

THE UNIVERSITY OF TEXAS SYTEMWIDE COMPLIANCE OFFICE
 SYSTEMWIDE COMPLIANCE ACADEMY

PROVIDING COMPLIANCE LEADERSHIP AND GUIDANCE TO THE UNIVERSITY OF TEXAS SYSTEM



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Essentials of Export Controls
 September 9, 2009


Agenda

I. Welcome	Larry Plutko
Webinar basics	
II. Essentials of Export Controls	Kay Ellis
Q & A	Marianne Woods
IV. Announcements	Larry Plutko

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Webinar Basics

1. Session is currently being recorded, and will be available to UT personnel on our website.
2. Attendees are currently muted. If you wish to ask a question please click on the "Raise Hand" button.  The webinar administrator will un-mute you at the appropriate time. Please be patient as there may be multiple questions pending.
3. Be careful of turning down speaker volume to avoid feedback.
4. CPE credit is available for this webinar for attendees who attend the live webinar. Please request credit by sending an email to the SWC Office at systemwidecomp@utsystem.edu.

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Upcoming SWC Academy:
Export Controls Committee Update
September 23, 2009, 10:00 – 11:00 am

Presented by Lisa Leiden

This second session will include an update of the activities of the Export Control Compliance Committee, including a model policy and available export control tools and educational material.

THE ESSENTIALS OF EXPORT CONTROLS

Kay Ellis
Associate Director, Export Controls Officer
Office of Sponsored Projects
The University of Texas at Austin

Marianne Woods
Senior Associate Vice President for Research Administration
The University of Texas at San Antonio

Topics To Be Covered

- The Cost of Noncompliance
- Overview of the basic regulations
- Differences between ITAR and EAR
- Key issues for universities
- Determining the need for a license
- License or Technology Control Plan
- Export Control Management Plan

This could happen to you

***The Violation:** On January 14, 2003, Dr. Thomas Campbell Butler, M.D., a professor at Texas Tech University in Lubbock, Texas reported to the FBI that thirty vials of a potentially deadly plague bacteria, *Yersinia pestis* (the causative agent of human plague), were missing and presumed stolen from his research lab. The report sparked a bio-terrorism alert in west Texas. The investigation proved that Dr. Butler had illegally exported the *Yersinia pestis* which is a controlled item under the EAR and cannot be exported without the required export licenses from BIS. On January 15, 2003, Dr. Butler was arrested. **Among the numerous charges of which Dr. Butler was found guilty at trial, two were export control related: making false, fraudulent and fictitious statements regarding the exports to federal agents and making an unauthorized export to Tanzania.**

Dr. Thomas Butler



**Don't let this happen to you. Real Life Examples of Export Control and Anti-boycott Violations", U.S. Dept. of Commerce, Bureau of Industry and Security Export Enforcement, April 2005

Penalty

- **The Penalty: Dr. Butler was convicted of forty-seven counts of a sixty-nine count indictment that stemmed from BIS's investigation.**
- **He was sentenced to two years in prison on March 10, 2004, and fired from Texas Tech.**

The Cost of Noncompliance

- **ITAR**
 - **Criminal: Up to \$1 million per violation and 10 years imprisonment**
 - **Civil: seizure and forfeiture of article, revocation of exporting privilege, up to \$500,000 fine per violation**
 - **Professor Roth (Univ. TN) convicted on 9/3/08 and recently sentenced to four years**
 - **Raytheon fined \$25M**
 - **Hughes Electronics and Boeing Satellite Systems - \$32M**
 - **Boeing - \$4.2M**
 - **Lockheed Martin - \$13M**

The Cost of Noncompliance

- **EAR**
 - Criminal: \$50K to \$1 million or 5 times value of export, whichever is greater, per violation, 10 years imprisonment
 - Civil: revocation of exporting privilege, fines \$10K-\$120K per violation
 - Examples
 - Bass-Pro - \$510K for shipping guns without a license
 - Dr. Thomas Butler, Texas Tech – 2 years in prison for making fraudulent claims and unauthorized exports (plague bacteria)
 - ITT fined \$100M for exporting night vision materials without license

