

Export Control Program

Export Control, Fundamental Research and Award Clauses

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Objectives

- What is Export Control?
- What is Fundamental Research and the Fundamental Research exemption?
- What award clauses can have export control implications and how do you address them?



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Agenda

- Export Control
- Non-Compliances
- Fundamental Research and Exemptions
- Award Clauses (that can impact Export Control)
 - Export Control clause
 - Publication restrictions
 - Personnel restrictions
 - DoD Funding
 - International shipping
 - International travel
 - NDAs
 - Other Types of Agreements
- Examples



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Export Control



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What is Export Control?

- Export control consists of a group of federal laws / regulations that control certain commodities, technologies, information and data
 - Limits what can be shipped out of the country and to whom it can be shipped
 - Can limit access to information for certain foreign nationals and/or organizations
 - Determines when a license is required to ship items or information abroad



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Purpose of the Regulations

- To control the export of military and dual use products, technology and services to foreign persons or organizations
 - Primarily for national security purposes
 - Some economic reasons as well
 - Dual Use: commercial items that could have military, national security or proliferation applications
 - Ex: computer technology and software, sensors, lasers



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Why Do We Care (about Export Control)?

- It's the law (we need to comply with the regulations)
- These regulations can affect:
 - What type of research we do
 - Who we hire
 - Who we can share information with
 - Who we work with (collaborators / sponsors)
 - Where we ship items
 - What items we ship
 - Level of security for projects / labs



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Examples

- Physics department uses lasers
- Material Sciences is developing software regarding how treads on vehicles travel over different types of terrain
- Microbiology is working with Ebola and Avian influenza
- Political Science professor wants to travel to the Sudan
- Education researcher wants to go to a conference in Iran
- Chemistry wants to ship chemicals to a Chinese university
- Art department wants to have a show in Cuba
- Limnology wants to study the waters in Venezuela
- Psychology uses thermal imaging cameras to study meditating monks in India



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Export

- **Export:** Sending or taking anything out of the United States in any manner, except mere travel outside of the U.S. by a person whose personal knowledge includes technical data; including:
 - Shipping – commercial shippers or hand-carry
 - Verbal transfer of technical data (i.e., phone, Skype)
 - Electronic transfer of technical data (i.e., e-mail, fax, text, social media)
 - Items: computers, equipment, biological agents, materials, substances, etc.
- **Deemed Export:** Transfer (oral or visual disclosure) of technology, information or data to a foreign person within the U.S. is **deemed** to be an export to that person's home country
- **Defense Service:** Performed for or on behalf of a foreign person or organization



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Foreign Persons/Organizations

- A Foreign Person or Organization is anyone who is NOT a U.S. Person. A U.S. Person is:
 - U.S. citizen or national
 - Permanent resident (green card holder) of the U.S.
 - A refugee, someone granted political asylum or someone granted amnesty
 - U.S. government agency and any state or local governments therein
 - U.S. company, business, LLC or partnership
 - U.S. university





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Key Regulations

Parameter	ITAR	EAR	FACR
Name of Regulation	International Traffic in Arms Regulations	Export Administration Regulations	Foreign Asset Control Regulations
Agency	State	Commerce	Treasury
What Does Regulation Control?	Military equipment & information	Dual use items & information	Foreign assets (bank accounts)
Control Listing	USML (United States Munitions List)	CCL (Commerce Control List)	Specially Designated Nationals List
Comments	Treats all foreign destinations the same	Need for license depends on commodity, destination country, reason for control & exemptions	Depends on who (person or organization) you are communicating with

Export Licenses - Authorization from the federal government to:

- Ship certain items / information out of the U.S.
- Ship items / information to countries on which the U.S. has imposed restrictions
- Ship items / information to restricted parties



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Export

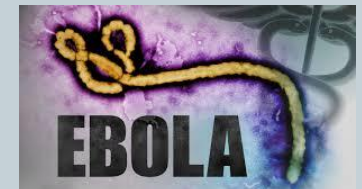
▪ **ITAR Examples**

- Guns, tanks, etc.
- Space vehicles and launch vehicles
- Naval vessels
- Fighters, bombers
- Cryocooler



▪ **EAR Examples**

- Select Agents (Ebola, Avian influenza)
- Lasers
- Oscilloscopes
- Computers (most laptops are controlled)
- Telecommunications equipment





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Non-Compliances



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Penalties of Non-Compliance

- Civil and Criminal Penalties
 - May be levied against individuals as well as organizations
- Loss of Research Funding
- Loss of Export Privileges
- Bad Press





