## Overview of U. S. Export Control Regulations

<table>
<thead>
<tr>
<th>Type</th>
<th>Export Administration Regulations (EAR)</th>
<th>International Traffic in Arms Regulations (ITAR)</th>
<th>Office of Foreign Asset Controls (OFAC)</th>
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<tbody>
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<td>Example of what may be covered</td>
<td>• Regulations by the U.S. Department of Commerce that control the export of articles, services, and related technical data whose predominant application is not defense. &lt;br&gt;• Dual use items such as but not limited to - lasers; radars; sonar systems; satellite components; computers; signal processors; cameras; centrifuges; fermenters; electron beam systems; fiber optics; GPSs; vacuum pumps; telecom components and microorganisms such as Bartonella; Chlamydia; Clostridium; Salmonella; avian influenza; Puccinia; African horse sickness; porcine herpes; blue tongue; goat pox and African swine fever.</td>
<td>• Regulations from the U.S. Department of State that control the export of articles, services, and related technical data whose predominant application is defense. &lt;br&gt;• Items deemed to be inherently military in character such as but not limited to – toxicological agents; explosives; ranging and guidance systems; cryptography system; magnetic, pressure and acoustic sensors; radar systems; satellites and spacecraft components; lasers/directed energy devices; submersible vessels; unmanned vehicles; this also includes any experimental or developmental equipment specifically designed or modified for military applications or specifically designed or modified for use with a military system.</td>
<td>• OFAC administers and enforces economic sanctions programs primarily against countries and groups of individuals, such as terrorists and narcotics traffickers. The sanctions can be either comprehensive or selective, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals. &lt;br&gt;• OFAC maintains list of individuals and entities with whom the university and its employees may not export to or engage in controlled transactions. These include the Denied Persons List, Entity List, and Unverified List (Department of Commerce); the Debarred Parties Lists (Department of State); and the Specially Designated Nationals and Blocked Persons List (Department of Treasury).</td>
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It is important to note that the export control regulations are considered “the law of the land.” This means they are rarely included in the terms and conditions of an award in full text or as an incorporation by reference, however, they must be adhered to if the nature of the work conducted falls under the scope of the regulations. Therefore, it is important to understand the following definitions in order to ascertain applicability:

**What is an export?** The shipment or transmission of items, services, or technical data that is subject to either the EAR or the ITAR out of the United States, or the release of technology or software source code (EAR), or technical data (ITAR), to a non-U.S. or Foreign Person in the United States. Technology, software, or technical data is “released” for export through:

- Visual inspection
- Oral exchanges of information in the United States or abroad
- Transfer or shipment via any means (physical or electronic) to a foreign entity
- Provision of a service, or the application to situations abroad of personal knowledge or technical experience acquired in the United States

**Does it matter how an item is released?** No, something can be sent through the regular mail, hand carried on an airplane, faxed, uploaded or downloaded from the internet, sent via email or disclosed during a telephone conversation or other verbal exchange. Regardless of the method used for the transfer, the transaction is considered an export.

**What is a Deemed Export?** The release of export controlled technology or software course code to a Foreign Person (even when the Foreign Person is physically located in the U.S.). This release is “deemed” to be an export to the country of the Foreign Person. Deemed exports include transfers of export controlled technology that may be communicated in meetings, emails, and telephone conversations, or through visual observation. A deemed export can occur not only when export controlled technology is shared with a foreign national, but also when US Persons provide technical assistance on the development, production or use of export controlled technology to a foreign national in the US or abroad.

**Who is considered a Foreign Person when considering the export regulations?** Anyone who is not a “U.S.Person” such as a student, post-doctoral scholars, or research staff in F-1 or J-1 status, and foreign national employees in H1-B status. A Foreign Person can also mean any foreign corporation, business association, partnership, pro any other entity or group that is not incorporated to do business in the U.S. The general rule is that only US persons are eligible to receive controlled items, software or information without first obtaining an export license from the appropriate agency unless a license exception or exclusion is available.

**To be clear, under the export regulations, who is considered a U.S. Person?** Under the ITAR, a natural person who is a lawful permanent resident (green card holder) or a protected individual (citizen or national of the U.S, special agricultural worker, admitted refugee or person granted asylum); or any entity (corporation, business association,

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<th>Possible Sanctions</th>
<th>Criminal: Maximum $1,000,000 per violation or imprisonment of up to twenty years, or both.</th>
<th>Administrative: Maximum $11,000 per violation or $120,000 per violation for items involving national security.</th>
<th>Maximum $1,000,000 per violation or imprisonment of up to twenty years, or both pursuant to 22 U.S.C. 2778(c).</th>
<th>Trading with the Enemy Act (TEWA) of 1917, 50 USCS Sec 5: Criminal (willful violation): maximum $1,000,000 per violation, and up to $100,000 in individual fines, per violation or imprisonment of up to ten years, or both.</th>
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partnership, etc.) incorporated in the U.S. or any federal, state, or local government entity. The EAR is effectively the same, although without explicit definition.

**What is a Dual Use Item?** Items, information, and software that are primarily commercial or civil in nature but also have potential military applications. Dual use items may require an export license depending on the item, the recipient, the recipient’s citizenship or country of destination, and the item's application. Technologies determined to have a dual capability are specified in the Commerce Control List (CCL) and are covered by the EAR (15 CFR 730-774).

**What does it mean to be “ITAR listed?”** Items, information, and software “specifically designed, developed, configured adapted, or modified” for a military, spacecraft, or intelligence application are subject to the U.S. Department of State regulations. These items, information, and software are identified on the ITAR's US Munitions List. ITAR-listed items that are not the tangible products of university fundamental research generally require a license for access and use by all foreign persons.

**What is “Fundamental Research?”** The concept of "fundamental research" was established by National Security Decision Directive 189. The NSDD 189 defines fundamental research as:

"Basic and applied research in science and engineering where the resulting information is to be shared broadly within the scientific community, as 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."

Under the EAR (15 CFR part 734.8), university research normally will be considered as fundamental research unless the university or its researchers accept sponsor restrictions on the publication or scientific and technical information resulting from the project or activity. Research at companies or outside of the US can qualify as fundamental research when there are no restrictions on publishing the results. The EAR specifically permits limited prepublication reviews by research sponsors to prevent the inadvertent disclosure of proprietary information provided to the researcher by the sponsor or to ensure that the publication will not compromise the patent rights of the sponsor.

Under the ITAR (22 CFR part 120.11 (8)), only research at accredited institutions of higher education in the U.S. can qualify as fundamental. University research will not qualify as fundamental research if: (1) the university or its researchers accept any restrictions on the publication of scientific and technical information resulting from the project or activity; or (2) the research is federally funded and specific access and dissemination controls protecting information resulting from the research have been accepted by the university or researcher.

Additional, overarching considerations - because export regulations expressly recognize that the conduct and informational products of fundamental research are excluded from deemed export controls, export licenses or other government approval is generally not needed before involving foreign persons in fundamental research activity. **However, such research may give rise to export issues if** 1) the primary research is to be conducted outside of the US; 2) requires foreign person access to ITAR-listed items and technical data; or 3) requires foreign person access to disclosure-restricted technical information or software code generated by third parties such as defense contractors, commercial vendors or collaborators.