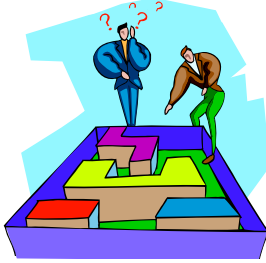
The Cost of Noncompliance

- **OFAC**
 - Criminal: \$50k TO \$10M per violation and 10 to 30 years imprisonment
 - Civil: \$11K to \$1M per violation
 - Example
 - Augsburg College, Minneapolis, MN fined \$9,000 for 4 trips to Cuba; attorney negotiated reduction in fine from \$36,000

Overview

- **Export controls cover**
 - Any item in U.S. trade (goods, technology, information)
 - U.S. items wherever located, even internationally
 - "Deemed exports" (access to controlled technology or defense service by a foreign national in the U.S.)
- **Excludes**
 - Items in the public domain
 - Artistic or non-technical publications (maps, children's books, sheet music, calendars, film)

Need help navigating the export control maze?



Basic Regulations: ITAR

- International Traffic in Arms Regulations (ITAR) 22 CFR Parts 120 – 130
 - U.S. Munitions List (USML) enumerates the defense articles and services (furnishing technical assistance - includes design, engineering and use of defense articles) which are controlled
 - Based primarily on whether an article or service is deemed to be inherently military in character
 - Licensing handled by the Directorate of Defense Trade Controls (DDTC)

Basic Regulations: EAR

Export Administration Regulations (EAR) 15 CFR Parts 730-774

- The Commerce Control List (CCL) contains commodities, technology, and software subject to the EAR; identified by an Export Classification Control Number (ECCN)
- Licensing handled by Bureau of Industry and Security (BIS)
- Dual use items (military or commercial)

Basic Regulations: OFAC

Department of Treasury Office of Foreign Assets Control

(OFAC) – Economic sanctions focus on end-user or country and may limit transfer of technologies and assistance to OFAC's list of sanctioned countries

- OFAC has a "Specially Designated Nationals and Blocked Persons List"
- Prohibits payments or providing "value" to nationals of sanctioned countries and certain entities or could require a license

Differences Between ITAR/EAR

ITAR:

- Covers military items (munitions and defense articles)
- Includes most space related technologies because of application to missile technology
- Includes technical data related to defense articles and services (furnishing assistance including design and use of defense articles)
- Not much latitude, few exemptions

Differences Between ITAR/EAR

ITAR:

- ITAR will deny a license for exports/sales of defense service or articles to certain countries
- Research must already be published
- ITAR has stricter proprietary review concerns
- Has exemption for foreign nationals if full-time regular employee of a university
 - No grad students, post-docs, or employees from countries prohibited by 126.1
 - Individual must be informed in writing technology may not be transferred to other foreign persons

Differences Between ITAR/EAR

EAR:

- Covers dual use items (found on the CCL)
- Regulates items designed for commercial purposes but that can have military applications (computers, pathogens, civilian aircraft, etc.)
- Covers goods, test equipment, materials and the software and technology

Differences Between ITAR/EAR

EAR:

- Differs on “ordinarily publishable” (EAR) vs. “published” (ITAR)
- Not as many license restrictions to certain countries
- DOC easier to work with—more exemptions available

Key Issues for Universities

- Public Domain
- “Deemed” Exports
- Fundamental Research Exclusion (FRE)
- Troublesome Clauses/Contract Restrictions
- Equipment Use
- Software Development
- Travel
- Shipping
- Payment to Vendors

Key Issue: Public Domain

- Includes information that is published and generally available to the public:
 - Through sales at bookstands and stores
 - Through subscriptions available without restrictions
 - At libraries open or available to the public
 - Through patents
 - Through unlimited distribution at a conference, meeting seminar, trade show, generally accessible to the public in the U.S.
 - Includes technology and software that are educational and released by instruction in catalog courses and associated labs and universities

Key Issue: Deemed Exports

- The EAR defines a deemed export as the release of technology or source code subject to the EAR to a foreign national (no green card) in the U.S.
- Such release is "deemed" to be an export to the home country of the foreign national.
- Situations that can involve release of U.S. technology or software include:
 - Tours of laboratories
 - Foreign students or professors conducting research
 - Hosting foreign scientists
 - Emails, visual inspection, oral exchanges
- Unless the fundamental research exclusion applies, a university's transfer of controlled (on the CCL or the USML) technology to a non-permanent resident foreign national may require a license and/or be prohibited.

