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International Trade, Customs & Export Law

40
YEARS
1977 - 2017

Export Controls & Wesleyan

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Today's Discussion

- U.S. Export Control Overview
- Key Exemptions for Universities
- Limitations and “Red Flags”
- Export Compliance @ Wesleyan
- Questions and Answers

U.S. Export Control Overview

U.S. Export Control & Sanctions Regulations

Regulations	EAR Export Administration Regulations	ITAR International Traffic in Arms Regulations	Sanction Regulations
Gov. Agency	Department of Commerce Bureau of Industry & Security	Department of State Directorate of Defense Trade Control	U.S. Department of Treasury, Office of Foreign Assets Control
Controlled Items	Commercial, "Dual Use" and some military/space	Inherently military and certain space items	Comprehensive, Partial and Targeted Sanctions
Notes	Many exceptions; License requirements based on item + destination	License required for most export transactions	Well-known examples include Cuba and Iran

“Deemed Exports”: Greatest Risk for Universities

- A release or transfer of technology or technical data to a Foreign National in the U.S.
 - Physical export out of U.S. is NOT required
 - Transfer takes place in the U.S.
 - “Release” could occur by providing technical data stored on shared network drives
- “Deemed” to be an export to the Foreign National’s “Home Country”
- May require a U.S. government export license or other approval

Export Administration Regulations

(15 CFR Parts 730-774)

- Dual-Use Technologies
 - Commerce Control List (15 CFR Part 774)
 - Items not on Commerce Control List (“EAR99”)
- Nature of Technology + “Home Country” = License Requirement
 - License Exception May Be Applicable

International Traffic in Arms Regulations

(22 CFR Parts 120-130)

- Military and Space Technologies on U.S. Munitions List (“USML”)
- USML Technical Data + Foreign National= License Required

Foreign Persons

- “Foreign Person” is any individual who is not a:
 - U.S. Citizen or National;
 - U.S. Lawful Permanent Resident;
 - Person Granted Asylum;
 - Person Granted Refugee Status;
 - Temporary Resident
- “Foreign Person” includes:
 - Persons in U.S. in non-immigrant status (for example, H-1B, H-3, L-1, J-1, F-1 Practical Training, L-1)
 - Persons unlawfully in the U.S.

Implications of Control

- Export License may be required *prior to* release of technology or technical assistance
- Lengthy processing times
 - Currently 2-3+ months
 - Denial possible
- Must curtail or modify activities pending license issuance
- Must secure controlled technology via electronic and physical access controls

Key Questions

- Publicly Available/Public Domain exemption available?
- If not, will the effort involve “Controlled Technology?”
 - If so, what Home Countries require an export license?
 - Until an export license is obtained, do not release Controlled Technology to a foreign person that requires an export license
- Involves Review of EAR and ITAR
 - EAR: Commerce Control List, countries controlled at various levels depending on nature of technology
 - ITAR: U.S. Munitions List, a license is generally required prior to release of ITAR technical data to any foreign person though some exemptions are available for university employees

Hypothetical

A PI intends to have 2 research assistants from China work on ablative materials that will improve the performance of launch vehicles for satellites. Do they need an export license?

- First: Publicly Available/Public Domain?
- Second: EAR or ITAR?
- Third: Review Control List
- Fourth: Is an Exemption Available?
- Fifth: Review ITAR Licensing Policy
- Sixth: Determine viability of license approval.

Fundamental Research

EAR §734.8

Key Elements:

- Basic and applied research in science and engineering
- Resulting information is ordinarily published and shared broadly within the scientific community

Such research can be distinguished from ***proprietary*** research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary reasons

Fundamental Research @ Universities

EAR §734.8

- Limitations:
 - Must be conducted at accredited institutions of higher learning in U.S.
 - May be unavailable if the university or its researchers **accept** (at the request, for example, of corporate sponsor) **restrictions on publication** of scientific and technical information resulting from the project or activity

Educational Information:

EAR §734.9

Key Elements:

- Information concerning general scientific, mathematical or engineering principles commonly taught in universities
- Includes information that is released by instruction in catalog courses and associated teaching laboratories of academic institutions

“Use” Technology

EAR Definition Part 772

- “Use” Technology [technical information]:
 - Operation;
 - Installation (including on-site installation);
 - Maintenance (checking);
 - Repair;
 - Overhaul; and
 - Refurbishing
- Department of Commerce interprets “use” technology to include all of the elements, which rarely is found together
- *Example:* Controlled Lab Equipment

Hypothetical

A PI intends to have 2 research assistants from China work on ablative materials that will improve the performance of launch vehicles for satellites. Do they need an export license?

