Export Controls:
Understanding the Basics

University Compliance Office

Introduction

- The objectives of this presentation are to:
  - Provide a general overview of export control regulations
  - Discuss export controls and university research
  - Provide examples of the types of activities that may be impacted
  - Outline how you can identify export control issues and exemptions

What are export controls

- The term “Export Controls” refers collectively to those U.S. laws and regulations that govern the transfer of controlled information, items or technologies to foreign countries (“export”) and/or foreign nationals (“deemed export”).

- Restrictions apply to information, items, technologies, and *services* deemed by the U.S Government to be critical interest to:
  - National security;
  - Economy; and/or
  - Foreign Policy

What laws are we addressing

- EAR: Export Administration Regulations; U.S. Department of Commerce – Bureau of Industry and Security
- ITAR: International Traffic in Arms Regulations; U.S. Department of State – Directorate of Defense Trade Controls
- OFAC: U.S. Department of Treasury - Office of Foreign Assets Control

EAR

- Covers “dual use” items - found on Commerce Control List (CCL)
- Regulates items designed for commercial purposes but also have military applications (computers, pathogens, civilian aircraft, etc.)
- Covers goods, test equipment, materials and the software and technology
- Each item has an export controls classification number (ECCN)

ITAR

- Covers military items found on the United States Munitions List (USML) - munitions and defense articles
- Includes most space related technologies because of application to missile technology
- Includes technical data related to defense articles and services -furnishing assistance including design and use of defense articles
- Policy of denial for exports to certain countries
  - See 22 CFR 126.1 for up-to-date list

OFAC

- Economic sanctions focus on end-user (individual/entity) or country and may limit transfer of technologies and assistance to OFAC's list of sanctioned countries
- OFAC has a "Specially Designated Nationals and Blocked Persons List"
- Prohibits payments or providing "value" to nationals of sanctioned countries and certain entities or could require a license

How do these laws/regulations apply to the University and YOU

- Export Controls apply to all international university activities/interactions (here and abroad), not just sponsored research projects involving controlled information or technology.
- Export Controls apply regardless of the funding source and federal funding can be the most problematic.
- Export Controls are not intuitive

Examples of University activities

- Traveling overseas on University business (e.g., conferences, conducting field work, international symposia)
- Research collaborations with foreign nationals (here or abroad)
- Visits or tours of research facilities by foreign nationals
- Sponsoring research or providing services to an embargoed or sanctioned country
- Providing professional services (e.g., consulting) internationally or to problematic end-users

What constitutes an export

- An export occurs whenever an item, commodity, technology, or software is sent out of the U.S. to a foreign destination.
  - If the item being released or exported is a “controlled item” then an Export License may be required before the transfer can legally occur.
  - An export can take any form - not just physical shipments - and the manner in which the transfer or release of the item takes place is not relevant to export control regulations.

What do the regulations cover (EAR and ITAR)

- Export controls cover
  - Any item in U.S. trade (goods, technology, information)
  - U.S. items wherever located, even internationally
  - “Deemed exports”
  - Providing a defense service or ITAR technical data to a foreign national in the U.S. or abroad
- Excludes
  - Items in the public domain
  - Artistic or non-technical publications (maps, children’s books, sheet music, calendars, film)

Public Domain

- Includes information that is published and generally available to the public:
  - Through sales at bookstands and stores
  - Through subscriptions available without restrictions
  - At libraries open or available 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

Examples of export activities

- Shipment of items out of the U.S.
- Written or oral communications
- Electronic or digital transmissions
- Hand carrying items out of the country
- The use or application of a controlled service or technology on behalf of or for the benefit of foreign person or entity

What constitutes a deemed export

- Release or transmission of controlled technology, source code or information to Foreign Nationals (non-US citizen, non-Green Card holder) within the U.S.
  - Deemed Exports are regulated by the same Export Controls as the actual transfer of items out of the U.S.
  - Deemed Exports are considered an export to that person's home country.

Examples of deemed exports

- Activities with foreign or visiting faculty, research assistants, and students
  - Providing visual inspections or tours of facilities
  - Hosting foreign scientist
  - Certain research, development and manufacturing activities.
- Transferring ITAR technical data to or performing a defense service (includes training) on behalf of a foreign person in the U.S. or abroad

Why is this important to the University and You

- Since 9/11, Federal agencies are increasingly focused on Universities and their compliance with export regulations
- Non-compliance can lead to:
  - Substantial criminal and monetary penalties imposed on both individual researchers and the University.
  - Denial of export privileges
  - Loss of federal funding

Export Controls & University Research

- Research conducted at U.S. universities is exempt from export controls under the following exclusions:
  - Fundamental Research Exclusion
  - Educational Information Exclusion
  - The Public Information Exclusion

- **University must demonstrate (and document) that the appropriate export control reviews were performed in order to claim exemption.**

Fundamental Research Exclusion (FRE)

- Applies to basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community.