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Cases of Non-Compliance

Case of J. Reece Roth - U of Tenn (Sept 2008)

- *Retired professor in plasma physics*
- *Convicted on 18 counts of conspiracy, fraud & violating ITAR*
- *Gave 2 grad students from China & Iran access to sensitive info*
- *Sentence - 48 months in prison*
 - *Worst case: 175 yrs in prison; \$15.5M*

Teledyne LeCroy, New York (June 2015)

- *Exporting 2 oscilloscopes (3A292) to Beihang University, China (an entity-listed university)*
- *Failed to get export licenses & file accurate shipping documentations;*
- *Value of oscilloscopes < \$16K*
- *Fine = \$75K*



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Fundamental Research and Exemptions



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Fundamental Research

Basic or applied research in science or engineering and resulting in information that is ordinarily published and shared broadly in the scientific community



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Key Exemptions for Universities

- ***Fundamental Research Exemption (ITAR, EAR)***
 - *No license is required to conduct fundamental research*
- ***Public Domain Exemption (ITAR, EAR)***
 - *No license is required to export information or research that are generally available in the public domain. This does not apply to physical equipment, materials, substances, etc.*
- ***Education Exemption (ITAR, EAR)***
 - *No license is required to transfer information to students, including foreign nationals, concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges or universities*



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Award Clauses

(to look out for)



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Finding export control issues is much like looking for a golf ball in a haystack





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Export Control Clause

Examples:

- *The contractor hereby certifies that it will comply with all U.S. export control laws and regulations including but not limited to the International Traffic in Arms Regulations (“ITAR”) (22CFR 120-130), Export Administration Regulations (“EAR”) (15CFR 730-774) and regulations administered by the U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”) (31CFR 500-598).*

Key Points:

- *Not all export control clauses are created equal; some may be a boilerplate clause for the sponsor, others may actually apply to the project*



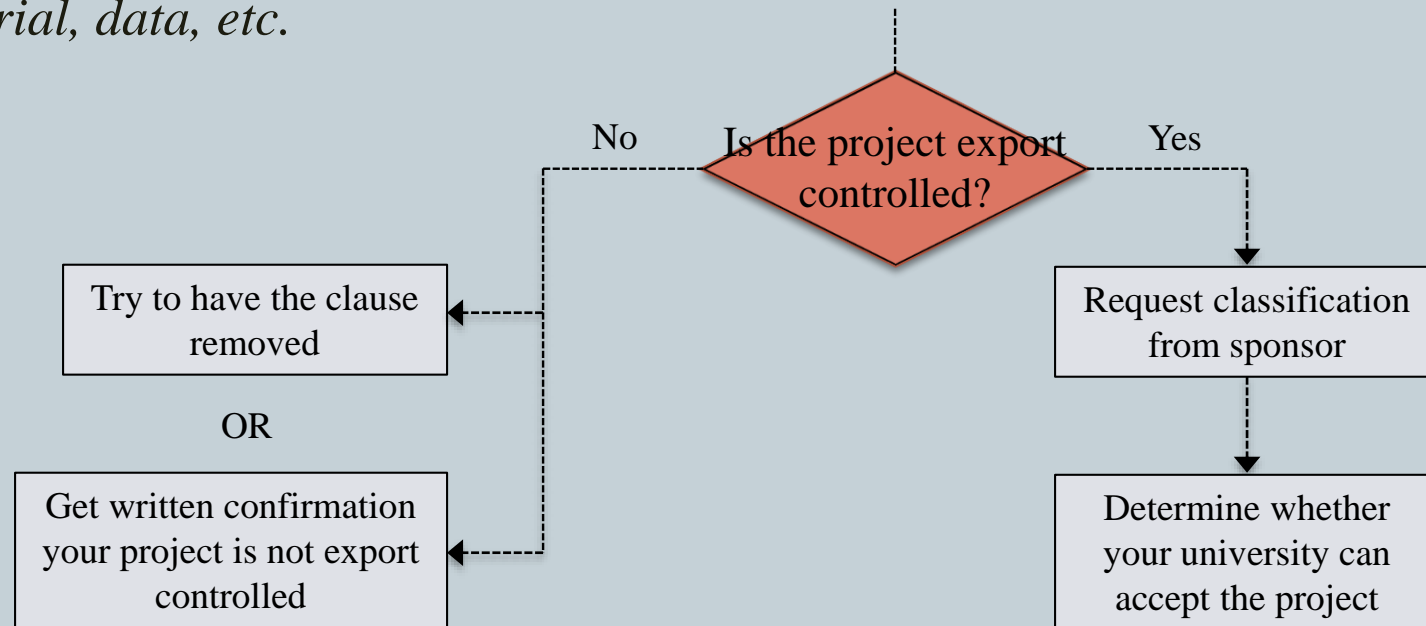
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Export Control Clause (cont.)

