandate that under no circumstances will the University run afoul of the U.S. export regulations and laws

- Explain possibly non-compliant situations

- Describe penalties for non-compliance

- Identify who is responsible for the University export compliance and resources available

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A Written Export Control Policy

- Ensure that the University's export control policy is legally accurate and complete

- Mold the policy to address the University's compliance vulnerabilities

- Update the policy on a regular basis

- Draft the policy in a user-friendly manner so that it is easy for University personnel to implement

- Make the policy easily accessible to the University community

- Employees sign upon receipt

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Communication

- Open up channels of communication between the hiring department, export control personnel, and the office preparing the Form I-129.

- Determine when and where the process should begin and how information should travel through these departments to facilitate the review process and minimize delays between the time a hiring decision is made and visa petitioning process ends. Once avenues of communication are mapped out, institutions should create a questionnaire to facilitate the flow of information.

Communication

- The individual signing Form I-129 is certifying the accuracy of the information provided, including the Part 6 deemed export attestation

  - Will need reliable information about type of work in which the prospective employee will be engaged, and the technology or data to which that employee will be exposed.

  - Create a questionnaire or sign-off form to be completed by the appropriate college or university official, which would determine whether a license might be required for any deemed exports of information or technology.

    - Create a record evidencing that the review process was completed, which would be invaluable if USCIS, the Department of Commerce or the Department of State ever conducted an audit.

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Compliance Training

- Design training protocol that is legally accurate and complete and tailored to the University's export control exposure

- Training is mandatory for all employees

- Employees are trained at the start of employment and thereafter at regular intervals

- Employee attendance is recorded

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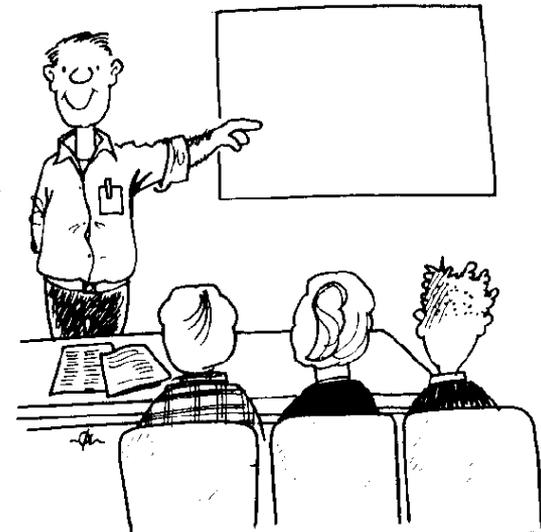
Recordkeeping

- Maintain detailed records

- Document University's processes to identify and comply with export control regulations

  - Self-audit

  - Training

  - Screening

  - Export Control Policy

- Required to keep records for five years under the regulations

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QUESTIONS?

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