

Export Control Regulations and the University Fundamental Research Exemption

Overarching Principle: Cooperative Compliance. The UIDP comprises US based Sponsors, Corporate commercial entities, and Universities; therefore most UIDP members are subject to US Export Laws & Regulations. While universities strive to conduct research in an unrestricted academic environment and broadly publish its research results, most commercial organizations strive to gain competitive advantage by maintaining secrecy to information, technologies and product characteristics. Both parties must balance these cultural differences and comply with their respective obligations under these laws and regulations.

Background on Regulations:

1. **Export Administration Regulations:** The Export Administration Regulations (EAR) is found at Title 15, sections 730-774, of the Code of Federal Regulations (CFR). These regulations implemented by the Department of Commerce controls the export of goods and services identified on the Commodity Control List (CCL), Title 15 CFR 774, Supp. 1. Goods and services on the CCL are *not* inherently military in nature; they are primarily and inherently commercial or potentially commercial in nature. Note: The EAR regulates items designated for potentially commercial purposes but that can have military applications (“dual use”).
2. **International Traffic in Arms Regulations:** The International Traffic in Arms Regulations (ITAR) is found at 22 CFR, section 120-130 implement Section 38 of the Arms Export control Act (22 USC 2778). These regulations implemented by the Department of State control the export of articles, services and related technical data that are inherently military in nature, as determined by the State Department. These “defense” articles,” “defense services” and related technical data” are listed on the Munitions List (USML), 22 CFR 121.
3. **Office of Foreign Assets Control:** The Treasury Department Office of Foreign Assets Control (OFAC) administers and enforces economic and trade sanctions and, based on US foreign policy and national security goals, targets foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction. OFAC sanctions focus on activities involving particular countries and nationals of those countries. Collaborative research activities with nationals of OFAC-sanctioned countries may be viewed by OFAC as prohibited services. A list of statutory authorities for OFAC may be found at the OFAC website : <http://www.ustreas.gov/offices/ofac/legal/statutes/>

Exclusions and Exemptions from the Export Control Regulations: The fundamental research exclusion (FRE) applies to (a) information (but not to export controlled items) (b) resulting from “basic and applied research in science and engineering” (c) conducted at an “accredited

institution of higher education” (EAR) or “higher learning” (ITAR) (d) “located in the United States” (e) that is “ordinarily published and shared broadly within the scientific community” and (f) that is “restricted for proprietary reasons or specific national security reasons” (EAR) or subject to “specific US government access and dissemination controls” (ITAR). This exclusion generally permits US universities to allow foreign members of their communities to participate in research projects involving export controlled information on campuses in the US without securing a deemed export license. This exclusion generally does not permit the transfer of export controlled material or items abroad, even to research collaborators.

Both the EAR and the ITAE treat fundamental research as a subset of the “publicly available” or “public domain” exemptions (15 CFR 734(b)(3); 22 CFR120.11(a). The EAR provides that research conducted by scientists, engineers or students at a university normally will be considered fundamental research 15 CFR 734.8(b). The ITAR does not contain that affirmative statement, but instead states that university research will not be considered fundamental research if the information resulting from the project or activity or the research is funded by the US Government and specific access and dissemination controls protecting the information resulting from the research are applicable (22 CFR 120.119a)(8).

The FRE essentially incorporates the provisions of the National Security Decision Directive (NSDD) 189. That directive originally issued in September, 1985, and reaffirmed by Condoleeza Rice in 2001. According to NSDD 189, “Fundamental research means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as 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 Directive goes on to state that “It is the policy of this Administration that, to the maximum extent possible, the products of fundamental research remain unrestricted. It is also the policy of this Administration that, where the national security requires control, the mechanism for control of information generated during federally-funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification ... No restriction may be placed upon the conduct or reporting of federally-funded fundamental research that has not received national security classification, except as provide in applicable US Statues”.

The principles of the NSDD 189 are further supported by the John J. Young memo of June 2008 issued to the Secretaries of the Military Departments on the subject of Contracted Fundamental Research. Young explains that Contracted Fundamental Research includes [research performed under] (a) grants and contracts that are funded by budget Category 6.1 (Basic Research), whether performed by universities or industry or (b) funded by budget Category 6.2 (Applied Research) and performed on-campus at a university. Young states in the

memo, "This means that DoD awards for the performance of fundamental research should, with rare exceptions, not involve classified items, information, or technology. Nor, with rare exceptions, should an award be managed or executed in such a manner that it becomes subject to controls under US statutes, including export control. The performance of fundamental research, again with rare exceptions, should not be managed in a way that it becomes subject to restriction on the involvement of foreign researchers, or publication restrictions."

