MEMORANDUM

TO: Deans, Department Chairs, and Directors

FROM: Charles E. Phelps, Provost

SUBJECT: Export Control Laws and Regulations

DATE: December 24, 2002

Export control laws, federal laws implemented both by the Department of Commerce through its Export Administration Regulations (EAR) and the Department of State through its International Traffic in Arms Regulations (ITAR), have been in place for more than twenty years, and they stand as the law of the land. As such, institutions of higher education and their employees must comply with these laws and regulations. The government is very serious about these laws -- criminal sanctions (including fines and/or prison sentences for individuals) can apply in the case of violations.

Following the events of 9/11, the export control regulations have become more prominent and scrutiny concerning the level of compliance with these regulations has heightened. It is important that faculty and other researchers in University of Rochester (UR) departments, laboratories and centers understand their obligations under these regulations and adhere to them.

The regulations cover virtually all fields of science and engineering. However, they only require a license for the export of certain identified materials or information[1] that are "license-controlled" for reasons of national security or protection of trade. And even for such information, there can be a further exception to the license requirement where the export or disclosure is of *fundamental research, the results of which are or are about to be or, in some cases, ordinarily are publicly available.* Understanding three basic concepts related to export controls is essential: (1) the nature of the technology that is export controlled and how it is recognized, (2) the fundamental research exclusion, and (3) what is a *deemed export.* A few items deserve special emphasis:

[1] See 15 CFR 774, Supplement 1 (EAR) and 22 CFR 121.1 (ITAR).

(1) Nature of the Technology. The vast majority of exports do not require government licenses. Only exports that the U. S. government considers license controlled under the EAR and ITAR may require licenses. Exports usually are license controlled for one or more of the following reasons:

- The technology or information has actual or potential military applications or raises economic protection issues;
- Government concerns about the destination country, organization, or individual; or
- Government concerns about the declared or suspected end use or the end user of the export

It is important to remember that the term "export" includes not only physical transfer of items or information, but also disclosure of information, whether written or oral.

(2) Fundamental Research Exception. Even if an export might involve a license-controlled technology or item, generally a license is not required to export fundamental research (i.e., the research results), as long as there are no restrictions on publication of the research or other restrictions on dissemination of the information. In some cases, the exception applies as long as the research or information is "*made public*" or is "*intended to be made*" public. Since UR research policy does not allow research to be undertaken without the possibility of publication, this exclusion almost always applies.

(3) However, keep in mind that, even if no publication restrictions exist, the fundamental research exception may not apply to the export of license controlled tangible items or software or if the export is to an embargoed country (see item (4) below).

(4) Deemed Exports. The term "export" can mean not only transfer or disclosure beyond the shores of the United States to any person (including to a U.S. citizen abroad whether or not pursuant to a research agreement with the U.S. government), but also transmitting or disclosing the technology within the United States to someone who is not a U.S. citizen or permanent resident. The latter type of disclosure is called a "deemed export." *Even a disclosure to a foreign researcher or student in an UR laboratory is considered a deemed export. This could pertain to access to equipment within a lab at the UR, and thus can become an issue even if the research resulting from use of that equipment is excluded from restrictions. Thus concern about deemed exports requires particular attention of UR researchers.*

(5) Exports Prohibited to Certain Countries. There are certain countries where it is the policy of the United States generally to deny licenses for the transfer of these items. These countries include (but are not limited to) Afghanistan, Belarus, China, Cuba, Iran, Iraq, Libya, North Korea, Sudan, Syria, and Vietnam.

Clearly most of the research activities in which UR is involved are excluded from export controls because UR can assert the fundamental research exclusion. However, when this is not the case (such as when one needs to export a tangible research item, such as a prototype or software) it is critically important that the researcher begin the process of seeking a license from either the Department of Commerce or State (as applicable) early, since it can take as long as six (6) months to receive a license after the submission of the license application.

For those departments that are more likely to conduct research subject to export controls, the index for both the Munitions Control List and Commerce Control List are attached. **I ask Chairs to review the lists carefully.** Also attached is additional information that will help in addressing these difficult but critical issues. In addition, there is more explicit general information available on the ORPA home page at http://www.rochester.edu/orpa.

