

# **FUNDAMENTALS OF EXPORT CONTROLS AND TRADE SANCTIONS FOR RESEARCH UNIVERSITIES**

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## Export Controls and Sanctions—The Very Big Picture

- Export Controls Are Very Serious Federal Laws With Individual And Institutional Criminal and Civil Penalties For Noncompliance
- What Should Faculty and Staff Know Without Being Experts:
  - That Export Controls and Trade Sanctions Exist—And What Exports Abroad--Deemed Exports In the U.S. (*even on campus*)—And Trade Sanctions Are In General Terms;
  - That They Apply to Many Common Items/Activities – As Well As Technical, Military and Space Information and Items;
  - That Even Non-technical Fields May Trigger Export Controls and Trade Sanctions (*know when*);
  - Parameters and Prerequisites For Exclusions From Export Controls and Exemptions From Licensing Requirements For Otherwise Controlled Information (*And That The Exclusions Don't Apply To Exporting Controlled Items Abroad*);
  - That An Export License Doesn't Authorize Trade Sanctioned Activities-- and A Trade Sanctions License Doesn't Authorize Exports of Controlled Information or Items—Must Separately Comply With Each Regulation;
  - When To Ask For Expert Assistance (*from DSR and General Counsel's Office*) For Analysis of Whether Controls Apply and How To Comply;
  - That The Director, Division of Sponsored Research, Is the UF Empowered Official For Export Controls: Only Person Authorized To Apply For Export Licenses; Must Approve Security Plans When Controls Apply; Must Approve Any Restriction Requiring Approval Before Publication of Research Results or Limiting Participation In, or Access To, or Dissemination of Research (*because publication/access/dissemination restrictions destroy information exclusions from controls and may trigger licensing requirements even on campus in U.S.*) 2

# THREE EXPORT CONTROLS AND TRADE EXPORT & SANCTION REGIMES IN THE U.S.

- 1. International Traffic in Arms Regulations (ITAR), Department of State, 22 C.F.R. §§ 120-130 (Export Controls)**
  - Covers “Munitions,” other Military Application Technologies, both offensive and defensive, Space Technology—*Covers Much That Is Not Intuitively Military*
- 2. Export Administration Regulations (EAR), Commerce Department, 15 C.F.R. §§ 730-774 (Export Controls)**
  - Dual Use Technologies With Primary Commercial Application, But Also Possible Military Use—*Includes Many Common Items (e.g., Normal Computers, Cameras, GPS)*
- 3. Office of Foreign Assets Control (OFAC) Regulations, Treasury Department, 31 C.F.R. § 500 et seq. (Trade Sanctions)**
  - Implement U.S. Foreign Policy—Change Frequently, With Foreign Policy
  - Impose Trade Sanctions Aimed at Controlling Terrorism, Drug Trafficking and Other Illicit Activities—*May Prohibit Travel, Collaboration, Academic Conferences, Contracts, Payments-- Regardless of Your Discipline*
  - Sanctions Vary By Country

# OFAC Sanctions Apply In Addition To Export Controls

- OFAC:
  - Applies Routinely to All Disciplines—Not Just Technical Fields—If OFAC Countries Involved
  - Depending On Terms Of Each Country's Sanctions, May Prohibit Travel, Making Payments--Taking Common Computers, Cell Phones, PDAs--Providing Services or Value To – Collaborating or Contracting With -- Sanctioned Countries and Their Nationals, as well as Listed Entities/Individuals--U.S. and Foreign
    - E.g., May include conducting a survey, planning a conference in OFAC Country
  - OFAC Prohibitions Apply-- Even When EAR/ITAR Controls Don't Per Exclusions
  - Must Comply With OFAC Regulatory Restrictions, Obtain OFAC Licenses, As Required By Sanctions Applicable to a Country/Person/Entity
  - OFAC Licenses Do Not Authorize Exports or Deemed Exports Under EAR/ITAR—Nor Do EAR/ITAR Licenses Authorize OFAC Sanctioned Activities
    - Must Separately Comply

# Export Controls: LICENSING AND EXCLUSIONS

- **Most Research and Teaching on Campus in U.S.—Some Information Transfers on Campus and Abroad—Can Qualify for Regulatory Exclusions or License Exemptions From Export Controls**