- No, if the information qualifies for “fundamental research” exemption.
- Yes, if the activity will involve the use of proprietary information
 - Due to current U.S. government policy, an export license application would likely be denied for this activity

Examples of Limitations and Red Flags

Restrictive Clauses or Conditions

- **Publication or Research Restrictions:** The exemptions may be negated if the employee or the university accepts a clause or restriction, including those that:
 - Forbids/restricts the participation of foreign persons (*i.e.*, U.S. citizen only)
 - Requires the use of sponsor's proprietary technical information
 - Restricts access to or disclosure of research results
 - Specific item, software or technology designated by a third party as "subject to export controls"

Note: A provision giving the sponsor a right to approve publications or patent applications resulting from research (*i.e.*, pre-publication review) is generally acceptable as long as any publication delay is reasonable

Examples

AFMC 5352.227-9000 Export Controlled Data Restrictions

- (d) Equipment and technical data generated or delivered under this contract are controlled by the International Traffic in Arms Regulations. An export license is required before assigning any foreign source to perform work under this contract or before granting access to foreign persons to any equipment or technical data generated during performance.

Non-Disclosure Agreement

“Sponsor’s information shall be considered confidential and proprietary and shall not be disclosed to a third party without prior written consent.”

International Travel & Collaboration

- **Travel and Collaboration:** The exemptions may not apply to:
 - Travel to a country subject to a U.S. embargo or sanction
Current List: Geographic area of Crimea, Cuba, Iran, North Korea, Sudan* and Syria
 - Research activity involving a foreign location or exchange of technology or technical data with a foreign located collaborator

Case Studies

The Professor Roth Case & UMass - Lowell

The Roth Case

Retired University Professor Sentenced to Four Years in Prison for Arms Export Violations Involving a Citizen of China

“John Reece Roth, 72, of Knoxville, Tenn., was sentenced to 48 months in prison for violating the Arms Export Control Act by conspiring to illegally export, and actually exporting, technical information relating to a U.S. Air Force (USAF) research and development contract.”

Source: U.S. Department of Justice, Press Release,
Wednesday, July 1, 2009

The Roth Case

- Key Facts:
 - DoD contract with Atmospheric Glow Technologies (AGT) to develop advanced plasma technology for use on U.S. Air Force Unmanned Air Vehicles (“drones”)
 - Contract was subject to the ITAR
 - AGT entered into a subcontract with Prof. Roth/University of TN
 - Prof. Roth used University facilities and hired Foreign Nationals (China and Iran) to serve as graduate assistants
 - University Export Compliance Officer informed Prof. Roth that Foreign Nationals could not receive ITAR Technical Data under the contract

UMass - Lowell

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF INDUSTRY AND SECURITY
WASHINGTON, D.C. 20230

In the Matter of:

University of Massachusetts at Lowell
600 Suffolk Street
215 Wannalancit Mill
Lowell, MA 01854

Respondent

ORDER RELATING TO
UNIVERSITY OF MASSACHUSETTS AT LOWELL

The Bureau of Industry and Security, U.S. Department of Commerce ("BIS"), has notified the University of Massachusetts at Lowell ("UML"), of its intention to initiate an administrative proceeding against UML pursuant to Section 766.3 of the Export Administration Regulations (the "Regulations"),¹ and Section 13(c) of the Export Administration Act of 1979, as amended (the "Act"),² through the issuance of a Proposed

**Charges 1-2 15 C.F.R. §764.2(a) –Export of Atmospheric Testing Device and
Related Antennae and Cables to a Listed Entity in Pakistan Without
the Required License**