FRE can be lost if…

- Accept restrictions on the publication of the results of the project
  - Pertains to many industry contracts and testing agreements
  - EAR/ITAR have a carve-out for delay of publication for a pending patent application
- If there is a "**side deal**"
  - Could take place via a **non-disclosure agreement** or acceptance of export-controlled information

The FRE can be lost if…

- Sponsor approval required prior to publication
  - Sponsor “Review” vs “Approval”
- The government contract involves an ITAR project with access and dissemination of information controls
- There is a transfer of defense services
  - Potential license requirements for work with foreign nationals

FRE and deemed exports

- Unless the FRE 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 Commerce or State and/or be prohibited.

Educational Information Exclusion

- Information that is commonly taught in universities via instruction in catalog courses and/or through the associated teaching laboratories.

Public Information Exclusion

- Information that is already published or out in the public domain. Information in the public domain is not subject to Export Controls.
- Examples include:
  - Books, newspapers, pamphlets
  - Publically available technology and software
  - Information presented at conferences, meetings or seminars open to the public
  - Information included in published U.S. patents
  - Websites freely accessible to the public

Determining when export restrictions may apply to your research

1. Does the research involve military, weapons, defense, chemical or biological weapons, encryption technology & software, space or other dual-use items or export restricted technologies?
2. Does the research involve collaboration with any foreign colleagues/collaborators/students either here or abroad?
3. Does the research involve the transfer or shipment of equipment, materials or funding out of the U.S.?
4. Does any part of the research take place outside of the U.S.?

Determining when Export Restrictions may apply to your research

5. Does any part of the research involve the receipt or use of Export Controlled information or items provided by a 3rd party?
6. Are there any contractual restrictions on publication or access to or dissemination of the research results?
7. Does the research involve the shipment or transfer of materials, money or any other type of collaboration with foreign nationals from a sanctioned or embargoed country (i.e., Iran, Cuba, Syria, Sudan, or North Korea)?
8. Do you have any reason to believe that the end-user or the intended end-use of the item or information violates any existing export controls?

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

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

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

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

Other key issues

- Faculty start-up funds and non-sponsored research
- Equipment “Use”
- Software development
- Shipping and payments to foreign persons outside the U.S.
- Travel

Faculty start-up funds or non-sponsored research

- Could have export control issues depending on the nature of the research and if you plan on releasing to public domain
  - Proprietary research could have export control implications
  - Foreign nationals on project could be an issue
  - Nondisclosure agreements

Equipment "Use"

- "Use" of controlled equipment by a foreign national may require a license even if Fundamental Research exclusion is applicable.
  - The transfer of controlled technology or source code of a controlled item to a foreign national may require a license, NOT the normal operation or use of the item or piece of equipment
  - "Use" is operation, installation, maintenance, repair, overhaul AND refurbishing. Otherwise EAR-99 and subject to end use and end user controls.

Software

- Software development
  - Software that is provided to the public for free may not require licenses, but proprietary software of controlled technology could require licensing
  - Encryption technology could require license or could be prohibited for transfers to certain foreign nationals and countries

Shipping and vendor payments

- Shipping equipment, technology, software, computers, goods, outside the U.S. may require a license
- Payment to foreign entity outside the U.S.
  - OFAC has regulations regarding payments to sanctioned countries
    - Iran and Cuba the most restrictive
  - Payments to entities/persons on the denied lists could result in fines

Travel outside the U.S.

Commerce and State have regulations that affect:

- Physically taking items with you on a trip such as
  - Laptop
  - Encryption products on your laptop
  - Blackberry (cell phone)
  - Data/technology
  - Blueprints, drawings, schematics
  - Other “tools of the trade”
- Giving controlled technology/data to a foreign person outside the U.S.

Travel outside the U.S.

The Office of Foreign Assets Control (OFAC) has regulations that affect:

- Money transactions and the exchange of goods and services in certain countries – providing “value”
- Travel to sanctioned countries:
  - Balkans, Belarus, Burma, Cote d’Ivoire, Cuba, Democratic Republic of the Congo, Iran, Iraq, Former Liberian Regime of Charles Taylor, North Korea, Sudan, Syria, and Zimbabwe
- Doing business with certain people or entities
  - Commerce, State, and OFAC lists

What does this mean

- A license could be required depending on what you are taking and the country you are traveling to
- A license or technical assistance agreement would be required if you were providing a “defense service” to a foreign person (in the U.S. or abroad)
  - *A defense service means the furnishing of assistance (including training) to a foreign person relative to a defense article. It also includes furnishing any technical data relative to a defense article.*

What does this mean

- Travel to most countries does not usually constitute an export control problem.
- Taking a laptop with only Microsoft Office Suite, Internet Explorer, etc. okay to *most* countries – no license required
  - Export issue if taking to Cuba, Syria, Iran, North Korea, or Sudan
- In most cases, if you are taking or need to work with export controlled info abroad, a license exception or exemption is available.

