



University of North Dakota
Export Compliance Awareness
Training

Fischer & Associates

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> Training Agenda

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1. Introduction: Why is Awareness So Critical to the University of North Dakota (UND)?
 2. What Are Export Controls? How Do They Work? How Are They Enforced?
 3. How Do Controls Impact You as a PI, Researcher or Research Administrator?
 4. How Do You Remain Compliant *and* Subject to As Few Controls As Possible?
 5. OFAC Regulations: Purpose, Scope, and Enforcement
 6. FAQ
 7. Whom Do I Contact for Help?
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1. Introduction: Why Is Awareness So Critical to UND?

As an exporter of equipment, software and technical data, UND must adhere to the export control requirements administered by the Departments of State, Commerce, and Treasury.

Exports are defined as follows:

- Outbound shipments or transfer by any means (cargo, hand-carried, courier, electronically transmitted data or spoken communication).
- Laboratory access to foreign nationals for whom item is controlled.

EAR and ITAR Controls

Many items are controlled as "dual use" items under the Export Administration Regulations (EAR) by the Commerce Department or as "defense" items under the International Traffic in Arms Regulations (ITAR) by the State Department.

- Under dual use rules, controls are based on type of item, end use/user, country destination: not all items controlled for all countries.
- Under defense regulations, all exports of defense articles are controlled: "defense services" also controlled.
- An export license (agency authorization) may be required prior to export or disclosure to foreign nationals, depending on circumstance.

Exclusions

- The Fundamental Research Exclusion (FRE) per EAR allows access by foreign nationals to equipment/results that might otherwise be controlled: eliminates access licensing requirement in most cases.
 - But FRE criteria must be met: no citizenship or publication restrictions.
 - Public availability, education, self-invention rules also apply.
- The Public Domain exclusion (ITAR) allows access to research results only.
 - Access to ITAR equipment and ITAR technology by foreign nationals remains controlled, even if results intended for public domain.

>1. INTRODUCTION: WHY IS AWARENESS SO CRITICAL TO UND?

Other Regulations

- OFAC (Treasury's Office of Foreign Assets Control): Restrictions independently apply to certain transactions with "terrorist" sponsoring nations: Iran, Cuba, Syria, N. Korea and Sudan.
 - Transactions broadly defined: joint collaboration, importing, exporting, funding, certain types of peer review.
 - Requires OFAC license prior to transaction.
- Nuclear Regulatory Commission (NRC)
 - Certain items are controlled by the Nuclear Regulatory Commission and require General or Specific licensing.
- Department of Energy (DOE)
 - DOE-funded institutions may additionally be subject to DOE Orders pertaining to certain activities (i.e., Foreign Visits and Assignments Program).

Enforcement

- Failure to comply with the export control regulations can and does result in millions of dollars in civil and criminal penalties, laboratory closures, and criminal prosecution at the institutional and individual PI/Administrator levels.
- Government enforcement agencies have been enforcing these regulations, resulting in numerous investigations, fines and criminal prosecutions at universities. H-1 Visa certification requires UND to indicate whether access to technical data requires an EAR or ITAR license.
- H-1 Visa certification requirement: institutions must indicate whether access to technical data requires an EAR or ITAR license.

2. What Are Export Controls? How Do They Work? How Are They Enforced?

What constitutes exports of controlled commodity, software, technical data or technology?

“Exports” defined (EAR and ITAR):

Physical shipments of such items abroad by any means; electronic data transmission, spoken communication, hand carried articles.

“Deemed Export” (EAR)/“Disclosing” (ITAR) defined:

- “Release” concept: visual and computer access to export controlled technology or data, occurring in the U.S by foreign persons of certain countries validly on temporary student or employment visas, neither U.S. citizens nor Permanent Residents (export is “deemed” to occur upon foreign national’s return to home country); or release to foreign nationals abroad. The Definition of “Foreign persons” includes companies not incorporated in the U.S., foreign governments, and international organizations.
- ITAR incorporates analogous concept for purposes of defense articles and services, but subject to ITAR country prohibitions.

“Controls” defined:

EAR-Commerce Department “Dual use” controls (15 CFR 700-799):

- Commodity/hardware, software, technical data with both civilian and potential military or nuclear proliferation capabilities.
- Technical data/technology: blueprints, plans, diagrams, models, formulae, tables, engineering designs, and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape read-only memories.

> 2. WHAT ARE EXPORT CONTROLS? HOW DO THEY WORK? HOW ARE THEY ENFORCED?

How do export controls work?

EAR – Dual Use Destination/End Use controls

- Exports of certain commodities (whether hardware, software, technology or technical data) identified on the Commerce Control List (CCL) with an Export Control Classification Number (ECCN) require prior written authorization — an “export license” — or must meet an allowable exception.
 - Licenses take at least 30 plus days to obtain and are often issued with mandatory end use/user conditions.
- Licensing depends on three factors:
 - Type of item;
 - Reason(s) for control e.g., anti nuclear proliferation (NP), missile technology (MT), national security (NS), chemical biological control (CB), or several other types of control could be placed on it;
 - Whether country exported to is controlled for an item with that level of control, based on CCL Country Chart.
- Commerce Control List (CCL) 15 CFR 774 Categories 0-9:
 - 0 Nuclear Materials, Facilities, Equipment
 - 1 Materials, Chemicals, Microorganisms, Toxins
 - 2 Materials Processing
 - 3 Electronics
 - 4 Computers
 - 5 Telecommunications and Information Security
 - 6 Lasers and Sensors
 - 7 Navigation and Avionics
 - 8 Marine
 - 9 Propulsion Systems, Space Vehicles and Related Equipment

> 2. WHAT ARE EXPORT CONTROLS? HOW DO THEY WORK? HOW ARE THEY ENFORCED?

