Export Controls
The U.S. Government restricts the release of critical technologies, technical data, equipment, chemicals, biologicals, software code and other materials and information to foreign nationals through export regulation.
GENERAL OVERVIEW

- U.S. entities are required to obtain export licenses prior to providing foreign nationals access to controlled technologies or materials.
TRENDS

Since 9/11, export controls are:

• Increasingly used as anti-terrorism tools;
• Increasingly focused on universities and on enforcement; and
• Increasingly focused on life sciences and biological materials.
APPLICABLE REGULATIONS

1. State Dept - International Traffic in Arms Regulations
   a. “ITAR”
   b. applies to military and related technologies

2. Commerce Dept - Export Administration Act
   a. “EAR”
   b. applies to commercial technologies
   c. applies to certain “dual use” technologies

3. Treasury Dept - Office of Assets Control
   a. “OFAC”
   b. administers sanctions that apply to certain nations
   c. regulates transfer of assets or services to those countries
What is an “Export”?

- Sending or taking defense article out of the U.S.;
- Sending or taking an export-controlled item or material out of the U.S.;
- Transferring ownership of a defense article to foreign person;
- Transferring export controlled items or materials in the U.S. to a foreign entity;
- Disclosing Technical Data to foreign party; or
- Performing defense service for the benefit of a foreign person, either in the U.S. or abroad.
DEEMED EXPORT

• An export of technology or source code is “deemed” to take place when released to a foreign national within the U.S.

• Release is making technology or software available to foreign nationals, either visually, orally or by practice or application under guidance of persons with knowledge of the technology or software.
“Deemed exports” is defined as the release of controlled technology or technical data that conveys information to a foreign entity or individual in the U.S.

Includes “use technology”:

- Information on the operation, installation, maintenance, repair, overhaul and refurbishing of controlled equipment
FOREIGN NATIONAL

Deemed export rule does not apply if recipient has:
- Green Card
- U.S. Citizenship
- Political Asylum
Licensing and Exceptions, overview

An export license may be required before controlled item, information or material is exported. However,

- Most research and teaching on campus in U.S., and some information transfers on campus and abroad, can qualify for exclusions and/or exemptions; and

- Due to proprietary restrictions, certain industry-sponsored research activities may not be subject to exclusions/exemptions.
Exclusions applicable to universities

- FUNDAMENTAL RESEARCH
- PUBLIC DOMAIN
- EDUCATIONAL INFORMATION
Fundamental Research Exclusion

Fundamental Research (FR) Exclusion is based on NSDD 189 (1985). FR is:

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.
Fundamental Research Exclusion, con’t.

Fundamental Research Exclusion applies to:

- Information resulting from or arising during basic and applied research in science and engineering
- Conducted at an accredited institution of “higher education” (EAR) or “higher learning” (ITAR)
- Located in the U.S.
  - Doesn’t apply abroad
- Where the information is ordinarily published and shared broadly in the scientific community
- Is not subject to proprietary or U.S. government publication or access dissemination controls
  - e.g. a restriction on foreign national participation

(22 C.F.R. 120.11(8); 15 C.F.R. 734.8(a) and (b))
The fundamental research exclusion **DOES NOT** apply to
- items or materials
- transfers outside of the U.S.

It is an open question whether the fundamental research exclusion applies to information that is already existing and used during research that otherwise meets the criteria for a fundamental research exemption.
Public Domain\textsuperscript{1} and Publicly Available\textsuperscript{2} Exclusions

- The Public Domain/Publicly Available Exclusion applies to:
  - information that is \textit{already published},
    - not just ordinarily published,
  - through specific means
  - found in
    - libraries open to the public
      - including most university libraries,
    - unrestricted subscriptions, newsstands, bookstores
    - published patent information
    - conferences, meetings, seminars and trade shows open to the public
      - held in the U.S.(ITAR)
      - held anywhere (EAR)
    - websites accessible to the public for free and without the host’s knowledge or control of who visits.

1. \textit{ITAR}
2. \textit{EAR}
The Educational Information Exclusion applies to:

- **ITAR**
  - general science, math and engineering commonly taught at schools and universities
  - ITAR is focused on subject matter.