On two occasions, on or about September 1, 2007, and on or about October 6, 2007, UML, through its Center for Atmospheric Research, engaged in conduct prohibited by the Regulations when it exported items subject to the Regulations from the United States to the Pakistan Space and Upper Atmosphere Research Commission (“SUPARCO”) without the Department of Commerce license required by Section 744.11 and Supplement No. 4 to Part 744 of the Regulations. Specifically, on or about September 1, 2007, UML exported antennae and cables valued at \$12,480 and designated as EAR99³ to SUPARCO, an organization listed on the Entity List set forth at Supplement No. 4 to Part 744 of the Regulations. On or about October 6, 2007, UML exported an atmospheric testing device valued at \$191,870 and designated EAR99 to SUPARCO. SUPARCO has been on the Entity List since November 1998 through a rule published in the *Federal Register* regarding certain entities in India and Pakistan, including SUPARCO, that were “determined to be involved in nuclear or missile activities.”⁴ At all times relevant hereto, SUPARCO remained on the Entity List. In so doing, UML committed two violations of Section 764.2(a) of the Regulations.

WHEREAS, UML has reviewed the Proposed Charging Letter and is aware of the allegations made against it and the administrative sanctions that could be imposed against it if

Export Compliance @ Wesleyan

Export Compliance @ Wesleyan

- Export compliance program tailored to the university's environment
- Involved input from a variety of organizations
- Program and tools recently published and available at:

<http://www.wesleyan.edu/acaf/support/ExportControls.html>

Website

WESLEYAN UNIVERSITY

⚙️ TOOLS

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EXPORT CONTROLS COMPLIANCE AT WESLEYAN UNIVERSITY

Wesleyan University is committed to an open scholarly environment that fosters the creative process and the enrichment of teaching and learning, while ensuring the fulfillment of the University's financial, contractual, and regulatory obligations. This commitment includes compliance with export control laws, which may impose restrictions on the release or transfer of certain kinds of information, technology, and physical items.

This website is designed to provide an overview of U.S. export controls that are relevant to a university setting and to help you obtain assistance with questions related to export controls.

Overview of U.S. Export Control Regulations

U.S. export control laws, including the Export Administration Regulations (EAR), the International Traffic in Arms Regulations (ITAR), and U.S. Department of the Treasury, Office of Foreign Assets Control (OFAC) sanction regulations potentially impact the research and other activities that Wesleyan performs on a daily basis. The regulations not only cover exporting or traveling with items overseas, but could require an export license prior to releasing technical information and know-how to certain foreign national employees, professors, students, researchers or other foreign national collaborators. The regulations are complex and it's therefore important to understand how these rules impact your activities. For examples, non-technical information, as well as information generated during the course of "Fundamental Research", as defined under these laws, are excluded from export licensing requirements.

The civil and criminal penalties associated with violating export control regulations can be severe, including administrative sanctions (e.g., loss of research funding), monetary penalties, and imprisonment. Persons who violate this policy may be subject to disciplinary action up to and including termination of employment or expulsion.

Wesleyan is committed to educating the members of its community on U.S. export control laws and regulations, including

FAQs & Tools

For more information about export controls at Wesleyan, please click the following links:

[Export Controls at Wesleyan University: What You Should Know](#)

[PI Responsibilities and Export Controls](#)

[Export Controls and Visa Petition Reviews](#)

Questions regarding export control requirements, including those concerning the legitimacy of any transaction or a potential violation, should be referred to:

Contacts for Sponsored Research:

[Carol Scully](#), Director of Corporate, Foundation, and Government Grants
860-685-3964

[Carolyn Kaufman](#), Associate Director of Corporate, Foundation, and Government Grants
860-685-2580

Contacts for Non-Sponsored Research:

[David Winakor](#), General Counsel
860-685-3360

[Sheryl Culotta](#), Associate Provost
860-685-3680

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EXPORT CONTROLS AT WESLEYAN UNIVERSITY: WHAT YOU SHOULD KNOW

U.S. export control regulations can be complex. However, in a university environment the applicability of the rules comes down to a few key questions. Here's what you should know.

Does my work involve Technology?

Technology is specific information necessary for the development, production, or use of a product. The information takes the form of "Technical Data" (e.g., blueprints, plans, diagrams, models, formulae, engineering designs and specifications, and manuals and instructions) or "Technical Assistance" (e.g., instruction, skills training, working knowledge, and consulting services). Conducting research in liberal arts fields, for example, would probably not involve such technology.

