

Export Control Basics

For the University of Utah

Presented by Fischer & Associates

The goal of this training is to familiarize University of Utah faculty, staff, and students with the essential knowledge and tools to comply with federal export control regulations.

Our Training Objective

Training Agenda

1. Introduction: What Are Export Controls?

2. How Do Export Controls Work?

3. End-user Controls/ Prohibitions

4. OFAC Trade Sanctions

5. How Do Export Controls Apply to Utah Research?

6. How Do Export Controls Apply To Utah Academics?

7. How Do Export Controls Apply To Utah Business Activities?

8. Research Security

9. What Are The Key Take-aways From This Training?

Contact Information

1. What Are Export Controls?

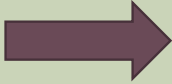

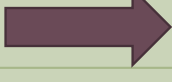

1.1 Overview of Export Controls

The U.S. Government actively regulates, and in some cases, restricts the export of certain information, items or technologies deemed to be critical to the interests of national security, economy and/or foreign policy.

1. What Are Export Controls?

1.2 Overview of Key Issues

Universities and research institutions are subject to **export control and trade sanctions regulations**, including the regulation of:

Exporting items from the US		Applies to the export of items from the US by any means (shipped, hand-carried, and in the case of technical data/electronically transmitted)
Sharing controlled data and software		Applies to access by foreign persons wherever located, including in the U.S.
Restricted Parties		Transactions with restricted parties (entities and individuals) located anywhere in the world
OFAC-Sanctioned Countries		Transactions with governments, entities, and individuals who are resident in a sanctioned country or who are blocked entities/persons

1. What Are Export Controls?

1.3 Overview of Key Regulations

Agency/ Regulations	Enforcement
Dept of Commerce- Export Administration Regulations (EAR)	Dual Use controls
Dept of State- International Traffic in Arms Regulations (ITAR)	Defense controls
Dept of the Treasury- Office of Foreign Assets Controls (OFAC)	Embargoed country transaction controls
U.S. Department of Agriculture	Select Agents and biosafety containment controls
U.S. Border Protection	Customs regulations (inbound and outbound shipments)
U.S. Department of Energy	Nuclear Regulatory Commissions

1. What Are Export Controls?

1.4 Enforcement

- Federal agencies have significantly **increased enforcement efforts** within Higher Education;
- Regulations carry both **institutional** and/or **individual** liability
- **Monetary fines** (can range up to millions in USD);
- Other penalties include:
 - Civil suit and criminal prosecution;
 - Federal debarment;
 - Revocation of export privileges;
 - Revocation of a facility clearance and/or individual security clearances.

2. What Are Export Controls?



An export occurs whenever a controlled, item, commodity, biologic, software, and/or technology is sent outside of the U.S. to a foreign person.

A “deemed” export occurs whenever controlled technology and/or source code is transferred to a foreign person in the U.S.

2. How Do Export Controls Work?

2.2 Foreign National Individuals & Entities

Foreign Nationals are persons who:

- Are not U.S. Citizens
- Are not permanent resident aliens of the U.S. (i.e., they do not have a Green Card)
- Are not in the U.S. as a refugee or with asylum status

Foreign Entities are:

- Those businesses, organizations, and governments that are not incorporated or organized to do business in the U.S.

2. How Do Export Controls Work?

2.3 Dept. of Commerce Export Administration Regulations (EAR)

- Dual-use items, commodities, hardware, software, biologics, encryption, and technical data (“items”)
- Many items are identified on the Commerce Control List (CCL) with an Export Control Commodity Number (ECCN); those dual-use items not on the CCL are classified as “EAR99”. The ECCN specifies the reason(s) that item is controlled
- Exports of EAR items require an “export license” when the country exported to is controlled for reasons matching the item’s control level
- Licenses generally take at least 30+ days to obtain

Commerce Control List Categories	
0	Nuclear Materials, Facilities, Equipment (and Miscellaneous Items)
1	Materials, Chemicals, Microorganisms, Toxins
2	Materials Processing
3	Electronics Design Development and Production
4	Computers
5	Telecommunications and Information Security
6	Sensors and Lasers
7	Navigations and Avionics
8	Marine
9	Aerospace and Propulsion

2. How Do Export Controls Work?

2.4 Dept. of State International Traffic in Arms Regulations (ITAR)

- All defense articles and technology; provision of defense services; buying/selling defense articles and services
- Defense articles and services are categorized on the US Munitions List (ITAR)
- Presumption of export authorization/license requirement for both international shipment and deemed export
- Certain countries/citizenships are prohibited access to U.S. defense articles/technology – including but not limited to Iran, Syria, North Korea, Cuba, China, and Russia