Actions:

- *Verify with the sponsor whether this is a project using export controlled items, material, data, etc.*



- *Note: Sometimes sponsors will award basic or applied research to universities from a larger project that is export controlled.*



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Publication Restrictions

Example:

- *The sponsor shall approve any and all research findings (from this award) prior to those findings being published.*

Key Points:

- *Approval is a bad term – can the sponsor limit what you can publish (substance-wise)?*
- *Publication restrictions remove the fundamental research exemption*
- *Short review (30-60 days) for patentability, IP or confidential information, or a review and comment period that does not affect the ability to publish OK*

Actions:

- **Remove clause**
 - *All or significant portions of your research may not be publishable*
- **If the clause cannot be removed**
 - *Determine whether your university can accept a project with a publication restriction*
 - *If acceptable, how does the project need to be structured to ensure compliance to the export control regulations (i.e., licenses, staffing, location, security)*



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Personnel Restrictions

Example:

- *No foreign persons may work on this project without authorization of the sponsoring agency's program manager*

Key Points:

- *This does not necessarily remove the fundamental research exemption, but does present a red flag.*
 - *If the project really is export controlled, a deemed export license may be required for foreign persons to participate.*
 - *Mere authorization by the program manager may be inadequate.*

Actions:

- ***Remove clause***
- ***If the clause cannot be removed***
 - *Clarify whether the project is export controlled and its classification*



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DoD Funding (*DoD Financial Management Regulation Vol 2B, Chap 5*)

- *If called out in the award, DOD funding classifications are:*
 - *Budget Activity 1 (6.1) – Basic Research*
 - *Budget Activity 2 (6.2) – Applied Research*
 - *Budget Activity 3 (6.3) – Advanced Technology Development*
 - *Budget Activity 4 (6.4) – Advanced Component Development and Prototypes*
 - *Budget Activity 5 (6.5) – System Development and Demonstration*
 - *Budget Activity 6 (6.6) – Research, Development, Test and Evaluation Management Support*
 - *Budget Activity 7 (6.7) – Operation System Development*

Key Points:

- *Only Budget Activities 1 and 2 can qualify as fundamental research*
- *Sometimes DoD will award basic or applied research to universities from a larger project that is export controlled*

Actions:

- *Sometimes clarifying the funding will tell you if the project is export controlled*



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International Shipping

- *Does the award include shipping anything internationally?*



Key Points:

- *Is the item being shipped Export Controlled?*
 - **E:1/E:2 Countries:** *Cuba, Iran, North Korea, Syria and Crimea – Major restrictions*
 - **OFAC & US Embargo List:** *Balkans (western), Belarus, Burma, Central African Republic, China, Cuba, Democratic Republic of the Congo, Ethiopia, Iran, Iraq, Lebanon, Libya, Mali, Nicaragua, N. Korea, Russia, Somalia, South Sudan, Sudan and Darfur, Syria, Ukraine, Venezuela, Yemen, Zimbabwe*
 - **ITAR Prohibited Countries (22CFR 126.1):** *Afghanistan, Belarus, Burma, Cambodia, Central African Republic, China, Cuba, Cyprus, Democratic Republic of the Congo, Eritrea, Ethiopia, Haiti, Iran, Iraq, Lebanon, Libya, N. Korea, Russia, Somalia, South Sudan, Sudan, Syria, Venezuela, Zimbabwe*

Actions:

- *Contact the Export Control Office to determine what the concerns are for shipping to these countries (the restrictions vary from country to country)*



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International Travel

- *Does the award require the awardee to travel internationally?*

Key Points:

- *The same list of countries as noted for international shipping*
- *What is the purpose of the trip?*
 - *Research, conference, discussions with companies, clinical studies, etc.*
- *Hand-carrying = shipping*
- *Certain equipment may require a license to travel; be careful with electronics*
- *Special considerations for Iran and Cuba*



Actions:

- *Contact the Export Control Office to determine what the concerns are for traveling to these countries (the restrictions vary from country to country)*



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Non-Disclosure Agreements (NDAs)

- *AKA: Confidential Disclosure Agreement (CDA), Confidentiality Agreement (CA), Proprietary Information Agreement (PIA), Secrecy Agreement (SA)*
- *Does the award require that a NDA be signed to ensure confidentiality of the information being transferred between the parties?*

