

Prepared by the Office of the Vice President for Research.
This is a NEW Executive Policy.

E5.218
July 2008

Executive Policy - Academic Affairs

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E5.218 **COMPLIANCE WITH EXPORT CONTROL LAWS AND REGULATIONS**

I. INTRODUCTION

Export controls are United States (US) laws and their implementing regulations that limit the distribution of certain materials, devices, and related technical information or software to foreign countries and to foreign persons, whether those foreign persons are inside or outside the United States. As such, a license may be required for the export of certain information, technologies, commodities, software, goods, or services that:

- Are inherently military in design, purpose, or use. These "defense articles" are found on the US Munitions List, 22 CFR (Code of Federal Regulations) 121. Spacecraft and satellites, even if not for military use, are included in this category.
- Are normally identified with commercial applications but could also serve military or security purposes. Such "dual use items" are identified in the Commerce Control List; Supplement No. 1 to 15 CFR 774.
- Are destined for certain "embargoed countries" or "specially designated" and "blocked persons."

The University of Hawai'i and its employees are required to comply with the export control requirements issued by the US Department of Commerce through its Export Administration Regulations (EAR), 15 CFR 700-799; the US Department of State through its International Traffic in Arms Regulations (ITAR), 22 CFR 120-130; and the US Department of the Treasury through its Office of Foreign Assets Control (OFAC), 31 CFR 500-599.

In the aftermath of September 11, 2001, Federal officials have expressed concerns about academic research that could result in the disclosure of information that would threaten the national security, foreign policy, and competitive trade interests of the

United States. In addition, there has been a significant increase in research awards (contracts, subcontracts, and grants) received by universities—from both Federal and industrial sponsors—where export control provisions are included.

Export control regulations apply not only to sponsored research and training activities but to all University activities in general. Violations of the export control requirements can result in personal liability as well as administrative and/or criminal penalties, including large fines per violation and/or imprisonment of individuals.

II. OBJECTIVES

The objectives of this policy are to:

- A. Formalize and codify current University policy requiring all employees to comply with Federal laws and regulations on export controls.
- B. Provide guidance to faculty and other researchers in the application of the export control regulations in order that they may understand their obligations under these regulations and adhere to them.

III. POLICY GUIDELINES

- A. This policy shall apply to all University of Hawai'i sponsored or unsponsored research, training, and educational activities including extramural contracts and grants accepted by the University and service-ordered to the Research Corporation of the University of Hawai'i (RCUH). The principal investigator is responsible for recognizing whether the technology or equipment involved in research may be subject to export controls, and for compliance with export control regulations in the conduct of research and educational activities. It is also important for administrators and administrative support staff (e.g., deans, directors, fiscal officers, personnel officers, et al.) to be familiar with export control policies and procedures in order to discern potential export control issues that may arise in the conduct of research and educational activities.
- B. **Export** refers to technology and information leaving the shores of the United States; as well as the transfer, release, or disclosure to foreign persons in the United States of source code or technical data about controlled commodities.

1. An **export** is an actual shipment or transmission of any commodity (equipment or hardware) out of the United States, an electronic transmission out of the United States, or the release of technology (technical data or information) about controlled commodities or software (commercial or custom-made) to a foreign national in the US.
2. The release of technology about controlled commodities or software to a foreign national in the US is known as a **deemed export**, since a transfer of "technology" or "technical data" to the foreign person is "deemed" to be an export to the home country of the foreign national.

C. A **foreign national** is:

1. Any person who is not a citizen or legal permanent resident (LPR)—also known as a permanent resident alien (PRA) or "green card" holder—of the United States.
2. Any person who is not a protected individual; i.e., not admitted as a political refugee or not granted political asylum.
3. Any corporation, business association, partnership society, trust, or any other entity, organization, or group—including any governmental entity—that is not incorporated to do business in the United States.

D. Situations that may involve the release of US technology or software, and thus require the prior approval or license from the US government, include:

1. A faculty member's oral disclosure or demonstration of technology to a foreign national in a laboratory.
2. Foreign national employees involved in certain research, development, and manufacturing activities.
3. Foreign students or scholars conducting research.
4. Hosting of foreign scientists.

E. In general, the export control regulations cover five types of University activities:

1. Transfer of controlled information, including technical data, to persons—including US citizens and US entities—outside the United States.