- Within each category 0-9 above, items are arranged according to the same five groups, A-E below:
 - A. Equipment, Assemblies and Components
 - B. Test, Inspection and Production Equipment
 - C. Materials
 - D. Software
 - E. Technology

Note: Just because an item is purchased in the U.S. and is commercially available does not render it uncontrolled for purposes of these regulations were it exported.

Note: Items are controlled to their highest level. A non-controlled item can become highly controlled by loading controlled technical data onto it. Example: Modem or transceiver loaded with controlled cryptography.

- Examples of controls and licensable destinations:
 - ECCN: Example - ECCN 2B230
 - Pressure Transducers capable of measuring absolute pressures at any point in the range of 0 to 13 kPa and having both of the following characteristics (See List of Items of Controlled).
 - Reasons for Control: NP and AT.
 - Examples of countries controlled for NP - license required: Singapore, China.
 - **Note:** “Know-how” technology is also controlled for deemed export purposes.
 - Example – ECCN 6A002
 - Optical sensors.
 - Reasons for Control: NS, MT, CC, RS, UN and AT.
 - Nearly all countries controlled for NS.

> 2. WHAT ARE EXPORT CONTROLS? HOW DO THEY WORK? HOW ARE THEY ENFORCED?

ITAR- State Department controls (22 CFR 120-130):

Defense Article:

- Hardware, software and technical data specifically designed, developed, configured, adapted or modified for a military application, and
 - Does not have predominant civilian applications, and
 - Does not have a performance equivalent (defined by form, fit or function) to those of an article or service used for civil applications; or
 - Is specifically designed, developed, configured, adapted or modified for a military application, and has significant military or intelligence applicability such that control under this subchapter is necessary.

Defense Service:

- Providing technical assistance (including training) to foreign persons (whether in the U.S. or abroad) in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;
- Providing to foreign persons any technical data controlled under this subchapter (see below) whether in the U.S. or abroad;
- Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the U.S. or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice.

Technical Data:

Information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles; Invention covered by a secrecy order; and software directly related to a defense article.

> 2. WHAT ARE EXPORT CONTROLS? HOW DO THEY WORK? HOW ARE THEY ENFORCED?

ITAR - Military/Defense Controls

- Based on U.S. Munitions List (USML – 22 CFR 121) pertaining to definitions of defense article, service, or technical data defined above (including certain items “specially designed or modified for military application”). Categories include:
 - I - Firearms
 - II - Artillery Projectors
 - III - Ammunition
 - IV - Launch Vehicles
 - V - Explosives, Propellants, incendiary Agents and their constituents
 - VI - Vessels of War and Special Naval Equipment
 - VII -Tanks and Military Vehicles
 - VIII - Aircraft [Spacecraft] and Associated Equipment
 - IX - Military Training Equipment
 - X- Protective Personnel Equipment
 - XI - Military [and Space] Electronics
 - XII - Fire Control, Range Finder, Optical and Guidance Control
 - XII – Auxiliary Military Equipment
 - XIV -Toxicological Agents/Equipment, Radiological Equipment
 - XV - Spacecraft Systems and Associated Equipment
 - XVI - Nuclear Weapons Design and related equipment
 - XVII - Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated
 - XX - Submersible Vessels, Oceanographic and Associated Equipment
 - XXI – Miscellaneous Articles

Sample from US Munitions List (ITAR)

- Example of control
 - Category XI-Military [and Space] Electronics
 - Radar system, with capabilities such as Search, Acquisition, Tracking, Moving target indication; Imaging radar systems; Any ground air traffic control radar which is specifically designed or modified for military application; etc.

> 2. WHAT ARE EXPORT CONTROLS? HOW DO THEY WORK? HOW ARE THEY ENFORCED?

Nuclear Regulatory Commission Controls

Materials used to support nuclear-related research exported from institutions are often subject to NRC licensing requirements. Specific requirements are predicated on a number of criteria, which could include the specific material, quantity, origin of the material, etc. Because some materials and technologies are alternatively covered by the CCL, this area requires review on a case by case basis.

Authorizations

Exports require prior “authorizations” based on item, design, end use or defense service activity for any export unless a specific exemption applies.

- EAR Items exported in furtherance of an ITAR defense service require authorizations.
- **Note:** Certain countries allowable or licensable for EAR exports are per se prohibited for ITAR, and presumed denied for ITAR purposes: e.g., China.

EAR/ITAR End User Controls/Prohibitions

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

- Compliance requirement to screen certain parties (for example foreign institutions, industrial sponsors) against government-published lists prior to export (Denied Parties List, Restricted Entities List, Debarred Parties List, Specially Designated Nationals List).

> 2. WHAT ARE EXPORT CONTROLS? HOW DO THEY WORK? HOW ARE THEY ENFORCED?