USML Categories	
1	Firearms and Related Articles
2	Guns and Armament
3	Ammunition and Ordnance
4	Launch Vehicles, Guided & Ballistic Missiles, Rockets,...Bombs...
5	Explosives and Energetic Materials, Propellants, Incendiary Agents...
6	Surface Vessels of War and Special Naval Equipment
7	Ground Vehicles
8	Aircraft and Related Articles
10	Military Training Equipment and Training
11	Personal Protective Equipment
12	Military Electronics
13	Fire Control, Laser, Imaging, and Guidance Equipment
14	Toxicological Agents, Including Chemical & Biological Agents...Equipment
15	Spacecraft and Related Articles
16	Nuclear Weapons and Related Articles
17	Classified Articles, Technical Data, and Defense Services
18	Directed Energy Weapons
19	Gas Turbine Engines and Associated Equipment
20	Submersible Vessels and Related Articles
21	Articles, Technical Data, and Defense Services not Otherwise Enumerated

2. How Do Export Controls Work?

2.5 Other key distinctions between the EAR and the ITAR

- The ITAR generally restricts foreign national access to **all ITAR items** (instruments, software, materials, technical data) and requires specific authorization or exemption before such items are accessed
 - Visual access **may** be permissible under certain limited circumstances, where there is no opportunity to gain ITAR-governed technical data about the item.
- ITAR licenses/authorizations (deemed exports and shipping) are prohibited to a number of prescribed countries, among them – China and Russia.

3. END USER CONTROLS/ PROHIBITIONS

3.1 End User Controls/Prohibitions

Separate from controls on exports of items, the government prohibits *exports to or export collaboration with* certain designated individuals and entities identified as export violators both in and outside the U.S.

- Exposure to **restricted entities** can occur in a variety of international engagements and collaborations
- To avoid engaging with a restricted party, the institution screens certain parties against government-published lists prior to export using a program call **Visual Compliance**. This is known as **Restricted Party Screening (RPS)** and is a critical part of an export compliance program
- Screening matches/hits should be resolved prior to the transaction occurring

Government Lists Include (amongst others):	Categories of Persons/ Entities that Should be Screened:
Denied Parties List	International agreements and collaborators
Restricted Entities List	Consignees of international shipments
Debarred Parties List	Sponsors
Specially Designated Nationals List	Visa candidates
ASPI List	Industry partners -commercialization programs

4. OFAC TRADE SANCTIONS

4.1 OFAC Overview

- ▶ The Dept. of the Treasury **Office of Foreign Assets Control** places economic embargos and sanctions on transactions by U.S. persons involving specific countries by prohibiting *without a license* a broad range of services and transactions that benefit or provide value to those countries
- ▶ OFAC Regulations restrict the **export** of products, software, and transfer of technical data to sanctioned countries. The regulations also restrict the **provision of services** (including educational, medical, and technical services) even where no monetary compensation occurs
 - ▶ Some sanctions are **comprehensive**: all exports, provisions of services, monetary transfers, and other interactions are prohibited without a license or other authorization. Currently, comprehensively sanctioned countries include Cuba, Iran, Syria, North Korea, and Russia
 - ▶ Other sanctions and embargoes are **targeted** only at specific industries, political regimes, or business sectors (i.e., oil & gas producers in Russia)
- ▶ Regulations are country-specific: different restrictions apply to different countries. It is important to engage with the Export Office as early as possible if you intend to engage with individuals or entities from a sanctioned country

4. OFAC TRADE SANCTIONS

4.2 OFAC Specially Designated Nationals

- OFAC regulations also include the Specially Designated Nationals List (SDNL) which lists blocked and sanctioned parties located anywhere in the world including the U.S. to whom the provision of services or exports are prohibited.
- SDNs are identified when running a RPS on an individual or entity, and a potential match should be cleared before the transaction occurs.

4.3 ITSR (Iran sanctions)

- Certain on-line courses may be offered to undergraduate and graduate students based in Iran subject to certain qualifying conditions.
- Research collaboration, professional travel, and other academic exchanges are also highly regulated and subject to OFAC authorization requirements

4.4 OFAC Licenses and Enforcement

- Licenses can be obtained from OFAC on case-by-case basis, but terms must be strictly complied with.
- OFAC licenses can take 3+ months to obtain (often longer).

5. How Do Export Controls Apply to Utah's Research?

5.2 Items/ Equipment/ Materials Used and/or Produced in Research

Controlled items, equipment, and/or materials (collectively, “items”) may be **developed or produced** in the course of research, *even when research that is otherwise uncontrolled*. Export of these items to international destinations or collaborators, sponsors, or other persons/entities may require an export license or authorization.

