

# GOVERNMENT CONTROL OF EXPORTED TECHNOLOGY OR ITEMS



Prepared November 2005

# OVERVIEW –

## Why do I need to **pay attention**



- The majority of U of R's teaching and research activities fall within an exclusion to the export control laws, BUT you need to know how the laws and exclusions apply to your teaching or research so that you know when a change in circumstances can raise an issue.
- Determining whether a certain project or item falls within export control regulation is fact-specific and can change based only on the item or project you're involved with.
- If you needed a license and failed to get one, you could be subject to individual civil and criminal penalties.
- The goal of the training is to sufficiently educate you so that you know when to raise a "red flag" .



as to a possible export control issue and consult with the U of R experts.

# When is there an “export”

- A transfer of a specific item or piece of information to someone located outside of the United States – even if that person is a U.S. citizen.
- The transfer of information to certain foreign nationals inside the U.S. (referred to as a “deemed export”).
- Any transaction with or the provision of services to anyone residing in certain foreign countries or individuals who are on embargo lists.
- Think about all the modern methods of “transfer” – e-mails, websites, conferences, telephones and cell phones, visual observation (e.g. a tour through a lab).



# What type of export is potentially controlled/regulated – EAR

- Export Administration Regulations (EAR) regulates the export of “dual use” information and items.
- Dual use – legitimately commercial AND potential military applications.
- The general goals of Commerce Dept.’s EAR is to curtail the export of technologies that assist the military potential of adversaries, to comply with trade agreements (e.g. chemical weapons convention) and to ensure that US trade is protected (prevent industrial espionage), and to prevent the development of nuclear, chemical and biological weapons.



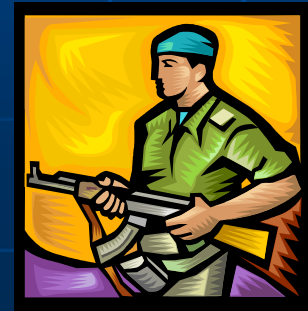


# What type of export is potentially controlled/regulated -EAR

- List of controlled technologies are found on the **Commodity Control List (CCL)** which is available on the ORPA website.
- Examples – batteries and fuel cells, cameras and optics equipment, artificial intelligence software, certain computer equipment, items using laser technology, certain chemicals, microorganisms and toxins
- The list depends on interplay of type of item, reason for export control and destination country. This list is large and a bit cumbersome to manage. There is an index that helps you navigate to the right place within the CCL by identifying the “ECCN” (export control classification number).

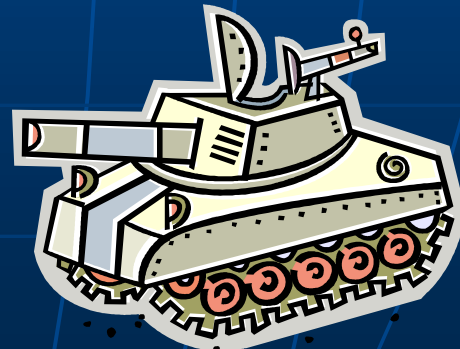
# What type of export is potentially controlled/regulated - ITAR

- The State Department administers International Traffic in Arms Regulations (ITAR).
- Regulates export of defense services, defense items and related technical data or information.
- Focus is entirely on national security and not on trade protection.



# What type of export is potentially controlled/regulated - ITAR

- List of items or information/data about the items listed on the **U.S. Munitions List (USML)** which is available through the ORPA website. This list is directly related to technologies with obvious military application and use and is easier to navigate through.
- Examples – explosives, rocket systems, military training equipment, spacecraft and satellite equipment (even if not for military use), toxicological agents and equipment, biological agents, radiological equipment including nuclear radiation detection and measurement devices, defense services.



# What type of export is potentially controlled/regulated - OFAC

- Office of Financial Asset Control (**OFAC**) within the Department of Treasury enforces economic and trade sanctions against targeted foreign countries and individuals (e.g. terrorists, drug traffickers, weapons dealers).
- Regulations prohibit transactions with certain countries and individuals who are viewed to be "our enemy". Goal is to prevent \$\$ from getting to people/countries that are embargoed.
- The prohibitions here are much broader and include providing any service, no matter how helpful, to people within the targeted countries or the targeted individuals. Common exemptions DO NOT APPLY.