How are controls enforced?

- Civil and criminal enforcement authority over EAR and ITAR violations, resulting in loss of export privileges, severe monetary fines (millions of dollars), prosecution (criminal) — against UND *and/or faculty member, researcher or administrator* to whom violation is found attributable.
 - Agencies exercise broad enforcement discretion.
 - Civil enforcement action: 5 year look-back rule.
 - The federal government investigates institutions and their investigations have resulted in criminal prosecution of faculty and researchers.

3. How Do Controls Impact You as a PI, Researcher or Research Administrator?

Key Point

“Exclusions”

Partially exempt research activities from *some but not all* of the export control licensing requirements, rendering export compliance easier to achieve, and faculty/administrators less vulnerable to violation.

- Exclusions are the cornerstone of preserving fundamental research without preventing foreign national participation.

The Catch

Exclusions must be used knowledgeably/correctly; otherwise, licensing requirement is triggered, failure of which to obtain is an export control violation.

Fundamental Research Exclusion (FRE) – EAR/Public Domain - ITAR

Fundamental Research Definition (EAR)

Basic and applied research in science and engineering conducted at a U.S. research institution, the results of which ordinarily are published and shared broadly within the scientific community.

Public Domain Definition (ITAR)

Generally accessible to the public through:

- Publication in periodicals, books, print, electronic, or other media available for general distribution (including websites that provide free uncontrolled access) or to a community of persons interested in the subject matter, such as those in a scientific or engineering discipline, either free or at a price that does not exceed the cost of reproduction and distribution;
- Readily available at libraries open to the public or at university libraries;
- Patents and published patent applications available at any patent office;
- Release at an open conference, meeting, seminar, trade show, or other open gathering held in the U.S. (under ITAR) or anywhere (under EAR). Note, a conference or gathering is "open" if all technically qualified members of the public are eligible to attend and attendees are permitted to take notes or otherwise make a personal record of the proceedings and presentations.
- ITAR: general descriptions/marketing material relating to function/purpose of defense article.

> 3. HOW DO CONTROLS IMPACT YOU AS A PI, RESEARCHER OR RESEARCH ADMINISTRATOR?

Benefit

Even if results of the research might otherwise be export controlled under the EAR and therefore subject to deemed export restrictions as to who could participate in the research, the FRE generally allows anyone of any nationality access to the results of the research.

Caveat

Absolutely no restrictions can be accepted from a corporate or government sponsor that:

- Directly or indirectly prohibits dissemination or publication of research results, or
- Mandates foreign national restrictions as to who can access research (if there will be foreign national participation).

Except for:

- Limited pre-publication review by research sponsors is acceptable within a reasonable timeframe but only to:
- Prevent inadvertent divulgence of proprietary information or government classified information (as having been mutually defined) and provided by the sponsor, or
- Ensure that pre-defined proprietary content will not compromise the sponsor's patent rights.

Educational Information Exclusion - EAR and ITAR

“Educational 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.

Employment Exclusion - ITAR

Information can be provided to a foreign person in the United States who is a “bona fide employee” of UND - working full time with full benefits subject to the following:

- Not a foreign person from ITAR prohibited or embargoed countries;
- The employee's permanent abode throughout the period of employment with UND is in the United States;
- UND informs the individual in writing that the technical data may not be transferred to other foreign persons without the prior written approval of the Directorate of Defense Trade Controls.

4. How Do You Remain Compliant and Subject to As Few Controls As Possible?

Restrictive Clauses:

These may occur in contracts, grants or cooperative agreements:

- Federal sponsor (primary or flow through via industry or other research institution).
- Industrial sponsor (as initiated by industrial sponsor or flow through from federal sponsor).
- Research institution (flow through from industry or federal agency).
- Example clauses:
 - DFARS 252.204-7000: Prohibitions on disclosure of information (reference to unclassified but sensitive).
 - ARL 52.004-4400: Approval of foreign national performing under contract, or reference to background checks.
 - AFMC 5352.227-9000: Export Controlled Data Restrictions under ITAR.
 - TACOM 52-227-4004: Approval by Contracting Officer prior to release.
 - ARO 360-1 D1/2: Clearance and Release of Contractor Materials/Information.
 - FAR 52.227-17(d): Release and Use restriction.
 - DD2345: Military Critical Technical Data Agreement: places a restriction as condition of attending a conference or receiving data from the government.

Non-Disclosure Agreements (NDA):

An NDA containing a confidentiality clause and/or an export control clause (should the data being provided be controlled) does not per se compromise FRE or public domain status, provided that:

- Where the purpose of the NDA is to safeguard proprietary background information and in no way restrict research results.

> 4. HOW DO YOU REMAIN COMPLIANT AND SUBJECT TO AS FEW CONTROLS AS POSSIBLE?

- Where the purpose of the NDA is to safeguard both proprietary data *and* export controlled data or just export controlled data, PI and sponsor need to discuss amount of information and the extent to which the project can be performed with either no transfer of said data to the PI, or transfer to only one or two PI's, but not the balance of the research team — i.e., consistent with the data being used strictly for background purposes.

Note: As a practical matter, it is better not to accept export controlled data where it can be avoided. Accepting ITAR data, even for background purposes, will require the PI or researcher to assume the responsibility of safeguarding the technology from inappropriate IT and physical access.

