EXPORT CONTROLS MANUAL

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Export Controls Manual
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I.

INTRODUCTION

Certain types of equipment, software and technology are regulated by the U.S. government and this may impact the university and its employees' ability to host international visitors, participate in international conferences, and conduct research in a completely open environment. While the CSU remains dedicated to academic freedom and openness in research, it must comply with the various laws and regulations known as export controls. Non-compliance with export controls may subject the university and individuals involved to civil and criminal penalties.

"Export Controls" covers a much broader array of activities than the term suggests. Export controls can apply to international faculty (faculty who are not U.S. citizens or permanent residents), international students and international visitors, as well as faculty and staff who travel outside the U.S. "Exporting" can occur through international shipments and physically carrying products and technology outside the U.S. (physical exports), or through "deemed" exports, which can include the domestic transfer of technology, or providing technical and/or financial assistance and training to foreign nationals in the United States.

The Office of General Counsel has prepared this manual to give you a general overview of a complex subject. Please consult OGC on a case-by-case basis as the need arises.

II.

HISTORY OF EXPORT CONTROLS

In 1775, the Continental Congress outlawed the export of goods to Great Britain, thus establishing the first American export control. Since then, the United States has imposed export controls for a variety of reasons through legislation such as the Embargo Act, Trading with the Enemy Act, the Neutrality Act, and the Export Control Act.

The Export Control Act of 1949 gave the U.S. Department of Commerce primary responsibility for administering and enforcing export controls on "dual-use" items (i.e., those items that have both commercial and military applications), and for the first time defined three reasons for the imposition of these controls: national security, foreign policy, and commodities in short supply. The Export Administration Act of 1979 provides the basic framework for export controls currently in place and has since been amended several times. While the Act itself actually expired in 1994 and again in 2001, the Export Administration Regulations remain in effect and the Department of Commerce is currently acting under the authority conferred by Executive Order No. 12924, signed on August 19, 1994. In that Executive Order, the President invoked his authority, including authority under the International Emergency Economic Powers Act, to continue in effect the system of controls that the United States had maintained under the Export Administration Act. Controls also are maintained for purposes of nuclear non-proliferation under the Nuclear Non-Proliferation Act of 1978.

III.

CURRENT EXPORT REGULATORY FRAMEWORK

Currently, the three agencies that have adopted regulations that are likely to have the most impact on university activities are:

A. The Department of Commerce and the Bureau of Industry Security

Export Administration Regulations **(EAR)** - The Department of Commerce has responsibility to regulate the export of "dual use" commodities (those that may have both a commercial and a military application), software and technology. These items are listed on the Commerce Control List and are administered through the U.S. Department of Commerce's Bureau of Industry and Security. (Export Administration Regulations, 15 C.F.R. Sections 730-744)

B. The State Department and the Directorate of Defense Trade Controls

International Traffic in Arms **(ITAR)** – The State Department has responsibility for the export of defense articles and defense services identified on the U.S. Munitions List. (22 C.F.R. Sections 120-130)

C. The Department of Treasury and the Office of Foreign Asset Control

The Department of Treasury regulates commerce with a specified list of embargoed countries and with certain "specially designated nationals". These regulations are subject to change because of the statutory powers given the President to protect U.S. foreign policy or national security. (31 C.F. R. Sections 500 et seq.; Executive Order 13224)

D. Other Federal Agencies That Regulate Exports:

- The Nuclear Regulatory Commission licenses the export of nuclear materials and equipment;
- The Department of Energy regulates the export of natural gas and electrical power, as well as nuclear technology and technical data for nuclear power;
- The Drug Enforcement Administration regulates the export of controlled substance and precursor chemicals;
- The Food and Drug Administration regulates food, drugs and cosmetics safety; and
- The Department of Agriculture guides exporters in meat, poultry and egg products, plants and pests.

Not all federal agency export regulations are the same. While this Manual identifies some of the major definitions and exemptions, specific agency regulations must be reviewed for each exported item.

IV.

WHAT IS AN EXPORT?

Any tangible or intangible item that is sent from the U.S. to a foreign destination is an export subject to regulation. “Items” include commodities, software or technology, clothing, building materials, circuit boards, automotive parts, blue prints, design plans, retail software packages and technical information.

It does not matter how the item is transported. It can be sent by regular mail, hand-carried on an airplane, sent by facsimile to a foreign destination, uploaded to or downloaded from an internet site, transmitted via e-mail, or even sent through a telephone conversation. Regardless of the method used for the transfer, the transaction is considered an export.

An item is considered an export even if it is leaving the United States temporarily, is not for sale, is being transshipped through the U.S., or is being returned from the U.S. to its foreign country of origin.

A release of technology or source code to a foreign national physically present in the U.S. is “deemed” to be an export to the home country of that foreign national under export control regulations.

It is considered an “export” of technology when a faculty member leaves the U.S. with a laptop containing computer programs or technical data. A “deemed” export may occur when a foreign national visits a campus laboratory or a consultant is hired. The sending of emails, faxes or even telephone conversations involving technical information may be considered an “export”.