- **Use** of controlled items **may** implicate export controls on foreign national access or use (known as a “deemed export”, even where the research is otherwise unrestricted (i.e., “fundamental research”).
 - In general, **operation/use** of EAR-controlled instruments, software, and materials in research by foreign nationals is not controlled, *unless* otherwise specified by the granting agency, or accompanied by export controlled technical data in any form
 - Use of controlled equipment, software, materials that imparts knowledge of specific design parameters; this control is based on the EAR's comprehensive definition of use: operate, repair, install, maintain, and refurbish: all activities must occur to trigger this deemed export restriction
 - However, technology related to export-controlled pathogens, toxins, microbiological materials, and encryption may also be controlled under certain circumstances so as to trigger a deemed export

5. How Do Export Controls Apply to Utah's Research?

5.2 Data and Software Used in Research

Use of controlled data and/or software in research **may** result in a deemed export requiring an export license, where foreign persons have access to the data and/or software. License requirements will depend on the classification of the data/software, the activity in question, and the citizenship of the individuals involved.

5.2 Data and Software Used in Research

- A project may produce restricted or unrestricted data and/or software. Whether the research products are controlled depends on **sponsor requirements** and **investigator actions**.
- **Fundamental Research Exclusion (FRE) Definition:** Basic and applied research in science and engineering conducted by a U.S. university or research institution, the results of which ordinarily are published and shared broadly within the scientific community.
- To determine whether research qualifies as Fundamental Research, the first step is to look at requirements/indications given by the sponsor. These include for example: indications that the work may be Classified, restrictions on publication of research results, restrictions on foreign national participation, and explicit statements that the results are subject to export controls.

5. How Do Export Controls Apply to Utah's Research?

Fundamental Research Disqualifiers:

- Sponsor and/or prime contractor states that research is subject to export controls
- Award terms include restrictions on sharing/publishing project research results without sponsor approval
- Subcontract "flow-down" clauses that contain any publication restrictions; knowledge that the subcontract should flow down restrictions obligates referral to the Prime/Sponsor's Contract Officer
- Distribution statements that require non-disclosure of project data
- DoD 6.3 funded defense contract work (or equivalent through other funding agencies)
- "Side" agreements not to disclose project information
- Continued development of previously unrestricted technology, where the development is not intended to be shared and/or published
- Work that is performed as proprietary, industry-sponsored engineering projects (e.g., design, test, prototype, etc.), as these would not qualify as "applied" research

5. How Do Export Controls Apply to Utah's Research?

Problematic Distribution Statements

- Department of Defense (DoD) Distribution Statements B, C, D, E, F and X.
 - **Distribution Statement A: Approved for public release. Distribution is unlimited; does not violate the FRE!**
 - Distribution Statement B: Distribution is limited to US Government agencies only; other requests shall be referred to the controlling DOD office.
 - Distribution Statement C: Distribution is authorized to US Government agencies and their contractors.
 - Distribution Statement D: Distribution of technical documents is authorized to DoD components and their contractors.
 - Distribution Statement E: Distribution of technical documents is authorized to DoD components only.
 - Distribution Statement F: All distribution of technical document is to be determined by the controlling DOD office.
 - Distribution Statement X: Distribution is authorized to US government organizations and private individuals or enterprises eligible to obtain export-controlled technical data in accordance with DoD Directive 5230.25.
- DoD "FOUO" marking: a legacy marking to identify unclassified information that is "For Official Use Only"; *usually* indicates that information cannot be openly shared or published.
- NOFORN: indicates that information cannot be shared with foreign nationals without the permission of the cognizant agency. While this is not an export control marking *per se*, it also triggers export controls around the information.

5. How Do Export Controls Apply to Utah's Research?

5.6 Classified Research, Defense Services

- Classified Research vs. Export Controlled Research
 - Classified (Security Clearance) research under the NISPOM may or may not be designated as ITAR or EAR controlled, though usually a classified program will be ITAR-governed as well, given defense objective and parameters.
 - A DD254 form in the solicitation and/or award terms will specify export control parameters.
- Defense Services
 - Defense services occur when training and/or services related to a defense article are provided to foreign military personnel in their military capacity.
 - Information provided in the Service can be predicated on public domain information (does not have to be based upon ITAR defense technical data).

6. How Do Export Controls Apply to Utah's Academic Activities?

6.1 Export regulations include exclusions for Public Domain (ITAR/EAR) and/or Educational Information (EAR)

- “**Educational information**” is information released by instruction in catalogue courses or professional conferences where all technically qualified members of the public are eligible to attend, and attendees are permitted to take notes of proceedings
 - Does not include the release of proprietary information
 - Specialized professional training programs should be evaluated, particularly if trainees are a defense organization
- **Study abroad:** courses attended at international institutions generally do not require an export license, provided that the information qualifies as commonly taught ‘educational information’. *However*, attendance at a prohibited institution may implicate additional review and/or license requirements to facilitate travel, payments, and other engagements to/at the institution and in the foreign country.