> 4. HOW DO YOU REMAIN COMPLIANT AND SUBJECT TO AS FEW CONTROLS AS POSSIBLE?

Special Considerations When Using Exclusions

Software and Encryption

Make self-created software “publicly available” so as to be excluded from the EAR

- Must have arisen during or resulted from fundamental research as defined by the EAR.
- Source code and machine readable code must be publicly available.
- Software and related technical data are published when available for general distribution/community subscription either for free or at a registration price that does not exceed the cost of reproduction and distribution.
- Contract terms for release of the developed software.
 - There should be no conditions placed on the research.
 - Should be the intent of the research team to publish its findings in scientific literature or elsewhere
 - If the contract requires that a private corporation review the findings of the research team with the intent of controlling what results are to be released in open literature, then the research is considered proprietary. The research is not considered fundamental.
- Proprietary tools: Background information or proprietary research tools can be used during the course of fundamental research. IP and export control considerations must be given to the NDA.

Special Encryption Rules

- Encryption software is consistently called out in the EAR to alert that stricter rules apply; government takes a conservative approach to cryptographic controls, **including removing some items from the Fundamental Research Exclusion** (“FRE”).
 - Where the FRE does not apply, a “deemed export” situation arises.
 - Deemed export definition: Access by a foreign national for whom home country is controlled.

> 4. HOW DO YOU REMAIN COMPLIANT AND SUBJECT TO AS FEW RULES AS POSSIBLE?

Special Encryption Rules (continued)

- Encryption software is controlled for its functional capacity – not for the informational content it supports.
- Category 5, Part 2 captures cryptography and where it has a higher level of control, supersedes other CCL categories that may have otherwise applied to underlying software.
- Items not covered by the FRE/Public Domain exclusions:
 - Software and related technology controlled under ECCN 5D002 for “EI” (Encryption Items) reasons.
 - Mass market encryption software with symmetric key length exceeding 64-bits, controlled under ECCN 5D002.
- License exception TSU (Technology & Software Unrestricted): Source code and resulting object code for this encryption software that results from fundamental research can be freely exported or shared that meets the definition of “public availability” (i.e., if already or will be published. The source code and object code can be posted on internet, as long as Commerce is notified of internet location and is provided copy of the source code).

Authorization Requirements for Cryptography

Deemed Export Authorizations may be required for accessing cryptographic software or technology, or providing technical assistance, unless otherwise exempted.

> 4. HOW DO YOU REMAIN COMPLIANT AND SUBJECT TO AS FEW CONTROLS AS POSSIBLE?

So When Do I Need a License?

- Shipment of Equipment Abroad – Since the FRE *only* applies to technology and technical data, a license may be necessary to export equipment depending on ITAR or EAR requirements.
- *Carrying* or transmitting export controlled technical data or development software - for example, loading cryptography development software or proprietary export controlled information on a laptop or sending it abroad to a destination for which the data is controlled.
 - Distinguishable from exporting FRE data results (must be uncontrolled results only) which does not require a license.
- See Section 5 about specific OFAC licensing requirements.

What actions preclude the FRE/Public domain exclusions and, therefore, must be avoided (or become subject to authorization requirements)?

- Acceptance of Restrictive Clauses noted above, resulting in selective deemed export license situation.
- Sharing export controlled *background* data subject to an NDA with the research team, resulting in a selective deemed export license situation.

What Can I Take with Me When I Travel?

Use License Exception TMP (Tools of Trade)

- Applies to usual and reasonable kinds/quantities of tools (commodities/software) for use by exporter.
- Must remain under effective control of exporter or exporter's employee (physical possession, locked in safe, guarded). **Would generally not apply to laboratory equipment that cannot be protected.**
- Must accompany exporter when traveling or be shipped within one month before departure or any time after departure, and be returned no later than one year post export.
- Tools of Trade Exemption does not apply to OFAC terrorist supporting embargoed countries such as Cuba and Sudan (See OFAC rules below).

5. OFAC Regulations: Purpose, Scope, and Enforcement

What Are the OFAC Regulations: What Are They Intended to Accomplish?

- Office of Foreign Assets Control (OFAC) falls under the Department of the Treasury.
- Regulations are found in Title 31 CFR, Parts 500-599
 - Broadly regulate and restrict transactions with embargoed countries, plus certain nongovernmental organizations, to implement strategic foreign policy.
 - Restrict transfer and exchange of items and services.
 - Restrict commercial, industrial, and financial relationships benefitting countries.
 - Restrict travel (Cuba) subject to certain exceptions.
 - Prohibit transactions with certain end users – OFAC’s Specially Designated Nationals List (present in the U.S. or abroad).
- Approximately twenty-five embargoed countries, plus certain non-governmental organizations: most comprehensive controls apply to the following:
 - Cuba, Iran, Syria, N. Korea and Sudan.
 - Regulations are country-specific.
 - OFAC regulations operate independently of other export control regulations (dual-use/EAR, military defense/ITAR).
 - An activity that might not be controlled under EAR or ITAR may be controlled under OFAC.
 - OFAC Sanctions Programs: Terrorism
 - Regulations include Executive Order and several sanctions (31 CFR 594-597).
 - Sanctions apply to certain listed entities.