V.

EXPORT LICENSE

A license is the method by which the U.S. government grants permission for an item to be exported that otherwise would be subject to export controls. While a relatively small percentage of total U.S. exports require a license, the main criteria for determining if a license is required are 1) the content or the technical characteristics of the item and its **ultimate use**, and 2) the destination of the item, including the country of the **ultimate end user**.

When an export license is required, most applications are made to the Bureau of Industry and Security of the Department of Commerce (BIS), including export items regulated by other federal agencies. The application must be approved and the license issued before the goods or technology may be exported. A license may be issued with certain conditions attached, such as limiting the capability of the export product, restricting the item to civilian use and prohibiting its use for military or intelligence gathering purposes, or prohibiting the resale of the item to another country.

When an export license is issued, the campus is responsible for the performance of all terms and conditions of the license, both in the United States and in the foreign country.

VI.

CONTENT

A. What is being exported?

The Bureau of Industry and Security of the Department of Commerce maintains the Commerce Control List (CCL). This list includes all items subject to export controls, except for those under the control of another branch of the government. The Department of State has responsibility for regulating all munitions, defense articles and defense services. The list of items controlled by the Department of State can be found in the ITAR regulations. These two agencies and lists cover the most commonly required export licenses. Other government agencies regulate the specific items described above, but the majority of regulated exports are contained in the CCL or ITAR lists.

B. How can it be used?

In general, the Export Administration Act and the BIS regulate items designated as "dual use". This designation means that an item may have a commercial use, but also may have a military or defense purpose. The designation of "dual use" is a convenient way to describe items that are regulated by the BIS, regardless of whether it actually has a military or defense purpose. The more likely an export is to have a military or defense purpose, the more likely it is to be regulated and need a license for export.

VII.

DESTINATION

A. Where is it going?

The destination of the item or technology is the second factor that is considered when determining if government permission is needed for export (export license.) Certain countries, organizations and individuals are subject to trade sanctions, embargoes and other restriction under U.S. law. These restrictions apply to both domestic and foreign transactions.

The Office of Foreign Assets Control of the Department of Treasury maintains the lists of countries that have been designated "comprehensively embargoed". At the time of preparing this Manual, these countries are Cuba, Syria and Iran. Comprehensive embargoes prohibit virtually all exports and other transactions without a license or other U.S. government authorization. The countries that are subject to targeted sanctions, where specific types of transactions are prohibited, include Libya, Sudan, North Korea, Myanmar (formerly Burma), Liberia, Iraq, Zimbabwe, Balkans, and the Cote D'Ivoire (formerly Ivory Coast.)

Countries that are restricted by the Export Administration Act can be found in the Commerce Country Chart, 15 C.F.R. Part 738, Supplement No. 1.

B. End User Certification

Both ITAR and EAR regulations require the campus to certify the ultimate end user of the item or technology. It is the responsibility of the campus to know who the ultimate end user will be and to take steps to ensure that this is actually the case. If an item or technology ends up in the control of a person in a country that would require a license, the campus and/or employee will be held to have violated U.S. law and will be subject to civil and criminal penalties.

VIII.

Export License Exemptions

An export license is not required if the item or technology falls within one of the following exemptions. While these exemptions are found in most federal agency export regulations, a review of specific regulations must be made for individual circumstances:

A. Educational Information Exemption

Educational information may be exported or "deemed" exported without an export license during instruction in courses regularly offered by universities. This exemption includes instruction in science, math and engineering concepts taught in courses listed in the university's catalogue and associated teaching laboratories, even if the information concerns export controlled commodities or items. (EAR 15 C.F.R. 734.3(b)(3)(iii), 734.9; ITAR 22 C.F.R. 120.10(5))

B. Fundamental Research Exemption

As used in the export control regulations, the fundamental research exemption includes basic or applied research in science and/or engineering at an accredited institution of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. Research will not be considered "fundamental research" if the campus accepts any restrictions on the publication of the information resulting from the research, or the research is federally funded and specific access and dissemination controls have been accept. (EAR 15 C.F.R. 734.8(a), (b); ITAR 22 C.F.R. 120.11(a)(8))

C. Public Domain

Information that is published and generally accessible or available to the public through sales at bookstores or newsstands, subscriptions, libraries, patents available at any patent office, conferences, meetings, seminars or trade shows, or through fundamental research. (EAR 15 C.F.R. 734.3(b)(3), 734.7-734.10; ITAR 22 C.F.R. 120.10(a)(5), 120.11, 125.1(b), 125.4)

There are also some special exceptions to the export license regulations. These include shipments of limited value, gifts and humanitarian donations. (15 C.F.R. 740)

IX.

DEEMED EXPORTS

The export regulations include the concept that the release of controlled information or data to a foreign national visitor, employee or student within the U.S. is "deemed" to be an export to that visitor, employee or student's home country. This means that an export license may be required for information or technology that never physically leaves the U.S.

X.