Export - ITAR

- Sending or taking a defense article out of the U.S. in any manner
- Disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the U.S. or abroad
- Performing a defense service (includes training) on behalf of a foreign person, whether in the U.S. or abroad



Key Issue:
Fundamental Research Exclusion

- National Security Decision Directive (NSDD) 189, National Policy on the Transfer of Scientific, Technical and Engineering Information issued 9/21/85 established national policy for controlling the flow of this information produced in federally funded fundamental research at colleges, universities and laboratories.
- Reaffirmed in letter from Condoleezza Rice, Asst. to the President for Security Affairs on 11/1/01.

Fundamental Research Definition (NSDD 189)

- *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.*

Key Issue:

Fundamental Research Exclusion

- Research conducted by faculty and students at a university will normally be considered fundamental research
- University based research is not considered “fundamental research” if the university or its researchers accept restrictions on the publication of the results of the project

ITAR and the Fundamental Research Exclusion

- Covers information which “is published and which is generally accessible or available to the public” through a number of mechanisms including:
 - Unrestricted publications
 - Patents
 - At an accredited institution of higher learning in the U.S. where the information is ordinarily published and shared broadly in the scientific community

ITAR and the Fundamental Research Exclusion (FRE)

- Excludes information restricted for proprietary reasons or by specific government access and dissemination controls
- Prepublication review and approval for anything other than pending patent applications invalidates the FRE under ITAR

EAR and the Fundamental Research Exclusion

- Exemptions significantly broader than ITAR
 - Prepublication review for inadvertent proprietary material does not trigger license
 - Short delay of publication for pending patent applications okay
 - Access and dissemination controls normally do not trigger license as long as university follows national security controls imposed in the award
- Prepublication approval by a corporate sponsor or other restrictions on publication invalidates the FRE
- Some technologies (advanced encryption) ineligible for fundamental research exemption and require licenses

Key Issue: Troublesome Clauses

- Major issue for research awards—can invalidate the FRE!
- Proprietary restrictions or restrictions on publication and/or publication approval by sponsor may invalidate FRE
 - Includes MTAs, Non-disclosure agreements
- Sponsor “Review” vs “Approval”

Key Issue: Troublesome Clauses

DFAR 252-204-7000 Disclosure of Information (Dec 1991)

- The contractor shall not release to anyone outside the Contractor’s organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless
 - The contracting Officer has given prior written approval; or
 - The information is otherwise in the public domain before the date of release.
- MIT has a list: http://web.mit.edu/osp/www/pre_fed.htm

The FRE Can Also Be Lost If...

- If conferences have potential restrictions on participants or the conference charge is unusually high
 - Inability to co-sponsor with certain countries or groups (e.g., restrictions on co-sponsoring conference with Iranian government)
- If there is a transfer of defense services
 - Potential license requirements for work with foreign nationals
- If the PI has made a “side deal”
 - Could take place via a non-disclosure agreement or acceptance of export-controlled information

Key Issue: Equipment Use

- “Use” of controlled equipment by a foreign national may require a license even if Fundamental Research exclusion is applicable.
 - The transfer of controlled technology or source code of a controlled item to a foreign national may require a license, NOT the normal operation or use of the item or piece of equipment
- “Use” Technology Summary Index from the BIS:
<http://www.utexas.edu/research/osp/ECR&R>

Key Issue: Software

- Software development
 - Software that is provided to the public for free may not require licenses, but proprietary software of controlled technology could require licensing
 - Encryption technology could require license or could be prohibited for transfers to certain foreign nationals and countries