If yes, is the Technology involved in my work "controlled"?

"Controlled Technology" is "Technology" (including "Technical Data" or "Technical Assistance") which is controlled for release or export to the country or nationality in question. In terms of the ITAR, items that appear on the USML are generally controlled for all countries/nationalities. Under the EAR, the analysis involves a review of the CCL and a subsequent determination as to whether the technology is controlled for the country/nationality in question.

If yes, then certain compliance requirements are triggered, including the possible need for a U.S. government export license prior to export or release to foreign nationals.

But Exclusions May Apply

Even if the work involves Controlled Technology, there are exemptions to these requirements. In the University setting information resulting from "fundamental research" is typically excluded from export controls. Fundamental research is defined as research in science, engineering, or mathematics, the results of which ordinarily are published and shared broadly within the research community, **provided that a confidentiality or other nondisclosure agreement or contract provision does not otherwise restrict information used during the course of the research or publication and dissemination.**

Although much of our research and other activities at Wesleyan may ultimately be eligible for certain exemptions from

PI Responsibilities & Export Controls

PI RESPONSIBILITIES AND EXPORT CONTROLS

As a PI, you must conduct a review of your research project and contract provisions to determine whether and, if so how your work might be impacted by export control regulations. The University will assist you in doing so, but primary compliance responsibility rests with the PI.

The University has prepared a review **tool that will help you to determine whether your work is subject to export controls.**

There are a couple of important points to keep in mind:

- During the grant application process, export control related questions are asked within the Grants Checklist. Though you may not know whether a resulting contract will impose confidentiality or other restrictions that may impose export control requirements, please complete these questions to the best of your knowledge.
- After award, Sponsored Program will require that you complete the Export Control Review Form prior to commencing any research in order to determine the applicability of export controls. In limited circumstances, you may be required to work with the Office of Sponsored Projects and Office of General Counsel to develop a technology control plan and obtain an export license from the federal government.
- You will need to re-evaluate the determination regarding the applicability of export controls before changing the scope or adding new staff to the project to determine if such changes affect the initial determination.
- You will want to make export determinations far enough in advance of your contemplated work to obtain a license, should one be required.

Questions regarding whether your work is subject to export control requirements should be directed to:

Carol Scully, Director of Corporate, Foundation, and Government Grants
860-685-3964

Carolyn Kaufman, Associate Director of Corporate, Foundation, and Government Grants
860-685-2580

Smart Grants Proposal

https://pf92prod.wesleyan.edu/psp/ps/EMPLOYEE/ERP/c/SM_DC_SMARTDOC.SM_DC_GM_PROPOSAL.GBL?PORTALPARAM_PTCNAV=SM_DC_GM_F

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WESLEYAN UNIVERSITY

Welcome CKAUFMAN Logged on to PF92PROD

Save Save Draft Save Template Open Draft Load Template Attach Collaborate Settings

Name:

Affiliation:

*Amount Requested:

Additional Information

1. *Will this proposal be submitted electronically? ☐ Yes ☐ No

2. *I understand that I may have to complete a Financial Conflict of Interest form for this proposal and this proposal will not be approved for submission without this form on file. For more information, please click on the link at right. ☐ Yes [FINANCIAL CONFLICT OF INTEREST IN RESEARCH](#)

3. *I certify that I have not been suspended or debarred from entering into transactions with the federal government. Furthermore, I agree to notify the grants accounting office of any changes in my status. For more information, please click on the link at right. ☐ Yes [DEBARMENT AND SUSPENSION CERTIFICATION POLICY](#)

4. *I understand that, depending on the funder, I must comply with the Federal Funds Purchasing Policy for any purchases made with grant funds should this proposal be funded. For more information, please click on link to the right. ☐ Yes [FEDERAL FUNDS PURCHASING POLICY](#)

5. *I understand that, depending on the funder, I may be required to provide training in Responsible Conduct of Research to students, graduate students and/or post-doctorals. For more information, please click on link to the right. ☐ Yes [RESPONSIBLE CONDUCT OF RESEARCH POLICY](#)

6. *I understand that under the provisions of the Fair Labor Standards Act that anyone hired who is earning less than \$47,476 annually and is NEITHER a student (undergraduate or graduate) NOR an educator must be an hourly employee and must receive overtime compensation (at time and a half) for any hours worked over 40 hours per week. ☐ Yes

7. *Will your project involve restrictions on the publication or dissemination of technical data, such as through a Non-Disclosure or Confidentiality Agreement, the use of a sponsor's proprietary technical data, or the limitation of foreign persons working on the project? ☐ Yes ☐ No [EXPORT CONTROLS](#)

Any "Yes" response requires a comment.