NON-IMMIGRANT APPLICATIONS AND "DEEMED EXPORTS"

The United States Citizenship and Immigration Services requires a "deemed export" certification in the visa application process for nonimmigrant workers. The Form I-129 "Petition for a Nonimmigrant Worker" requires prospective employers to declare, under penalty of perjury, that they have reviewed the Export Administration Regulations and the International Traffic in Arms Regulations, and that with respect to the technology or technical data the employer will be releasing to the employee, either a license is not required, or if it is, the campus will prevent access to the controlled technology or technical data until the required license is received.

This means that campuses facilitating an application for an H or O visa for an employee ***must be*** familiar with export control regulations.

XI.

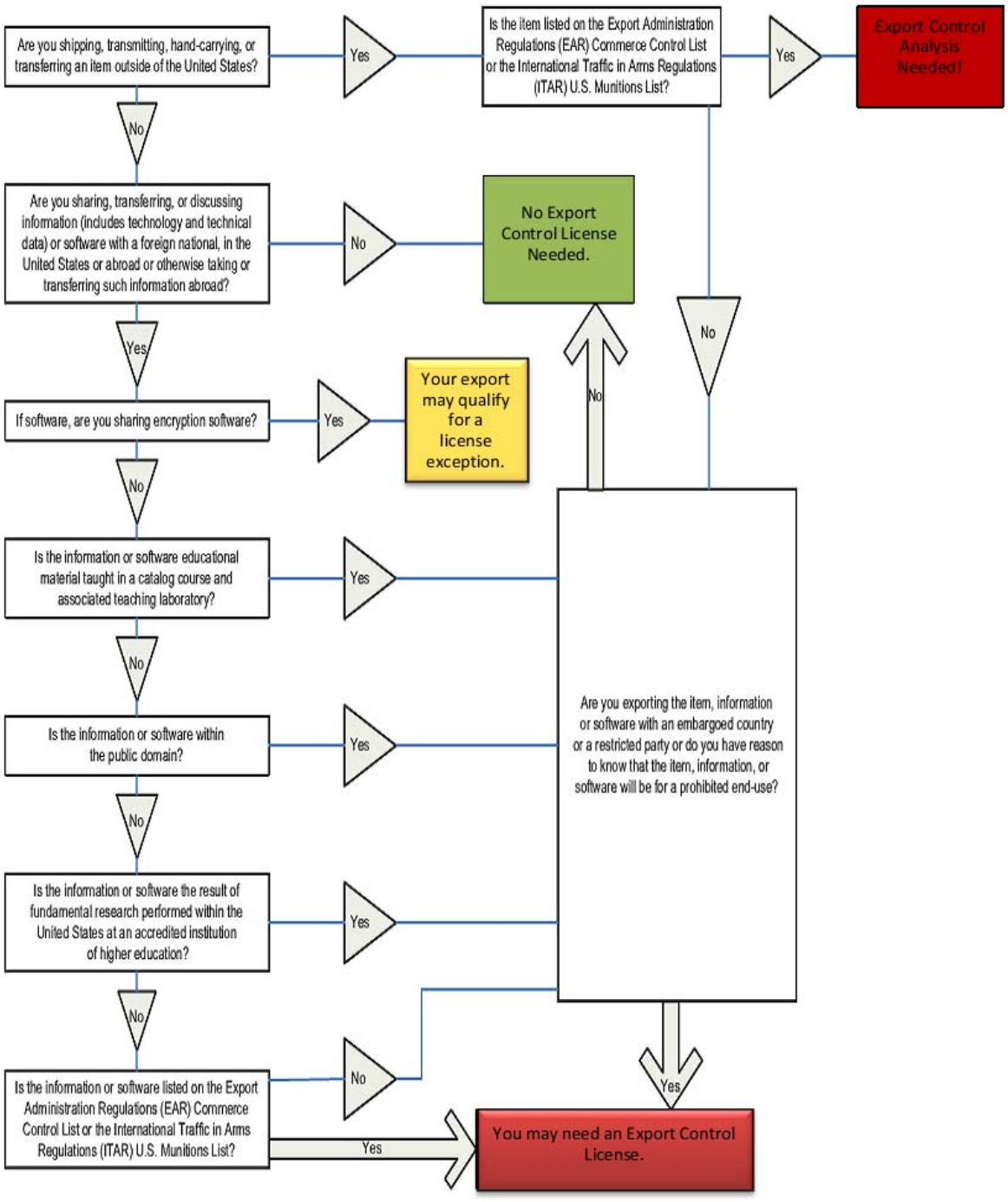
CONCLUSION

Export control regulations are complex, but the consequences of violating these regulations are significant. This Manual is necessarily general in nature. The Office of the General Counsel is available to respond to any export control questions.

RESOURCES

Commerce Control List (contains the official list of controlled technology, commodities, and software): http://www.access.gpo.gov/bis/ear/ear_data.html

U.S. Munitions List (Lists regulated defense articles and associated controlled data): http://www.pmddtc.state.gov/regulations_laws/documents/official_itar/ITAR_Part_121.pdf

Office of Foreign Assets Control (OFAC restricts transactions with foreign countries that have sanctions in place as well as the ability to transact with certain entities or individuals): http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx

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