> 5. OFAC REGULATIONS: PURPOSE, SCOPE, AND ENFORCEMENT

How Are OFAC Regulations Enforced?

- All regulated activity requires prior authorization in the form of an OFAC license issued by the Department of Treasury.
- While OFAC publishes some country-specific guidance on regulatory interpretation, such guidance is not comprehensive; in general, questions in doubt are handled through requests for Advisory Opinions or License Applications.
 - Data provided in advisory opinions is treated as proprietary and confidential upon request.
- Treasury deploys its own investigative enforcement team, and operates jointly with the FBI and the Commerce Department's Office of Export Enforcement (OEE).
- Sanctions include civil and criminal monetary penalties which can be assessed against the individual violator and/or the institution. Cases can be referred to the Department of Justice for criminal investigation.
 - Monetary penalties can range up to the greater of \$250,000 or twice the value of the transaction, per violation.
- The most common violations in the academic and research community involve the following:
 - Cuba-based research and independent travel.
 - Outbound and collaborative Iranian transactions (see below for further detail).
 - Access to restricted research tools in the U.S. by OFAC-restricted foreign nationals.
 - Failure to screen OFAC-restricted end-users.

> 5. OFAC REGULATIONS: PURPOSE, SCOPE, AND ENFORCEMENT

How Specific Research Activities Trigger Requirements: Common Scenarios

- Travel to an OFAC-restricted country.
 - Note: Only Cuba requires licenses for personal and certain professional travel; for all other countries, no license is required for personal travel.

- Providing a restricted “service”

This concept is common to the regulations across the five most heavily sanctioned nations, as excerpted below from the Iran sanctions:

“31 CFR §560.204 Except as otherwise authorized pursuant to this part, including §560.511, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any goods, technology, or services to Iran or the Government of Iran is prohibited, including the exportation, reexportation, sale, or supply of any goods, technology, or services to a person in a third country undertaken with knowledge or reason to know that:

(a) Such goods, technology, or services are intended specifically for supply, transshipment, or reexportation, directly or indirectly, to Iran or the Government of Iran; or

(b) Such goods, technology, or services are intended specifically for use in the production of, for commingling with, or for incorporation into goods, technology, or services to be directly or indirectly supplied, transshipped, or reexported exclusively or predominantly to Iran or the Government of Iran.”

> 5. OFAC REGULATIONS: PURPOSE, SCOPE, AND ENFORCEMENT

- Common scenarios involving restricted services include the following:
 - Exporting research data which is not publicly available.
 - “Export” is defined as a transfer: electronic, conversational or hard copy media.
 - “Publicly available” means published on a website or through scholarly publication, etc.
 - An Iranian download of a Website publication containing research results is allowable; however, providing technical assistance upon request from an Iranian individual or institution based in Iran triggers a license requirement.
 - Importing samples or materials for analysis/provision of data results.
 - Even where the samples or materials are strictly for research purposes and results are intended for publication, importation without a license is prohibited.
 - Note: Importing any item from Iran requires license authorization; other countries have item-specific requirements.
 - Data exchange with OFAC foreign national researchers and scholars based in OFAC countries.
 - Note export prohibition above: issuing data or research results that is unrelated to publication may constitute a restricted export.
 - Serving on collaborative research committees or boards: No issue, unless “service” is being provided: common sense standard – discussions should be limited to what has been published or general discussions pertaining to collaboration.

> 5. OFAC REGULATIONS: PURPOSE, SCOPE, AND ENFORCEMENT

- Common scenarios involving restricted services (continued):
 - Data exchange with OFAC foreign national researchers and scholars who are based outside of OFAC countries.
 - Where OFAC foreign national is at the institution under a valid US visa, case by case basis. Some activity such as access to source code containing export-controlled cryptography requires a license even in the context of fundamental research.
 - Where OFAC foreign national is present in a third country (e.g. France), case by case. There is no requirement to screen individual's nationality. However, one cannot self-blind, where it is evident that the data will be used to benefit an institution in the foreign national's home country.
 - See BIS screening requirement: Specially Designated Nationals List (SDNL) – individuals and entities identified as facilitators of illegal transactions with OFAC countries.
 - See ITAR defense service definition: providing “dual use” or uncontrolled data with a known military or defense end use.
 - Joint publication-related activities: collaborating on research journals; peer review.
 - Per published OFAC Guidance, peer review is allowable with respect to all sanctioned countries. However, peer review must meet certain specific parameters.
 - > Identification of problems within an article being considered for scholarly publication is allowable, but must be for the benefit of the publication and not constitute a substantive content-based rewrite that falls outside of what would normally be required for publication.
 - > Guidance on professional credentials: providing recommendations and advice to an institution on an OFAC foreign national's professional credentials is not an issue, as long as the *institution* is not in an OFAC country.

> 5. OFAC REGULATIONS: PURPOSE, SCOPE, AND ENFORCEMENT

- Common scenarios involving restricted services (continued):
 - Attending international conferences.
 - Presenting papers and research results:
 - > Conference being held outside of OFAC country: No issue as to OFAC foreign national audience members.
 - > Conference being held within an OFAC country other than Cuba: Guidance not clear; license approval recommended.
 - > Conference being held in Cuba: General license is required.
 - Participating in one-on-one “off podium” discussions: **Use caution.** License requirements may apply to information not already in the public domain. Discussing research results or projects with AT country citizens would require a license.
 - Humanitarian Endeavors
 - Exports of medicine/medical equipment typically do not require a license. However, activity in support of humanitarian aid may require authorization, depending on specific country at issue.
 - > Humanitarian activity may be defined as a restricted service depending on how broad the activity is and who is receiving it.