Key Issue: Travel

- Taking equipment, laptops, etc., out of the country may require a license
 - License may be required for controlled technology loaded on laptop, but not the laptop itself
 - EAR license exceptions (keep records!)
 - TMP – temporary exports
 - BAG – baggage
 - Laptop, equipment must stay under “effective control” for travel to certain countries
 - ITAR exemption (keep records!)
 - 125.4(b)(9) if “sent” to U.S. person
- http://www.utexas.edu/research/osp/export_control/license_exceptions.html

Key Issue: Travel

- OFAC has restrictions
 - Money transactions
 - Sanctioned countries
- The Departments of Commerce, State, OFAC, and other government agencies have denied entities/persons lists
 - We have a UT System-wide license to use Visual Compliance to check individuals and companies to see if they are on one of the lists.

Key Issue: Shipping

- Shipping equipment, technology, software, computers, goods, outside the U.S. may require a license
 - Can be fined if we ship without a required license
- EAR recordkeeping requirements
- How do we handle this at the various levels within the university?
 - Awareness of regulations at the time of purchase
 - Work with central research administration, central shipping, export controls officer, and import/export broker

Key Issue: Vendor Payments

- Payments to entities/persons on the denied lists could result in fines
 - Includes payments to entities in the U.S. or abroad
 - Payment to foreign entity should raise a red flag!
 - OFAC has regulations regarding payments to sanctioned countries
 - Iran and Cuba the most restrictive

Licensing the Technology and Goods

- EAR – not too complicated, can apply electronically, no fee
 - Deemed Export license required for foreign national working with certain controlled proprietary technology
 - License needed to ship certain goods/technologies outside the U.S.
- ITAR – very complicated and expensive
 - DSP-5/Technical Assistance Agreement required for foreign nationals working with export controlled technology/defense service
 - Technology Control Plan required

Determining the Need for a License (Export Controls Review)

- QUESTIONS TO ASK** (UT Austin reviews at proposal and award stage):
- Will there be restrictions on publication of results or release of proprietary information?
 - Does the sponsor have the right to approve publication?
 - Are foreign nationals restricted from working on project or does sponsor require prior approval?
 - Will the researcher or project director be receiving restricted information?
 - Will there be foreign national project personnel?

Determining the Need for a License (Export Controls Review)

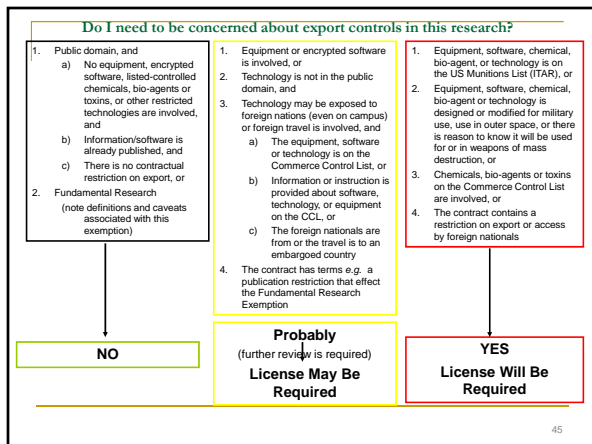
QUESTIONS TO ASK:

- Destination: Is the research technology or goods going overseas to a foreign company, government or individual?
- Is there foreign collaboration?
- What do the end-users intend to do with the research results or goods?
- Is foreign travel involved, and will the PI be taking export controlled items?

Determining the Need for a License

STEPS TO TAKE:

- Classify the technology or goods involved (ITAR, EAR, OFAC, other?)
 - Online systems
- Determine if license is needed for the technology/end user/end use
- Determine if license exemption or exclusion is available (public domain, fundamental research, EAR exemption from CCL, etc.)



Determining the Need for a License

- If no exemptions, determine what kind of license is needed
 - Technical Assistance Agreement (ITAR)
 - DSP-5 (ITAR)
 - Deemed Export License (EAR)
 - Shipping License (EAR or ITAR)
 - Others

License or Technology Control Plan?