For questions or further information, the UR contact points are Gunta Liders (extension 5-5373 or gunta.liders@rochester.edu) or Richard Crummins (extension 5-6649 or rcrummins@admin.rochester.edu)

United States Export Control Laws

Current export law controls both hardware and information concerning a wide range of technologies in a way that may have a substantial impact on research at UR. Federal regulations control the conditions under which certain information, technologies, and commodities can be transmitted overseas to anyone, including U.S. citizens, or to a foreign national on U.S. soil. The following Q&A may help clarify some of the requirements.

1.What is an export?

The export regulations define an export as:

- Any oral, written, electronic or visual disclosure, shipment, transfer or transmission outside the United States to anyone, including a U.S. citizen, of any commodity, technology (information, technical data, or assistance) or software/codes
- Any oral, written, electronic or visual disclosure, transfer or transmission to any person or entity of a controlled commodity, technology or software/codes with an intent to transfer it to a non-U.S. entity or individual, wherever located (even to a foreign student or colleague at UR)
- Any transfer of these items or information to a foreign embassy or affiliate

It is important to emphasize that only exports for which the U.S. government requires a license are those that are listed on the export controlled lists. The vast majority of exports do not require the prior approval of the U.S. government.

2.Who controls exports?

There are two agencies that control exports:

- The Department of Commerce through its Export Administration Regulations (EAR), Title 15, sections 730-774 of the Code of Federal Regulations. For a list of controlled technologies, see 15 CFR 774, Supplement I.
- The Department of State (which controls the export of "defense articles and defense services") under the International Traffic in Arms Regulations (ITAR), 22 CFR 120-130. For a list of controlled technologies, see 22 CFR 121.1.

A complete on-line version of the EAR and ITAR (including the critical technology list) is available[2] or hard copies are available for review at ORPA or Office of Counsel.

[2] http://w3.access.gpo.gov/bis/ear/ear_data.html or http://fas.org/spp/starwars/offdocs/itar/p121.htm (ITAR)

3.What is considered fundamental research?

Fundamental research, as used in the export control regulations, includes basic or applied research in science and/or engineering at an accredited institution of higher learning in the United States where the resulting information, in some cases, is ordinarily published and shared broadly in the scientific community and, in other cases, where the resulting information has been or is about to be published. Fundamental research is distinguished from research that results in information that is restricted for proprietary reasons or pursuant to specific U.S. government access and dissemination controls. University research will NOT be deemed to qualify as fundamental research if (1) the university or research institution accepts any restrictions on the publication of the information resulting from the research, other than limited prepublication reviews by research sponsors to prevent inadvertent divulging of proprietary information provided to the researcher by the sponsor or to insure that publication will not compromise patent rights of the sponsor; or (2) the research is federally funded and specific access or dissemination controls regarding the resulting information have been accepted by the university or the researcher.

4.What is considered published information as used in question 3?

The EAR and the ITAR approach the issue of publication differently. For the EAR, the requirement is that the information has been, is about to be, or is ordinarily published. The ITAR requirement is that the information has been published.

Information becomes "published" or considered as "ordinarily published" when it is generally accessible to the interested public through a variety of ways. Publication in periodicals, books, print, electronic or any other media available for general distribution to any member of the public or to those that would be interested in the material in a scientific or engineering discipline. Published or ordinarily published material also include the following: readily available at libraries open to the public; issued patents; and releases at an open conference, meeting, seminar, trade show, or other open gathering. A conference is considered "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 (but not necessarily a recording) of the proceedings and presentations. In all cases, access to the information must be free or for a fee that does not exceed the cost to produce and distribute the material or hold the conference (including a reasonable profit).

5.What is public domain and why is it important?

Public domain is the term used for "information that is published and generally accessible or available to the public" through a variety of mechanisms. Publicly available software or technology is that which already is, or will be, published. To fall under this exclusion, there are a number of conditions that demonstrate public availability which are enumerated in the EAR.

6.If a license is needed, what is the process?

UR has designated Gunta Liders, Director of the Office of Research and Project Administration, as its "empowered official" for export control issues. Gunta will arrange for appropriate support both within the UR and, where necessary, outside the UR to address export control and license issues. Unless there is an urgent need for expedited review and approval, it normally takes 4-6 months to secure a license to export controlled materials from the U.S. or to transmit them to a non-U.S. citizen or permanent resident within the U.S.