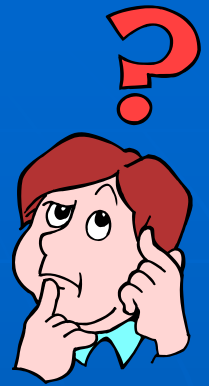


# What type of export is potentially controlled/regulated - OFAC

- OFAC's List of Sanctioned Countries and Specially Designated Individuals is available through ORPA's website.
- As of November, 2005, the following countries have sanctions imposed by the U.S. that restrict or forbid US citizens from rendering service to them: **Balkans, Burma, Cuba, Iran, Iraq, Liberia, Libya, North Korea, Sudan, Syria and Zimbabwe.**
- Sanctions/restrictions vary by country. OFAC list is organized by country, however, so it is relatively easy to discern what restrictions apply to dealings with people or organizations in those countries.
- Alphabetical list of all named individuals that are on OFAC's specially designated individuals list.



# So what does this mean?



- If U of R research or teaching activities involve these export-controlled areas, U of R may be required to get a license from the government before “exporting” the controlled information or item.
- Failure to comply carries heavy fines, possible imprisonment and potential loss of research money.
- Federal Government has increased enforcement and investigation of universities over the past few years because: (i) 9/11/2001 occurred, (ii) increased globalization of university research activities and foreign students on US campuses, (iii) based on government audits, some research universities did not have adequate measure in place to ensure compliance with export control regulations.



# To the Rescue . . .



## ■ Fundamental Research Exclusion

- EAR definition - Basic or applied research in science and engineering at an accredited institution of higher education in the U.S. where the resulting information is ordinarily published and shared broadly within the scientific community. (Does not apply to encryption software)



# To the Rescue . . .



- **Fundamental Research Exclusion**

- ITAR – exclusion applies to information which is in the “public domain” “Public domain means information which is published and which is generally accessible or available to the public through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly within the scientific community.



# EAR/ITAR exclusions compared

- EAR – applies to information which is or will be publicly available.
- ITAR- applies to information which is published and which is generally available to the public through fundamental research.
- Ambiguity, then, for ITAR controlled info during the course of research until it is published.

# When will the Fundamental Research Exclusion Fail to Rescue me?

- Applies only to transfer of information within the US, not to physical items or other defense or OFAC services.
- Actual and intended openness of research results determines whether research is fundamental.
- Apart from Export Control Laws the policy at the University of Rochester is to maintain a teaching and research environment that fosters the creation and dissemination of new knowledge. This requires open research that permits the free flow of ideas.
- **If the research carries restrictions on**
  - **access,**
  - **disclosure or**
  - **participation**
  - **IT IS NOT FUNDAMENTAL RESEARCH**

# Examples of Restrictions


- Contract prohibits foreign nationals from working on the project,
- Contract requires “screening” of personnel to be working on the project by contract sponsor,
- Research results will be published only at a symposium or conference where there are attendance restrictions that could exclude foreign nationals from attending,
- Any language in the research proposal that labels it as export-controlled, classified, proprietary or secret. *The recent trend is for government agencies to add this type of restrictive language in their grant qualifications,*
- Any language that restricts publication to certain periodicals or media that charge more than necessary to cover their operating costs,
- Don't forget similar restrictions in Non-Disclosure/Confidentiality Agreements and Material Transfer Agreements.

# Examples of Restrictions

- **ANY restriction on the publication** of research results – includes substantial time delays, reviews and approvals – whether imposed by not-for-profit, corporate or government sponsors.
  - **EXCEPTION** EAR specifically allows universities to accept temporary publication delay for prepublication review only to review inadvertent disclosure of proprietary information or to ensure that publication would not compromise patent rights.
  - ITAR has no similar language – so ambiguity as to whether this limited prepublication review is acceptable to ITAR-controlled information.