**Exclusions Don't Apply to *Already Controlled* Existing Technical Information or Exporting Items Abroad**

- **When Exclusions/Exemptions Don't Apply and Export License is Required, It Must Be Obtained**

— Before “Export” (or “Re-Export”): Transferring Controlled Items or Materials— or Controlled Information---Abroad in Any Medium—to Anyone Who is A National of the Country-- or to Anyone of Any Nationality Who Is Located In the Country-- To Which Controls Apply—

# BACKGROUND: LICENSING AND EXCLUSIONS

And

- — Before “Deemed Export”: Transferring to Foreign Nationals in the U.S. (Even on Campus) in any Medium—Controlled Technical Information (Treated As If An Export To That Person’s Country of Citizenship)
  - Deemed Exports Apply to Controlled Technical Information—But Not to Related Controlled Items or Materials Without Any Accompanying Information
  - If Licensing Exclusions Don’t Apply--Security Must be Implemented on Campus in U.S. to Prevent Unlicensed Deemed Exports To Foreign Faculty, Students, Staff and Visitors
  - Adhering to Exclusions Helps Avoid Deemed Exports On Campus

# WHAT ITEMS, MATERIALS, TECHNICAL INFORMATION IS EXPORT CONTROLLED?

## **1. Items or Materials on EAR Commerce Control List – Some Related Technical Information —Are EAR Controlled—** --

*Whether License Required Depends On Item and Destination*

- Includes Standard Office Laptops and Tourist Cameras
- OFAC Countries, EAR Entities/Denied Persons/Unverified Persons/General Order No. 3 Require License For All Items and Materials
- Will Not Get a License if OFAC Prohibited/State Department Terrorist List Persons/Entities Involved

## **2. Items or Materials On/Covered by the State Depart. ITAR US Munitions List (USML) – Related Technical Information and Defense Services-- Are ITAR Controlled—Require License For ALL Countries-Won't Get License for ITAR Prohibited**

*Countries, OFAC Prohibited/State Dept. Terrorist List Persons/Entities*

- Even if Not On USML, Covered IF Reason to Know that Items or Materials Will be Used In/For Weapons of Mass Destruction or If Designed or Modified for Military Use
- Listed items are not necessarily intuitively or intentionally military in nature—Know Fields Listed on USML

# BACKGROUND: LICENSING AND EXCLUSIONS

- **If Exports or Trade Sanction License is Required and Not Obtained, Export or Deemed Export or Trade Sanctioned Activity is Prohibited**
- **Violations are Subject to Civil and Criminal Penalties Against Individuals and Institutions—Can Also Result in Loss of Export/Deemed Export Privileges and Loss of Funding**
  - **ITAR: (Individual and Entity)**
    - Criminal Fines:  $\leq$  \$1M and/or  $\leq$  10 Years in Prison/Violation
    - Civil Fines:  $\leq$  \$500K and Forfeitures/Violation
  - **EAR:**
    - Criminal Fines/**Entities**:  $\leq$  Greater of \$1M or 5X Value of Export
    - Criminal Fines/**Individuals**:  $\leq$  \$250K and/or  $\leq$  10 Years in Prison/Violation
    - Civil Fines:  $\leq$  \$250K/Violation
  - **OFAC: (Individual and Entity)**
    - Criminal Fines/Entities:  $\leq$  \$1M
    - Criminal Fines/Individuals:  $\leq$  \$250K and/or  $\leq$  10 Years in Prison
    - Civil Fines:  $\leq$  \$250K/Violation
- **Violations Affect Reputations of Individuals and Institutions**

# EXCLUSIONS ARE CRITICAL FOR ON-CAMPUS ACTIVITIES AND COMMUNICATING ABROAD

## Best to Qualify for Export Controls Exclusions—

- Allow Open, Collaborative Research, Teaching, Lectures On U.S. Campuses With Foreign Faculty, Students, Staff, Visitors
  - Allow Disclosures (e.g. Lectures) Abroad of Unrestricted Information Created On Campus in the U.S. or Other Public Information
  - But Must Check OFAC Sanctions for OFAC Countries
- Must Understand Parameters and Adhere to Prerequisites for Exclusions ---Or Controls Apply and Normal Open, Collaborative, International Campus Environment Is Not Permitted
- Can't Rely On Exclusions For Exports of Controlled Materials or Items Abroad --or To Comply With Trade Sanctions (But Trade Sanctions For Some Countries Recognize Public Domain)