6. How Do Export Controls Apply to Utah 's Academic Activities?

- **6.2 International Conferences:** Attendance/ presentation is typically permitted without an export license, provided that the information presented is non-proprietary, public domain information.
 - However, conference attendance in OFAC-sanctioned countries **may** require a specific Treasury Dept/OFAC license. Ex: An OFAC license may be required to attend a conference under the ITSR Iran sanctions.
- **6.3 Distance Education:** providing distance education to students in a sanctioned or highly controlled country (ex. China) may invoke export controls around use of educational software and learning management systems, as well shipment of course materials and items to the student.

7. How Do Export Controls Apply to Utah 's business Activities?

7.1 Proprietary Work – Research and Service Activity for an Industry Partner

- Proprietary work which can include research and non-research-based “service”, or re-charge activity is performed *outside of the FRE*, as there is no intention to publish.
 - Therefore, all such activity whether performed as a prime or sub must be evaluated to determine export control implications-either in terms of laboratory access, and certainly to the extent it involves international transfers of proprietary data or other commodities.
- “Service” or re-charge activity usually involves the receipt/use of controlled technical information, items, materials, equipment, biologics, and/or software.
- “Service” activity may also include the export of items back to an international industry partner.

7. How Do Export Controls Apply to Utah's business Activities?

Sponsored Research	International Shipping & Imports	International Travel	Student Programs	I-129 Visa Attestations
Distance Education	Engagements & Collaboration with Foreign Entities	Technology Transfer	Procurement of items, equipment, materials, and software	Controlled Biologics (Incl. Select Agents & Toxins)
IT and Data Security	Receipt of Gifts from Foreign Entities	Work-for-Hire/ Recharge Services	Facility Clearance	Defense Services

8. Research Security

8.1 Background

- During the past three years, the U.S. Government's Executive and Legislative branches have focused considerable attention on the threat posed by Foreign Influence within research institutions.
- This in, turn, has resulted in (among other measures):
 - expanded grant disclosure requirements;
 - expanded restrictions and institutional and individual due diligence when potentially engaging with "Restricted Entities" and "Watch-listed" institutions
 - restrictions against participation by researchers funded by (or otherwise engaged with) foreign "Talent/Scholarship" programs.
- Federal enforcement consequences for non-compliance with laws pertaining to Foreign Influence can be severe and are enforceable at the institutional *and individual* levels.
- Depending on the circumstance, these consequences can include substantial monetary penalties; debarment from participating in federally-funded grant or contract-based research; federal criminal prosecution; and institutional as well as individual reputational damage.

8. Research Security

8.1 “Foreign Influence”

- The term “Foreign Influence” is generally used to characterize a situation wherein
 - an international entity (e.g., a sponsoring or collaborating institution, industry partner, donor, or other international entity with a direct or indirect relationship to a U.S. institution) positions itself to gain access to the US institution’s Intellectual Property (IP) and/or export-controlled information;
 - or to covertly influence or steer the course of federally-funded research in a manner that benefits said foreign entity.
- This may involve facilitating research efforts (in the U.S. or abroad) in a manner which provides the foreign entity with direct visibility into research activities in an incidental or even “supportive” manner, though nonetheless outside the scope of intended collaboration.

8. Research Security

8.1 “Foreign Influence”

- Other examples of foreign influence activity include:
 - Penetrating Information Technology (IT) safeguards to gain unauthorized access to research files
 - Misstating professional credentials and/or omitting home country affiliations for purposes of obtaining a visa to conduct research at the U.S. institution
 - Otherwise diverting research results outside the scope of the U.S. institution’s permission, including fundamental research concerning new or emerging technologies.
- **The Utah community should remain sensitive to foreign interference concerns with respect to both grant-funded research and industry proprietary research**

10. What Are the Key Take-Aways From This Training?

- 1 Export controls apply to the transfer of items, materials, equipment, biologics, software, information, and services to foreign nationals
- 2 Export control regulations apply to many university areas including research, purchasing, shipping, advancement, travel, and collaboration
- 3 The university is developing a comprehensive export compliance program that can help you identify and manage potential export control concerns
- 4 All university personnel should remain aware of research security concerns
- 5 Projects requiring CUI controls will require additional effort, time, and potentially cost; CUI requirements should be identified as soon as possible.

Questions?

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