What Are the Significant Differences Between Country-Specific Regulations?

Any transaction with an embargoed country requires either a general or specific license, or a license exemption.

Examples of other country-specific restrictions/exemptions include but are not limited to the following:

- Iran: broadest “service” restrictions apply: license required.
- Syria/Sudan: Export restrictions apply; provision of services is prohibited with regard to certain entities/end-users.
- Iran: Importation restrictions. Imports require licensing. Example: materials/samples for analysis and provision of research results.
- Iran: Research collaboration requires specific license; however, collaboration on publication is covered under a general license (no application necessary).
- Terrorism sanctions: Apply to specific individuals/entities, outside of a country-based context. Screening is essential.

6. Frequently Asked Questions

This Q & A Section addresses some of the most commonly-raised issues pertaining to export control.

1. Exporting Commodities, Technical Data or Software
2. Laboratory Access to EAR and ITAR-Controlled Items and Data
3. Staying within the Fundamental Research Exclusion (FRE)
4. Travel Abroad
5. International Collaborations and Conducting Research Abroad
6. Office of Foreign Assets Control (OFAC) Requirements

> 6. FREQUENTLY ASKED QUESTIONS**1. Exporting Commodities, Technical Data or Software****Q1. I am planning to export an item, technical data or software. What do I need to do?**

Notify UND's Export Control Officer.

Because the export of an item, data or software may require an export license and, at a minimum, recipients of such exports must be screened against the U.S. Government's restricted party watch-lists, please notify UND's Export Control Officer at least 30 to 60 days prior to your intention to export so that compliance requirements can be resolved.

Q2. Do I need to wait to export my item until I receive an export license or other authorization?

Yes.

If UND's Export Control Officer determines that the item requires an export license, you will need to wait until we have the license. In any case, you will need to wait until the Export Control Officer has completed watch-list screening. [Note: screening itself normally only requires approximately 48 hours to process. Absent any screening concern and no license requirement, an export can proceed immediately.]

Q3. Does it matter how I plan to export the item, i.e., ship by freight forwarder or courier, hand-carry, transmit data/software electronically?

No, the method of export has nothing to do with whether a license is required.

> 6. FREQUENTLY ASKED QUESTIONS**1. Exporting Commodities, Technical Data or Software (continued)****Q4. How difficult is it to obtain an export license to ship tangible items, data or software?**

Licenses are normally issued within 30 to 60 days from the date an application is submitted.

Normally, and subject to certain exceptions, it is not difficult to obtain a license. Upon obtaining the necessary details about the export (e.g., nature of the item, purpose/end use, destination, and end user) our Export Control Officer prepares and files the appropriate type of license application (dual use – EAR license or defense categorized - ITAR license). The license application is filed through one of the on-line U.S. Government agency portals, and the administrator is able to track the government's approval process. Licenses are normally issued within 30 to 60 days. Note that where the Government finds the proposed export to have particular national security, biological safety, or nuclear or missile technology implications, the applicable Government agency can deliberate longer over the issuance of the license, referring it for inter-agency review or requesting UND to provide specific details. Hence, it is critical to allow sufficient time prior to intended export for the license application to be processed.

Where the license application is intended to cover the provision of a defense service under the ITAR (i.e., the release in any manner of ITAR technical data to a foreign national or training or assistance to a foreign national using ITAR data), this type of ITAR license, called a Technical Assistance Agreement or TAA, can take longer to prepare and longer to process.

Q5. Once we have a license authorization, am I done with the compliance requirements?

No. All export licenses and authorization carry provisos or conditions which are the Government's specific restrictions or limitations on the export activity. For example, the Government may require that the recipient of the export provide a Letter of Assurance that they will not transfer or re-export the item beyond the originally licensed country destination. Limitations on the duration of the license, or on access by foreign nationals from certain countries, may also apply. Failure to adhere to these provisos results in an enforceable export violation.

> 6. FREQUENTLY ASKED QUESTIONS

1. Exporting Commodities, Technical Data or Software (continued)**Q6. Do exports to every country require an export license?**

Not necessarily.

Under the EAR dual use regulations, license requirements are on an item by item, country by country basis. As such, your particular item may or may not require a license. Under the ITAR defense regulations, exports to all countries presumptively require a license and, in some cases, depending on the country, the State Department will not, as a matter of policy, issue a license. For example, China is per se a prohibited country under the ITAR USML regulations: the State Department will not consider issuing a license of a USML item to China. There are approximately 10 other countries that are likewise prohibited under ITAR. Therefore, it is essential that all exports be cleared by the Export Control Officer.

Q7. Do I need an export license to *temporarily* ship research equipment or a prototype/sample out of the U.S., for example, for purposes of field research or equipment demonstration?

In some cases, yes.