Explanation: It is important the contractual relationships between university and commercial organizations properly recognize and respect the different compliance obligations and/or exemptions permitted under these laws and regulations, to ensure balance between the party's strategic, research and organizational objectives. Commercial organizations need to recognize universities cannot conduct restricted research under agreements that include the following provisions as these terms could compromise the FRE; the research requires the incorporation of export controlled information or materials into the research results, the terms restrict publications by requiring the sponsor's approval of publications or public release of research results, or the project limits researcher participation by citizenship. As a general rule, universities obtain very few if any export licenses due to (1) the existence of and desire to maximize use of the fundamental research exemptions and (2) policies that should not restrict research participation by citizenship, and (3) universities being non-profit organizations with cost accounting standards stipulated by the Office of Management & Budget have minimal resources to support export licensing activities or academic schedules that can tolerate delays for participation by foreign researchers to perform research that would require export licenses. Corporate entities generally maintain staff to obtain and manage export licenses for their products or deemed export licenses for their foreign national employees. Universities therefore rely on the commercial organizations and/or vendors for classification of the items they regularly export.

Principles:

1. Industries and universities are committed to complying with all US export laws. Each party has an obligation for export control compliance and will designate a responsible official/POC normally different from the technical point of contact or PI. It is expected that all parties working on a research contract that could be related to export controls should have executed an export control policy.
2. Primary mission:

- a. The primary mission of universities in the U.S. is to create and disseminate new knowledge. That unique mission is recognized by export control laws and regulations.
- b. The primary mission of industries is to generate sales of products or services that produce a profit for the investor. The capability to innovate, develop, manufacture and sell products and services any where in the world present challenges under the export control regulations.
- c. All parties are committed to including the "best minds" regardless of national origin. Export controls could conflict with equal participation at the intersection of national security and economic interests.

3. Universities have the Fundamental Research Exclusion under export regulations and alternatives to FAR clauses specific to educational institutions. Freedom to publish is a requirement for protecting the University's Fundamental Research Exclusion (FRE) under export control regulations. The FRE is a vital organizing principle that reflects global collaboration among scholars and the international nature of graduate education. University-based research conducted by scientists, engineers, or students at¹ any accredited institution of higher education located in the United States normally will be considered fundamental research. FRE exists in basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly with the scientific community.² Under certain conditions, industry may have FRE under EAR.

4. As early as possible and throughout the project, all parties will identify³ and disclose any export control implications or issues.

5. Language will be coming CMU... "engage in a conversation early onto work collaboratively to get that FRE" work with federal sponsors on flow down clauses related to export controls

6. If the parties transfer export controlled items (software, equipment, technology, materials, background IP, *etc.*), it shall notify the receiving party if the item is controlled by EAR or ITAR. If EAR, the CCL category will be provided. The providing party is responsible for categorizing and marking the materials before sending as part of cooperative compliance effort.

¹ The research must be conducted at the US institutions facilities

² as provided in the regulations, defined in NSDD 189 Reference, reiterated in Young memo and the Rice memo

³ NDA, RFP, MTA, *etc.*

7. All parties involved in a potential an export control violation will work collaboratively to submit Voluntary Self Disclosures simultaneously.
8. All parties will prohibit informal side deals between one of the parties and individual employees of the other.

Outliers:

- Each party of the agreement will cooperate to ensure that individuals not employed by either party will be properly screened for denied parties/entities for export controlled projects.
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- Foreign Export Compliance
 - Overseas campuses and companies
 - Foreign Industry Partnerships

Clarifications

- Movement of personnel from university to industry can results in the loss of FRE and may require a license (including outside consulting, SBIR/STTR, hiring of students, etc.).
- Patenting and Licensing – use BIS reference.

Regulations such as the Export Administration Regulations (EAR) under the Commerce Department, the International Traffic and Arms Regulations (ITAR) under the State Department, or the Office of Foreign Asset Controls under the US Treasury Department, the FAR and other agency clauses designate certain clauses for university research contracts. These prime contracts often do not include university based clauses and the commercial prime contractor must work with the Government and the university to ensure the proper clauses are incorporated into these contracts, or exceptions to the prime contract terms and conditions are granted to allow universities to conduct the research and release its results under the FRE. In some cases, Universities may grant access to restricted materials or information by applying license exceptions such as the full time bona fide employee exemption under the ITAR, or they might limit participation by citizenship for research not required for academic degrees. In most

cases, these Universities maintain separate facilities to safeguard materials from foreign nationals not covered by such exemptions.

The key clauses under federal awards that present potential compromise to the fundamental research exemption include:

FAR 52.227-17 Rights In Data –Special Works

DFAR 252.204-7000 Disclosure of Information

DFAR 252.204-7008 Requirements for Contracts Involving Export-Controlled Items.

DFAR 252.204-7009 Requirements Regarding Potential Access to Export-Controlled Items.

5352.227-9000 Export Control Data Restrictions