# Accepting a Third Party's Controlled Items or Data

- Fundamental research exclusion does not apply to **proprietary information** that was given to the University by the sponsor since it will not be part of the results of your fundamental research.
- Need to make sure the proprietary information is **not at the heart**  **of your research** project and is sufficiently tangential so that it will be possible to exclude that information in your publication of your research results.

# Education Exclusion



- Education Exclusion

- EAR – exclusion for “educational information” released by instruction in catalog courses and associated teaching laboratories.
- ITAR – exclusion for information (but not technology and materials) which is “general scientific, mathematical or engineering principles commonly taught in universities.

# Equipment Use Exclusion – The Controversy

- There are no express exclusions that allow foreign persons to receive any technology or data on the “use” of export-controlled equipment on University campuses without a license.
- The University maintains that if export-controlled equipment is used in most research, the technology or data connected with the use of the equipment would be covered by the Fundamental Research exclusion and/or the Education exclusion.
- In a report issued by the Commerce Inspector General questioned this interpretation and suggested that a deemed export license was needed. The same report was generally critical of the educational exclusions from export control regulations that allow universities to teach foreigners without obtaining licenses.
- Universities are working with the government to ensure that they can proceed with fundamental research without restrictions.

# Red Flags



- Contracts or grants which require a shipment of item(s) to a foreign country,
- Contracts or grants which involve collaboration with foreign nationals,
- ANYTHING you're doing that deals with an OFAC embargoed country,
- Any reference in a contract or grant to export-controlled information or technology,
- Any term in a contract that restricts publication research results.

# Red Flags

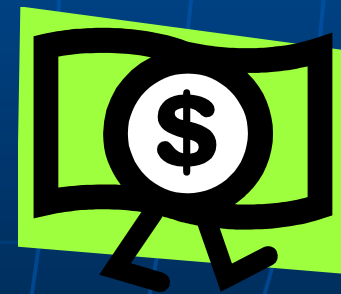


- If one of these red flags are present, IT IS YOUR RESPONSIBILITY TO CHECK THE CCL OR USML TO SEE IF THE RESEARCH PROJECT INVOLVES EXPORT-CONTROLLED INFORMATION, and to check to ensure you are not dealing with people or entities in an embargoed country. Links to the CCL, USML and OFAC Embargoed Countries list are posted on the ORPA website.
- If you have trouble interpreting these lists, please call ORPA or the General Counsel's Office and someone will assist you.
- We understand that export control laws and regulations are complicated, but compliance with them is very important.

# Big Red Flag



- Researchers may be held individually liable for violating export control laws or regulations in the conduct of their research.
- Penalties include very high fines and imprisonment.





# Shipment of Physical Items

- The exclusions mentioned do not apply to physical items (e.g. Fundamental Research exclusion).
- License may not be required if it falls within a more detailed list of No-License-Required rules (e.g. de minimus exceptions, temporary export).
- There are a fair number of exceptions from licensing under EAR – almost none under ITAR regulations.
- In general, OFAC rules trump all other export controls.



# License Considerations



- Heightened scrutiny for shipments to certain countries
- Countries of Concern:
  - EAR – China, former Soviet Union, Middle East countries, India, Pakistan, Eastern Europe, North Korea, Vietnam (plus OFAC countries)
  - ITAR – Afghanistan, Belarus, Ivory Coast, Cyprus, Indonesia, Syria, Vietnam, China, Haiti, Rwanda, Somalia, Yemen, Zaire (plus OFAC countries)

# What if I Need a License

- Not the end of the world, but
- License procedure takes time
  - License through Commerce takes less than 6 months and requires modest fees
  - License through the State Department can take 6 months or more and is more expensive
  - License through Treasury for OFAC license is very cumbersome, very investigative, and very time-consuming and may not be granted

Contact ORPA or the General Counsel's office for assistance in obtaining the license

# Recordkeeping

- Need records to **document** all shipments of items outside the U.S.
- Need records to **document** our treatment of export-controlled information provided to U of R researchers by third parties.
- Recordkeeping is necessary to demonstrate compliance with the export control laws. Records must be kept for 5 years.
- Copy of records should be forwarded to Gunta Liders at ORPA.