2. Shipment of controlled physical items, such as scientific equipment that require export licenses, from the United States to a foreign country.
 3. Provision of specific services to persons and entities outside the United States.
 4. Verbal, written, electronic, or visual disclosure of controlled scientific and technical information related to export-controlled items to foreign nationals, even when such release occurs within the United States (**deemed exports**).
 5. Travel to certain embargoed countries for purposes of teaching classes or performing research. As of its April 2, 2008 update, the Directorate of Defense Trade Controls, US Department of State, identifies the following embargoed countries under ITAR §126.1, as amended (<http://pmdtcc.state.gov/country.htm>): Afghanistan, Belarus, Burma (Myanmar), China, Côte d'Ivoire (Ivory Coast), Cuba, Cyprus, Democratic Republic of the Congo, Eritrea, Haiti, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, Rwanda, Sierra Leone, Somalia, Sri Lanka, Sudan, Syria, Venezuela, Vietnam, Yemen, and Zimbabwe.
- F. The vast majority of exports do not require government licenses. Only exports that are controlled under the Export Administration Regulations (dual use items) or the International Traffic in Arms Regulations (munitions), and exports intended for transfer to embargoed countries or blocked persons, require licenses. Much of the University's research and educational activities are exempt from export controls if they meet the criteria for an exemption as described below.

1. Fundamental Research Exemption. Fortunately, the vast majority of the University's research and educational activities is exempt from export controls because the University can assert the fundamental research exclusion. Accordingly, it is the University's policy to protect the fundamental research exclusion by eliminating contractual clauses that destroy our ability to claim the exclusion.

Fundamental research is defined as basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community. Fundamental research is 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.

The ***fundamental research exemption*** (or exclusion) may apply to items on the EAR Commerce Control List or ITAR Munitions List so that a foreign researcher can view the technology or equipment—which would otherwise trigger a review of the licensing requirements under the deemed export rule—as long as there are no restrictions on publication of the research, dissemination of information, access to the research, or—in some cases— as long as the research or information is made public. Any foreign national is subject to the deemed export rule.

If the research falls under the fundamental research exclusion, there would be no further concern about the need for an export license.

- a. Although the export control regulations cover nearly all fields of science and engineering, universities and colleges need not obtain a license to disclose technical information to foreign nationals inside the United States through classes, laboratories, publications, or conferences, if the information is in the public domain. Information is in the ***public domain*** if, in part, it is published and generally accessible to the public through unlimited and unrestricted distribution, or through fundamental research in science and engineering at accredited institutions of higher learning in the US where the resulting information is ordinarily published and shared broadly in the scientific community.

If the research falls under the public domain exclusion, there would be no further concern about the need for an export license.

- b. The fundamental research exemption does not apply to the initial transfer of information from an industry sponsor to University researchers where the parties have agreed that the results become the sponsor's proprietary information.

Access and dissemination controls in government contracts normally do not trigger a license requirement as long as the University complies with

all of the national security controls imposed by the contract.

c. The fundamental research exclusion is extracted from the ITAR provisions that exempt instructional materials used in typical classroom instruction or information that is otherwise in the public domain. Accordingly, the fundamental research exemption applies only to the dissemination of research data and information including non-encrypted software, and not to the transmission of material goods. This exception cannot be used to cover the export of ITAR-controlled equipment, EAR-controlled equipment, or other tangible materials to other countries.

d. The fundamental research exclusion applies to basic and applied research in science and engineering performed by colleges and universities provided that:

(1) The research is carried out openly and without restrictions on publication of, access to, or dissemination of, the research results. This exclusion applies essentially to the transfer of information to foreign persons on US soil, known as **deemed exports**.

When the fundamental research exemption applies, US universities may allow foreign nationals (e.g., students, faculty, researchers, and visitors) to participate in research projects involving export-controlled technical information on campuses in the United States without a deemed export license. Moreover, technical information resulting from fundamental research may be shared with foreign colleagues abroad and shipped out of the US without securing a license.

(2) Such research does not involve equipment, encrypted software, listed/controlled chemicals, bio-agents, or toxins.

(3) There is no reason to believe that any information or non-encrypted software being released will be used for a weapon of mass destruction.