An Export Control Question is now part of the Grant Checklist. This will trigger our office to follow up at the time of award to see if this status has changed.

If awarded and you will be engaged in activities that fall under Export Controls, this additional questionnaire (part of WFS, triggered by the Grants Office) will need to be completed before a Wesleyan Smartkey can be issued:

A. DOES THE CONTRACT, STATEMENT OF WORK, OR RELATED ATTACHMENTS CONTAIN OR CONTEMPLATE ANY OF THE FOLLOWING PROVISIONS, RESTRICTIONS OR CONDITIONS:	YES	NO	IF YES, LIST APPLICABLE DOCUMENT & SECTION #
1. References, incorporates or relates to, a prior Non-Disclosure Agreement or other confidentiality agreement.	<input type="checkbox"/>	<input type="checkbox"/>	_____
2. States that the contract activity <u>is</u> subject to U.S. export control laws.	<input type="checkbox"/>	<input type="checkbox"/>	_____
3. Any restriction on the publication or dissemination of technical information, including:			
- Prepublication review by the Sponsor.	<input type="checkbox"/>	<input type="checkbox"/>	_____
- Sponsor's right to withhold information from publication.	<input type="checkbox"/>	<input type="checkbox"/>	_____
- Other restriction on publication or dissemination.	<input type="checkbox"/>	<input type="checkbox"/>	_____
4. Items will or may be exported to a foreign destination.	<input type="checkbox"/>	<input type="checkbox"/>	_____
5. Any restriction on foreign national participating in contract activities.	<input type="checkbox"/>	<input type="checkbox"/>	_____

(Note: "Foreign National" (i.e., non-U.S. Person) are those, regardless of location in or outside the U.S., who are *not* U.S. citizens or nationals, lawful permanent residents, persons granted asylum or refugee status, or Temporary Residents. Non-U.S. persons include individuals in nonimmigrant status such as H-1B, L-1, F-1, etc. and those in the U.S. without lawful status.)

Hiring Foreign Nationals

EXPORT CONTROLS AND VISA PETITION REVIEWS

In submitting an H-1B petition for a foreign national employee, Wesleyan must attest that it has evaluated whether the university requires an export license to release export controlled technology or technical data to the individual during his/her anticipated course of employment. Specifically, the question is whether Wesleyan will require a U.S. government “deemed export” license to release technical information to the foreign national.

A “deemed export” is a release of export-controlled science or technical information to a foreign national under International Traffic in Arms Regulations (ITAR) or the Export Administration Regulations (EAR), as the release is considered an “export” to that individual’s home country.

On each H-1B petition that Wesleyan files on behalf of a foreign national “beneficiary” (employee), Wesleyan must certify, with input from the relevant Department Chair or other supervisor, that it has reviewed the EAR and ITAR and has determined whether or not a U.S. Government export license is required to release controlled technology or technical data to the beneficiary. United States Citizenship and Immigration Services (USCIS) has stated that these export licensing requirements will affect only a small percentage of petitioners because most types of technology are not controlled for export or release to foreign persons. However, for each H-1B petition, Wesleyan must review EAR and ITAR and determine whether the beneficiary’s case involves export controlled technology or technical data.

For each H-1B petition, the Department or Program Chair or other supervisor must complete the [deemed export screening tool and attestation found here](#). If the answer to any question on the screening tool is “Yes,” or if the Chair otherwise has reason to believe that an export license may be required, the Chair should contact [Jennifer Bomar](#) at 860-685-3090. If the answer to each question is “no,” the Chair should complete the second portion of the form, the deemed export attestation, and return it (with the screening tool) to [Jennifer Bomar](#).

Questions & Answers

Steven Brotherton, Partner

Sandler, Travis & Rosenberg P.A.

Export Controls & Sanctions

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