The answer depends on the export control jurisdiction of the item, as follows:

Scenario A: EAR dual use items: if the equipment does not require a license to export it to any country, then no, the temporary export does not require a license. If on the other hand, the item would normally require a license to export abroad, a specific license exemption such as the “Tool of Trade” exemption must apply to the temporary export or otherwise a license is required. [Note: the Tool of Trade exemption itself has numerous qualifications based on type of export, destination, and duration of export. Hence, it can only be used when all requirements are met.]

Scenario B: ITAR USML items: Yes: a DSP73 license is always required, even if you are only sending or transporting the ITAR equipment to international waters or airspace (i.e., not landing it in any particular country); there is no Tool of Trade exemption under the ITAR.

> 6. FREQUENTLY ASKED QUESTIONS

1. Exporting Commodities, Technical Data or Software (continued)**Q8. How does licensing work when I'm intending to ship both EAR and ITAR classified items?**

You will likely need to obtain two licenses.

The ITAR item will require a DSP license, depending on the purpose of the export; the EAR item may require a separate license if controlled under the EAR. EAR items incorporated into ITAR items lose their EAR identity: the entire item gets classified under ITAR. ITAR items incorporated into EAR-controlled or otherwise non-licensable items (No License Required) render the entire assembly ITAR, by virtue of the “see-through” rule under the ITAR regulations.

Q9. What does it mean to provide a “defense service” under the ITAR regulations?

When you release ITAR-classified technical data to a foreign national (including foreign national students or visitors on campus, off campus, or abroad), this constitutes a defense service, requiring a license prior to such activity. In addition, providing technical assistance or training to a foreign military organization in the U.S. or abroad constitutes a defense service, regardless of whether the data or information being transferred is EAR or ITAR-governed. In these instances, it is necessary to first obtain a TAA from the State Department prior to releasing the data or conducting the activity.

Q10. Does that mean teaching our foreign national students about something which happens to be listed on the USML requires a license?

Absolutely not.

Where we are teaching or discussing any item in the public domain which happens to be listed on the USML or we have self-invented such information during the course of fundamental research with the intention to publish it, there is no license requirement. The license requirement applies when we are exporting ITAR data which we have received from a sponsor (government or industry) or research collaborator (government, industry, or research institution) under a restricted agreement, i.e., it is explicitly export controlled and does not qualify as fundamental research intended for the public domain.

> 6. FREQUENTLY ASKED QUESTIONS

1. Exporting Commodities, Technical Data or Software (continued)

Q11. Is there any easy way to distinguish between what is classified as an EAR vs. ITAR item for export license purposes, such as a laboratory research tool? What if the classification is not clear from the use of the vendor's specifications?

When in doubt, refer the evaluation to our Export Control Officer.

Typically, our research instruments are not categorized under the USML; however, as noted earlier, they may be dual-use controlled under the EAR and hence require a license. Where an item is specifically designed or modified for defense purposes as defined under the USML, it is likely ITAR-classified. When an item is procured, this designation may be referenced in the vendors' Operation Manual or sales documentation, though not always. Research institutions transferring ITAR items during the course of collaborative research do not always identify such items as ITAR controlled, unless the Material Transfer Agreement so requires. Bottom line: you cannot tell whether an item is EAR or ITAR controlled merely by looking at it: if there is any doubt, refer the evaluation to our Export Control Officer, who will assist in the classification for license purposes.

Q12. Do I really need to be concerned if the item that I plan to export is commercially available abroad?

Yes. Commercial availability does not remove an article from export jurisdiction and a potential licensing requirement.

Q13. Do I need to be concerned if I'm importing an item into the U.S., i.e., are there import compliance regulations?

Yes. All imported items are subject to U.S. Customs regulations, and may have Customs duty and reporting requirements. In addition, importing items listed on the USML require an ITAR license, unless certain specific exemptions are met.

> 6. FREQUENTLY ASKED QUESTIONS

2. Laboratory Access to EAR- and ITAR-Controlled Items and Data**Q1. Do I need a license to allow foreign national access to laboratory equipment?**

In some cases.

Assuming the Fundamental Research Exclusion (FRE) applies to the activity in which EAR-classified equipment is being accessed, generally speaking no license is required. However, there are some narrow exceptions to this rule: access to a) certain levels of advanced cryptographic functionality and source code; and b) third party proprietary “use” and “development” technology pertaining to the equipment, if it in fact is controlled.

Q2. What about foreign national access to technical data?

In some cases, this will also be licensable.

As with the above scenario, unless the situation aligns to one of the FRE exceptions, access to technical data related to operating EAR equipment does not constitute a licensable deemed export.

Q3: How does having an ITAR item in my laboratory affect foreign national (student, post doc, H1) access to it?

If you have invented the item and publish the results of your invention, there is no access restriction, since it was created under the Fundamental Research/Public Domain exclusion. However, if you have purchased the item or otherwise received it from a third party (i.e., proprietary technology) and it is not already in the public domain, then access to or use of the item that allows the foreign national insight into how it works (directly or by virtue of controlled technical data) is restricted and subject to license authorization; in this case, while a license application is pending or if no license is applied for or approved, the ITAR item will require a Technology Control Plan to restrict access by foreign nationals.

Q4. But can't my foreign national students access all equipment and data since UND operates under the Fundamental Research/Public Domain Exclusions?

No. See above. The same rule applies to ITAR technical data (not self-invented) that exists in any form (soft or hard copy), conversational release of data, blue prints, manuals, etc.