- (4) Any information or software involving the project is already published.
- (5) Actual use of equipment by a foreign national in the US is not controlled by export regulations. As such, a deemed export license is not required in order for foreign nationals to use controlled equipment in research projects, classes, and teaching laboratories on campus. Inside the United States, any person—including foreign nationals—may purchase export-controlled commodities, and the deemed export rule applies only to technical information about the controlled commodity. While the use of equipment within the US is not controlled, the transfer of technical information relating to the use (i.e., operation, installation, maintenance, repair, overhaul, and refurbishing) of equipment may be controlled under certain circumstances.
- (6) The transfer of commodities and equipment is controlled by export regulations only when the item is shipped out of the country. A license to ship a controlled item outside the United States is required prior to shipment even when the item or equipment is used in or results from fundamental research.
- (7) In the post-9/11 environment, there has been a greater tendency for "regulation by contract." For example, there are new Federal funding programs that are increasingly linked to export controls or government security controls such as bioterrorism, homeland security, and cybersecurity. At the same time, however, both EAR and ITAR provide that the fundamental research exemption will be lost if a university or its researchers accept any government or private sponsor's contractual language that:
 - (a) Restricts publication of scientific and technical information resulting from the project or activity, other than a normal time-limited prepublication review to identify patentable subject matter or inadvertent disclosure of proprietary information furnished by a sponsor.

- (b) Forbids the participation of foreign nationals.
 - (c) Otherwise operates to restrict participation in research and/or access to and disclosure of research results; e.g., when the research is funded by the US government with specific access and dissemination controls that protect information resulting from the research.
- (8) In March 2002, a US Department of State rule expanded the fundamental research exclusion for foreign nations involved in space-related research, but did not provide relief for foreign nationals from certain countries (e.g., China) and created oversight obligations (e.g., a US entity must be responsible for what its European collaborator does with the information or technology).
- (9) The fundamental research and public domain exemptions apply only to disclosure of information or technical data to foreigners **in the US**. They do not apply to actual shipment or hand carrying outside US borders of physical items (e.g., specified scientific equipment), or to services (e.g., training foreign nationals inside or outside the United States). Other exemptions may apply to exports of equipment and services but not to the fundamental research or public domain exemptions.
- (10) To the extent that disclosure of information falls within the "safe harbor" of the fundamental research, public domain, or other regulatory exemption; University faculty, researchers, staff, and students need not be concerned about export controls on campus. However, vigilance is required to ensure that the availability of the fundamental research and other exemptions is not lost due to inadvertent acceptance of contractually imposed restrictions on access to, dissemination of, or participation in, research.
- (11) To the extent that University activities involve shipping equipment abroad, or teaching

or training foreign students on campus or foreign colleagues abroad in the use of equipment, export control issues do arise.

2. Teaching (or Education) Exemption. Both the EAR and ITAR contain a second critical "university exemption" known as the **teaching exemption**, that authorizes the disclosure of educational information released by instruction in catalog courses and associated teaching laboratories of academic institutions without the need for a license from the US Departments of Commerce or State. The **teaching exemption** allows the disclosure of unclassified technical data—excluding encrypted software—in the United States by US institutions of higher learning to foreign persons who are their bona fide and full-time regular employees, which normally excludes students or postdoctoral researchers, provided that:
 - a. The employee's permanent abode throughout the period of employment is in the US.
 - b. The employee is not a national of an embargoed country; i.e., a country to which exports are prohibited under ITAR §126.1.
 - c. The institution informs the employee in writing that the technical data may not be transferred to other foreign persons without the prior written approval from the Directorate of Defense Trade Controls, US Department of State.

When the teaching exemption applies, there would be no further concern about the need for an export license for general scientific, mathematical, or engineering principles commonly taught in colleges and universities.

3. Other University Exemption. The ITAR contains an additional university exemption for the export by universities of **scientific, research, or experimental satellite components that are fabricated for fundamental research purposes**. However, special conditions apply to the use of this exemption (see ITAR §123.16(b)(10)).
- G. When a University activity is not covered by one of the foregoing exemptions, it is critical that the principal investigator begin the process of seeking a license from the appropriate Federal agency early, since it can take as long as six months or more to receive a license after submission of the license application.

- H. Noncompliance with export control regulations may result in administrative and/or criminal penalties against individuals and/or institutions (e.g., fines of up to \$1 million per violation, revocation of exporting privileges, or 10-year prison sentences).

- I. Detailed information and guidance are forthcoming in updated UH Administrative Procedures (AP). Any questions on this matter may be referred to the Office of the Vice President for Research.