- In some situations it is possible to put a TCP in place instead of applying for a license
- A TCP is simply a plan that outlines the procedures to secure controlled technology (e.g., technical information, data, materials, software, or hardware) from use and observation by unlicensed non-U.S. citizens
 - If this is not possible, then a license or technical assistance agreement would be needed

When do you need a TCP?

- In conjunction with a Technical Assistance Agreement (TAA) – Dept. of State
- In conjunction with a Deemed Export license – Dept. of Commerce
- In conjunction with an agreement that does not allow foreign nationals
- In conjunction with an agreement that involves controlled technology – includes NDAs
- Or in conjunction with **any** project that involves controlled technology!
- TCP template - Export Controls website:
<http://www.utexas.edu/research/osp/ECR&R.htm>

Federal Websites

- BIS - <http://www.bis.doc.gov>
 - EAR database – Commerce Control List
http://www.access.gpo.gov/bis/ear/ear_data.html
- ITAR - http://www.pmdtc.state.gov/regulations_laws/itar.html
- OFAC - <http://www.treas.gov/offices/enforcement/ofac/>

Where do we go from here?



Export Control Management Plan

WHO'S IN CHARGE?

- Need to have a "go-to" person (empowered official)
- Essential to have back-up from President, VPR, Director of Sponsored Programs, Legal Office
- Need buy-in from college administrators, Tech Transfer Office, Purchasing, and of course, the PIs!

Export Control Management Plan

TRAINING

- Training faculty and staff is crucial –
Get the word out!
 - Seminars/workshops
 - Departmental/faculty meetings
 - One-on-one sessions
 - On-line presentations
 - On-line training modules

Export Control Management Plan

RECORDKEEPING

- Training session attendees
- Licenses must be kept 5 years after end date
- Document decision-making process
- Document exemptions and exceptions
- Check records and follow-up with projects;
i.e., have an audit plan
 - Change in personnel (might trigger a license)

Export Control Management Plan

- Keep export control information and forms on a website that is easily accessible
 - Definitions
 - Policy, procedures and forms
 - Links to regulations
 - Training opportunities
 - Other resources

<http://www.utexas.edu/research/osp/ECR&R.htm>
- Create a manual with policies and procedures

Export Control Management Plan

STAY UP-TO-DATE

- Check government websites for updates
- Read the regulations
- Attend meetings
- Network with other universities: don't re-invent the wheel!
 - University of Maryland <http://www.umresearch.umd.edu/ORAA/ecg/index.html>
 - UC Irvine <http://www.rgs.uci.edu/ora/exportcontrol/index.htm>
- Get outside legal help if necessary
- Questions? Call the experts!

Export Control Management Tips

- Review proposed research for potential EAR/ITAR issues - don't wait until the contract arrives!
- Check to see if equipment/supplies to be purchased is controlled under EAR/ITAR – find the Export Control Classification Number
- If you are planning to hire a foreign national, check the regulations to see if there will be export control issues – work with Sponsored Projects Office
- At the contract stage, check for unnecessary restrictive clauses that would eliminate the FRE

Export Control Management Tips

- Apply for a license BEFORE project begins--process can take 2-6 months or longer!
- Honest errors are acceptable but gross negligence is punishable
- It is better to self-disclose than not say anything
- Violations are civil and criminal---Fines and jail time!!!

It Takes a Village to Ensure Export Controls Compliance

- Sponsored Projects
- Tech Transfer
- Research Compliance
 - IRB
 - EHS
- Academic Units
- Accounting
 - Revenue Accounts
- Grants and Contracts
- Payroll Office
- International Programs
- Shipping
- Travel
- Internal Audit
- Purchasing/Inventory
- Excess Property
- Legal Counsel
- Public Affairs

Questions?

Kay Ellis

kay.ellis@austin.utexas.edu

512-475-7963

<http://www.utexas.edu/research/osp/ECR&R>

Marianne Woods

marianne.woods@utsa.edu

210-458-5193

<http://www.utsa.research>



Announcements

1. Export Controls Committee Update on September 23.
2. Please request CPE credit by sending an email to the SWC Office at systemwidecomp@utsystem.edu.