EAR exceptions, ITAR exemption

- EAR license exceptions
  - TMP – temporary exports (university owned)
  - BAG – baggage (personal)
  - Laptop, equipment must stay under “effective control” for travel to certain countries
  - Required to keep records for 5 years
- ITAR exemption
  - 125.4(b)(9) if sent to or carried by a U.S. person
  - Required to keep records for 5 years

If a license is required

- EAR –
  - Deemed Export license required for foreign national working with certain controlled proprietary technology
  - License needed to ship certain goods/technologies outside the U.S.
  - Electronic application process
- ITAR –
  - DSP-5/Technical Assistance Agreement required for foreign nationals working with export controlled technology/defense service
  - Technology Control Plan required
- OFAC –
  - Application by letter

License or Technology Control Plan (TCP)

- In some situations it is possible to put a TCP in place instead of applying for a license
- A TCP is simply a plan that outlines the procedures to secure controlled technology from use and observation by unlicensed non-U.S. citizens
  - If this is not possible, then a license or technical assistance agreement would be needed

When do you need a TCP?

- In conjunction with a Technical Assistance Agreement (TAA) – Dept. of State
- In conjunction with a Deemed Export license – Dept. of Commerce
- In conjunction with an agreement that does not allow foreign nationals
- In conjunction with an agreement that involves controlled technology – includes NDAs
- Or in conjunction with ***any*** project that involves controlled technology.

Voluntary disclosures

- If you realize you have violated the regulations, notify University Compliance Office.
- Honest errors are acceptable but gross negligence is punishable
- It is better to self-disclose than not say anything
- Violations are civil (fines) and criminal (imprisonment)

The cost of noncompliance

- EAR
  - Criminal: $50K to $1 million or 5 times value of export, whichever is greater, per violation, 10 years imprisonment
  - Civil: revocation of exporting privilege, fines $10K-$120K per violation
  - Examples
    - Bass-Pro - $510K for shipping guns without a license
    - Dr. Thomas Butler, Texas Tech – 2 years in prison for making fraudulent claims and unauthorized exports (plague bacteria)
    - ITT fined $100M for exporting night vision materials without license

The cost of noncompliance

- ITAR
  - Criminal: Up to $1 million per violation and 10 years imprisonment
  - Civil: seizure and forfeiture of article, revocation of exporting privilege, up to $500,000 fine per violation
    - Professor Roth (Univ. TN) convicted on 9/3/08 and recently sentenced to four years
    - Raytheon fined $25M
    - Hughes Electronics and Boeing Satellite Systems - $32M
    - Boeing - $4.2M
    - Lockheed Martin - $13M

The cost of noncompliance

- OFAC
  - Criminal: $50K TO $10M per violation and 10 to 30 years imprisonment
  - Civil: $11K to $1M per violation
  - Example
    - Augsburg College, Minneapolis, MN fined $9,000 for 4 trips to Cuba; attorney negotiated reduction in fine from $36,000
    - Sep 2009 - Thermon Manufacturing, San Marcos, Texas, fined $14,613 for three shipments to Sudan. Fine significantly reduced because they disclosed to OFAC

The Butler case

***The Violation:** On January 14, 2003, Dr. Thomas Campbell Butler, M.D., a professor at Texas Tech University in Lubbock, Texas reported to the FBI that thirty vials of a potentially deadly plague bacteria,*Yersinia pestis (the causative agent of human plague),* were missing and presumed stolen from his research lab. The report sparked a bio-terrorism alert in west Texas. The investigation proved that Dr. Butler had illegally exported the *Yersinia pestis which is a controlled* item under the EAR and cannot be exported without the required export licenses from BIS. On January 15, 2003, Dr. Butler was arrested. **Among the numerous charges of which Dr. Butler was found guilty at trial, two were export control related: making false, fraudulent and fictitious statements regarding the exports to federal agents and making an unauthorized export to Tanzania.**

Dr. Thomas Butler

•Convicted of forty-seven counts of a sixty-nine count indictment that stemmed from BIS's investigation.

•Sentenced to two years in prison on March 10, 2004, and fired from Texas Tech.

*"Don't let this happen to you. Real Life Examples of Export Control and Anti-boycott Violations", U.S. Dept. of Commerce, Bureau of Industry and Security Export Enforcement, April 2005

The Roth case

- Professor John Roth, Univ. Tenn., was sentenced to 48 months for violating the Arms Export Control Act by illegally exporting technical information relating to USAF research contracts.
  - He was developing plasma technology for use on an advanced form of an unmanned air vehicle (UAV)
  - Roth gave ITAR technical data to a Chinese and an Iranian student
  - Downloaded his project from a Chinese colleague's computer while in China
  - His laptop and flash drive were confiscated
- The university's export control officer warned Roth
- Article; indictment, and trial brief:

http://www.patentbaristas.com/archives/2009/09/17/professor-gets-4-years-in-prison-for-exporting-technical-information-on-uavs/

Federal Websites

- EAR - http://www.bis.doc.gov
  - Commerce Control List
    http://www.access.gpo.gov/bis/ear/ear_data.html
- ITAR - http://www.pmddtc.state.gov/regulations_laws/itar.html
- OFAC - http://www.treas.gov/offices/enforcement/ofac/

QUESTIONS?

- Penny Whiteside, 5-2438
  Director, Sponsored International Programs
- Marilyn Thomas, 4-9564
  Associate University Compliance Officer
- Joe Roberson, 6-6224
  Associate University Compliance Officer
- Tim Parker, 4-6793
  Assoc Dir Grants Contracts Admin