## FUNDAMENTAL RESEARCH INFORMATION EXCLUSION

- **Fundamental Research Exclusion (EAR/ITAR) (22 C.F.R. 120.11(a)(8); 15 C.F.R. 734.8(a), (b)) Applies to**
  - Information--Not to Items or Materials
  - Resulting From--Or Arising During (Open Issue: -- Or Already Existing and Used During)
  - Basic and Applied Research in Science and Engineering
  - Conducted at an Accredited Institution of Higher Education (EAR)/Higher Learning (ITAR)
  - Located in the U.S. (Doesn't Apply Abroad with Limited, Specific Exception Under ITAR)
  - Where the Information Is Ordinarily Published and Shared Broadly In The Scientific Community
- and
- Is Not Subject to Proprietary or U.S. Government Publication or Access/Dissemination Controls (e.g., re: foreign national participation)

# PUBLICLY AVAILABLE/ PUBLIC DOMAIN INFORMATION EXCLUSION

- **Publicly Available (EAR)/Public Domain (ITAR) Information Exclusion (See 22 C.F.R. 120.10(a)(5), 120.11, 125.1(b), 125.4; 15 C.F.R. 734.3(b)(3), 734.7-734.10) Applies to**
  - Information already published, not just ordinarily published, through specified means:
    - libraries open to the public, including most university libraries;
    - unrestricted subscriptions, newsstands, or bookstores for a cost not exceeding reproduction and distribution costs (including a reasonable profit);
    - published patents;
    - conferences, meetings, seminars, trade shows, or exhibits held in the U.S. (ITAR) or anywhere (EAR), which are generally accessible by the public for a fee reasonably related to the cost and where attendees may take notes and leave with their notes; or
    - Websites accessible to the public for free and without the host's knowledge of or control of who visits or downloads software/information (clearly acceptable under EAR, and likely acceptable under ITAR).

# PUBLICATION/ACCESS RESTRICTIONS DESTROY EXCLUSIONS

- **Once Created In Fundamental Research or Made Publicly Available, Information May Be Exported Without a License**
- **If University Accepts Publication or Access/Dissemination Restrictions --Fundamental Research/Publicly Available/Public Domain Exclusions Are Destroyed**
  - Side Deals With Sponsors Destroy Exclusions
  - Short (30 - 90 days) Pre-publication Review Period (Not Approval) For Patent Protection/to Remove Inadvertently Included Sponsor-Proprietary Information Does Not Destroy Exclusions

# OTHER INFORMATION EXCLUSIONS/EXEMPTIONS

- **Educational Exclusion (EAR/ITAR) (15 CFR 734.3(b)(3)(iii), 734.9, 22 C.F.R. 120.10(5)) Applies to**

— General Science, Math, Engineering Principles Commonly Taught at Schools/Universities (ITAR - Subject Matter Focused and Cannot Teach How to Build or Operate Specific Controlled Equipment Off Campus), or

— Information Conveyed In Courses Listed In Course Catalogues and In Associated Teaching Labs of Any Academic Institution (EAR – Venue Focused -- but Doesn't Cover Some<sub>13</sub> Encrypted Software)

# GOVERNMENT SPONSORED RESEARCH INFORMATION COVERED BY CONTRACT CONTROLS EXEMPTIONS

## ▪ License Exemption for Government Sponsored Research Information Covered by Contract Controls (EAR Only - 15 CFR 734.11) Applies Only To:

- Information Resulting From Federally-funded Research that Includes Specific National Security Controls in the Government Agreement (e.g., prepublication reviews or dissemination controls)
- Does Not Qualify for Fundamental Research Exclusion (15 CFR 734.8) But No License is Required If You Comply with All Specific National Security Controls in Contract
- If All Controls are Not Followed, Fundamental Research Exclusion Is Not Available—If License Was Required and Not Obtained = Violation

(Be Careful To Comply With Contract Controls Or Criminal Prosecution May Result—University of Tennessee faculty member indicted in 2008)

# RESOURCES

- **Licenses Can Take Weeks--Months—Longer to Obtain**
  - Must Apply Through Division of Sponsored Research
  - Apply Early
- **When In Doubt, Contact DSR or General Counsel**