> 6. FREQUENTLY ASKED QUESTIONS

2. Laboratory Access to EAR- and ITAR-Controlled Items and Data (continued)**Q5. What if I'm a foreign national PI who wishes to access an ITAR item as part of my fundamental research program: am I excluded from access as well?**

Yes, with one exception that can be utilized with the assistance of UND's Export Control Officer.

There is one narrow exception under the ITAR which allows a PI access to ITAR technical data where the PI is a bona fide, full time employee of the university and meets other specific criteria. Assuming the terms of this exception are met, the PI is subject to the same no-transfer restrictions that a U.S. person PI is subject to. Hence, this exception is used for accessing background information only necessary to launch or conceptualize contemplated fundamental research. If the research requires the data to be shared with the research team which may include foreign nationals, the exception cannot be invoked, since only the PI may qualify under the exception. PIs wishing to explore using this exception must contact the Export Control Officer prior to accessing any such data.

Q6: Is there any problem with communicating with or assisting a foreign government with respect to our research?

It depends on the situation.

If the data involves ITAR technical data and we are training the government representative to use it in a defense context, this would require a "defense service" TAA. This applies even if the data is already in the public domain (this rule is currently being de-regulated by State, but is not yet law); i.e., data not yet in the public domain and provided to a foreign defense organization would still constitute a defense service and require a TAA. (Note: even EAR-classified technical data being provided to a foreign defense organization for a defense purpose may constitute a defense service).

> 6. FREQUENTLY ASKED QUESTIONS

3. Staying Within the Fundamental Research Exclusion (FRE) Outside the Laboratory

Q1: How do I remain within the FRE for purposes of the EAR and ITAR when teaching or lecturing abroad?

When teaching or presenting research results abroad, attending professional conferences, etc., as long as what is being presented is the result of fundamental research intended for publication or to be published, there is no export license requirement. However, to the extent you depart from this framework and present in any form data which is proprietary to another party, or restricted by the sponsor's contract or funding mechanism, then the FRE education and conference exclusions no longer apply. Note that when presenting at professional conference, the conference has to be one normally associated with the academic or professional subject at hand and not closed in a way that is contrary to the premise of published fundamental research.

Q2. What if I need to export laboratory instruments or tools as part of my work abroad?

See Section 4 below concerning Travel abroad, and Section 5 concerning International Collaborations.

4. Travel abroad

Q1: Can I bring my laptop and other hand held communication devices with me?

Yes, with several exceptions.

If, for example, you happen to have export controlled data on your laptop (i.e., proprietary data which is not the results of fundamental research), this would require a license, depending on its EAR or ITAR classification. In addition, the U.S. Government's OFAC restrictions prohibit the export by any means of any article (including laptops or hand held devices) to Cuba, Iran, Syria or Sudan without specific license authorization.

Q2: Can I hand carry samples or other laboratory instruments?

If dual use controlled, such items may or may not qualify under the Tools of Trade exemption, and therefore require prior classification. If ITAR controlled, a license is likely required.

> 6. FREQUENTLY ASKED QUESTIONS

5. International Collaborations and Conducting Research Abroad

Q1. Does collaborating internationally with another researcher or foreign institution have export control requirements?

Yes, in several respects. The exchange of scientific information with researchers and administrators abroad can trigger control requirements, such as end user screening and export licensing for tangible items and software under ITAR and EAR control regimes (see also OFAC section below).

In addition, the ITAR regulations include controls on providing a “defense service.” This pertains to providing advice, training assistance, and other release of technical data to a foreign national with respect to an article on the USML or providing same to a foreign national for a military/defense objective with respect to any article, whether or not listed on the USML.

Visiting scholars and researchers who visit UND as part of the collaboration will likewise need to be restricted from accessing UND laboratories wherein ITAR items or data are kept or used.

> 6. FREQUENTLY ASKED QUESTIONS

6. Office of Foreign Assets Controls (OFAC)**Q1. What Special Rules Apply to Cuba, Iran, Syria and Sudan?**

The OFAC regulations pertaining to transactions with these countries vary by country. These regulations address not only export, but a much broader spectrum of activity (e.g., funding, service providing) that OFAC restricts absent specific license approval.

For example, the Cuba sanctions regulate personal travel to Cuba as well as professional research activity conducted with Cuba institutions here and abroad. That said, the Cuba regulations allow for broad range of research and humanitarian related activity when approved by license from OFAC.

The Iran regulations, on the other hand, do not regulate individual tourist travel to Iran, but remain highly restricted as to any activity, research or otherwise, which OFAC defines as a “service” to Iran. While certain kinds of collaborative research activity are permissible with Iranian institutions, to the extent such research contemplates the exchange of material items with Iran or, providing advice on establishing a laboratory or research facility in Iran, a license may be required. Likewise, peer review or editorial comment that extends beyond the scope of what is normally defined as credential input or scientific journal editorial review may likewise trigger a license requirement.

With respect to Syria and Sudan, because of the geopolitical instability in both countries, transactions with those nations likewise must be evaluated carefully for evolving sanctions and requirements. Hence, when contemplating any research or transactional activity with one of these OFAC countries or foreign nationals known to reside in these countries, contact Grants & Contracts for assistance before proceeding.

7. Whom Do I Contact For Help?

Contact:

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