- **EAR**
  - information conveyed in courses listed in course catalogues and in their associated teaching labs of any academic institution
  - EAR is focused on venue
  - the exclusion does not cover encrypted software.
Licensing Exceptions

Exclusions and exemptions do not apply:

- When controlled research equipment, biological samples, or computers with research data or encrypted or proprietary software are hand-carried or shipped abroad

- When a university has reason to believe the recipient is violating export laws

- When sponsors provide proprietary information that is controlled to the university researchers who are foreign nationals or who then share it with anyone abroad or with foreign nationals in the U.S.
Georgia Tech policies and procedures:
- generally reflect the expectation that research will be performed under the fundamental research exclusion
- provide for specific procedures for classified research
- provide for compliance with export controls
Licensing

When exemptions and/or exclusions don’t apply…

- a license must be obtained **BEFORE** any deemed export, export or re-export, and
- **PRIOR TO** undertaking the activity, including
- **BEFORE** transfer of information sufficient to develop research proposals.
- OLA coordinates licenses.
Export Control issues challenging universities


• 2003 reports focus on university compliance with deemed exports.

Export Control issues challenging universities, con’t.

In 2003, the Department of Commerce IG found:

*While universities have assumed that use of controlled equipment for fundamental research is exempt under the EAR fundamental research exemption, Commerce believes that “technology relating to controlled equipment—regardless of how use is defined—is subject to the deemed export provisions (and the requirement to license foreign nationals having access to that equipment) even if the research being conducted with that equipment is fundamental.”*
Export Control issues challenging universities, con’t.

Commerce IG Recommendations:

- The definition of “use technology” should be more encompassing.
- The actual publication of information may be a more appropriate indicator that technology is publicly available than the fact that the research is intended for publication.
- Deemed export policy should take into account:
  1. all the nationalities a foreign national has ever maintained, and
  2. require employers to obtain export licenses based on country of origin regardless of an individual’s most recent citizenship or residency status.
Export Control issues challenging universities, con’t.

The Defense Department recently proposed amending the DFAR to include requirements for export controlled information in research contracts. The proposed requirements include:

- Adequate controls over physical, visual, and electronic access to export-controlled information and technology
- Contractors (universities) would be required to establish unique badging for foreign nationals and foreign persons
- Contractors (universities) would be required to create segregated work areas for export-controlled information and technology
- An export license or other exemption would be required before foreign nationals or foreign persons gained access export-controlled information and technology
- Contractors (universities) will have to conduct initial and periodic training on export compliance controls for those employees who have access to export-controlled information and technology
A word about OFAC

- Department of Treasury, Office of Foreign Assets Control
  - “OFAC”
  - Sanctions are a “diplomatic” tool
  - Regulate the transfer of items, assets, and services of value to sanctioned nations

- Imposes Trade Sanctions, and Trade and Travel Embargoes Aimed at Controlling Terrorism, Drug Trafficking and Other Illicit Activities

- Prohibit Payments/Providing Value to Nationals of Sanctioned Countries and Some Specified Entities/Individuals

- May Prohibit Travel and Other Activities with Sanctioned Countries and Individuals Even When Exclusions to EAR/ITAR Apply
Far Reaching Impact of Export Controls on Universities – Looking Beyond Research

University departments and export activities that warrant attention:

- Laboratories
- HR
- Security
- Health
- Library Sciences
PRACTICES AND PROCEDURES

- **RESEARCH**
  - OLA coordinates review with OSP and other offices
  
  - Contracting Officers provide OLA with copies of:
    - completed export questionnaire
    - statement of work
    - any additional information to assist with export review

  - Attorneys review the project for any exclusions or exceptions and determines whether a license is required

  - If a license is required, OLA files necessary application for export license

  - Unit approval and concurrence required:
    - School chair and dean
    - Laboratory director and VP and Director for GTRI

  - Research Security assists with access controls
Review Process at GT

• Foreign Personnel and Visitors

  • OHR contacts OLA and Homeland Security regarding employment of foreign nationals or visitors.

  • The hiring department completes an export questionnaire which provides information regarding access to specialized equipment, restricted chemicals or biologicals, controlled equipment, encryption software and proprietary information.
Moving forward...

- Additional training will be available from OSP Fall 2005.

- Procedures are being reviewed to determine regulatory requirements relating to travel, access to specialized equipment and foreign campus issues.

- Continued efforts by OLA and OSP to address proposed rule changes.
Violations & Penalties

Failure to comply with U.S. export control rules can result in severe penalties both for the individual and the entity

- **Criminal Penalties**
  - Fines: ≤$1 or 5x export value
  - Jail: 10 years in prison
- **Civil**
  - Fines: $12 K - $500 K and forfeitures
- **Loss of Export Privileges**
- **Bad Press**

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1. ITAR, EAR and OFAC all impose criminal and civil penalties although the ranges of the penalties vary.