Key Points:

- *What type of information requires confidentiality?*
- *Confidentiality of **technical** information may prevent the awardee from publishing some or all of the paper, which can nullify the fundamental research exemption*
 - *Personal, health (HIPAA), educational, business (finance) and marketing information are not typically affected by export controls*

Actions:

- *It may be prudent to have the awardee and Export Control Office discuss the type of information that will be transferred and whether it will have an export control impact*





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Other Types Agreements

Fee-For-Service (FSS) Agreements

- *Services are work done for hire*
 - *Analyzing unknown pharmaceutical substances*
 - *Running tests on biological specimens*
 - *Manufacturing items that are incorporated into commercial products*
- *They are NOT considered research; research exemptions do not apply*
 - *Who is your agreement with?*
 - *Are foreign persons conducting the service using controlled technologies?*

Material Transfer Agreements (MTAs)

- *An export license may be required for:*
 - *Some items, such as select agents*
 - *The destination country*
 - *Persons or organizations that are listed in government restricted party lists*



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Potential Responses

- **License**
 - Not the “end of the world”, but will take 1-2 months
- **Technology Control Plan**
 - Puts into place a formalized system of security that is monitored and on which all project staff are trained
- **Lab security**
 - Basics like locking doors, using passwords, etc.
- **Restricted Party Screening**
 - Ensuring that people, businesses, etc. are not on any government lists
- **Training**
- **Do Not Accept the Award**



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Examples



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Scenario 1 – Prepublication Review

Clause 14 in the Terms and Conditions of an award from NIH states:

14. Prepublication Review – The Contractor shall provide to the Sponsor a copy of any planned article resulting from this research to allow the Sponsor to conduct a prepublication review. The purpose of this review is to examine the article for patentable information, intellectual property and confidential information. The planned article shall be submitted to the Sponsor at least 30 days prior to submission to a publisher.
- Is there a potential export control issue here?
 - If yes, how do you address this concern?



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Scenario 2 – International Travel

As part of an award, the PI is required to attend the annual conference on biomaterials at Sichuan University, Chengdu, China.

- Is there a potential export control issue here?
- How do you determine whether there is an actual export control concern?
- If there is an export control concern, how do you address it?



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Scenario 3 – Export Control Clause

Clause 23 in the Terms and Conditions of an award from industry states:

23. Export/Import Controls – (a) Seller hereby certifies that it will comply with U.S. export and import controls laws and regulations, including but not limited to the International Traffic in Arms Regulations (“ITAR”) (22CFR120 et seq.), the Export Administration Regulations (“EAR”) (15CFR Part 730-774), the regulations administered by the U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”) (31CFR Part 500-598), the regulations administered by the U.S. Department of Commerce, Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) found in 27 CFR Chapter II, and all other applicable U.S. Government regulations relating to the importation of goods into the United States (including, but not limited to, the regulations administered by the U.S. Customs and Border Protection (“CBP”) at 19CFR0 et seq. and other import regulations promulgated by other U.S. agencies).
- How do you determine if there is an export control issue with this project?
 - What do you do if there is no export control concern?
 - If there is an export control concern, how do you address this concern?
 - Can we accept export controlled projects?



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Scenario 4 – Non-Disclosure Agreement (NDA)

The Institute for Educational Achievement on your campus receives an award that requires a NDA so the institute can receive educational records that include student names, IDs, classes, grades and birthdates as well as other information.

- Is there a potential export control issue here?
- What if it was the medical school and they were receiving healthcare information (HIPAA), including patients' names, SSNs, lab tests, diagnoses, etc.?
- What if it was the Department of Electrical Engineering and they were receiving design information for a new high speed communications device on which they are to conduct transmission tests?



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Scenario 5 – Payment for Maps

The Geography department wants to purchase a number of maps for publication in an upcoming book. The maps are only available from state archives in Moscow, Russia. They only accept payment through the Bank of Moscow in rubles.

- Is there a potential export control issue here?
- Are there special considerations for Russia?
- How should you proceed with payment?



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Scenario 6 – Shipping

The Pathobiological Sciences Department wants to ship the PR8 influenza virus to the University of Munich under a Material Transfer Agreement.

- Is there a potential export control issue here?
- How should you proceed?



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Contact Information



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For Additional Information, Contact:

- *Tom Demke, UW-Madison Export Control Officer*
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UW Export Control Website:

<https://research.wisc.edu/integrity-and-other-requirements/export-control/>