

ARNOLD & PORTER LLP

---

# **SUNY and Export Controls: Compliance, Education and Awareness**

**RICHARD A. JOHNSON**

**Richard.johnson@aporter.com**

**The Research Foundation of  
State University of New York  
Stony Brook – March 2, 2009**

## Export Controls: An Overview

- Export Controls 101: The Essential Framework, Issues and Procedures for Researchers and Others in the SUNY Community
- Increasing Focus on Universities: Which directly affects much of the SUNY research portfolio, and its growing range of global activities on campus and abroad
- Challenges for SUNY Researchers: Some Specific Examples
- The Importance of Compliance: SUNY adheres to a policy of strict compliance with all U.S. export controls and believes that education and awareness of the applicable rules by the SUNY community is key to compliance. Violations can result in severe penalties; the denial of government funding; and other adverse effects for SUNY and for individual members of the SUNY community

## U.S. Export Controls – Coverage and Basic Principles

- Export controls apply to goods, material, tests, software and technology (includes information and technical data)
- Technology transfers in the U.S. to certain foreign nationals also are considered exports (“deemed exports”)
- Under U.S. law, exporting is a privilege and not a right
- A wide-range of high-technology items, and associated technologies, at SUNY are subject to U.S. export controls
- An increasing amount of academic research is covered BUT most does not require licensing or prior approval of the U.S. government because of key exclusions and/or exceptions for university research and teaching that must be safeguarded vigorously

# The Goals of U.S. Export Controls

- Protect national security
- Advance U.S. foreign policy objectives and priorities
- Combat terrorism
- Prevent the proliferation of weapons of mass destruction (WMD) by any means – nuclear, chemical, biological, missiles
- Fulfill U.S. international obligations (e.g., UN sanctions, Australia Group, security agreements)

## What Constitutes an “Export”? Broad Definition and Coverage

- Physical Exports – a shipment or transmission of an EAR-controlled item or good from the U.S. to a foreign country (includes technical data)
- Digital Transmissions – information related to controlled items
- Disclosures or Releases (verbal or visual) – any disclosure or release of controlled technology, software, or technical data in the U.S. (including lab visits) or abroad to a foreign national
- Re-Exports –
  - A shipment or transmission of a U.S.-origin item or technology from one foreign country to another foreign country
  - U.S. export control jurisdiction extends to all U.S.-origin items and technology wherever they are located
- Deemed Exports – transfers in U.S. to certain foreign nationals

## What's a “Deemed Export”?

- “Deemed exports” (1994) include “release” or transfer of technology or source code to a foreign national within the U.S. (FNUS) – treated same as export to that country
  - “Release” includes: (1) visual inspections; (2) oral exchanges; (3) emails; and (4) use abroad of information acquired in U.S.
- Residency status important: (1) permanent residents (green card holders) and (2) “protected immigrants” have same right to controlled information as U.S. citizen
- Key point – Unless exemption applies, any transfer of export-controlled technology to a non-permanent resident FNUS is subject to U.S. jurisdiction and may require the prior approval of U.S. government (license)
- Principal current focus – students, post-docs and visiting researchers/scholars without green cards
- Includes “use technology” – information about operation, repair, maintenance and refurbishing of controlled-equipment or tools

## What's Covered in the Export Control Regulations and Controls?

- U.S. export control regulations, technology control lists and entity/person denial lists restrict the release to foreign nationals (without green cards) in the U.S. and abroad of:
  - Controlled Critical technologies: both civilian “dual-use” (EAR) and “military focus” (ITAR)
  - Technical Data and Software Code (especially encrypted)
  - Equipment and research tools, and technology related to them
  - Chemicals and biological materials
  - Certain other materials and information, and
  - Services of value to certain countries, entities or individuals

## A Growing Amount of SUNY Activities are Subject to Export Controls But Most Should Not Require Licenses

- An increasing amount of SUNY research and other activities now are subject to U.S. export controls BUT most research and teaching on campus qualifies for an exclusion and/or exemption from licensing
- Therefore, it is important that all conditions for these exclusions and/or exemptions are met
- Coverage of U.S. export controls extends beyond SUNY research – university IT/servers; library sciences; security and HR

## Export Controls 101 – EAR Priority Areas for SUNY Attention and Compliance: Check the CCL

- Advanced computing, microelectronics and telecommunications
- Information security and encryption
- Applied physics – ex. lasers and directed energy systems
- Sensors, sensor technology, imaging
- Nanotechnology and materials technologies – ex. composites and ceramics (ex., SUNY’s various nanotech and sensor programs)
- Life Sciences (biotech and biomed engineering) and Chemicals (including SUNY’s academic medical center and health sciences research )
- Marine technologies
- Advanced avionics and navigation (DOC), and Space-related technologies and prototypes (ITAR exclusive jurisdiction)
- Sophisticated machine tool technologies and bearings
- Robotics

## EAR Application Varies Depending on the Technology and the Fact-specific Context

Many items and technologies are “subject to” the EAR but only some require prior U.S. government approval, especially in connection with SUNY research. It all depends on:

- The nature of the goods, material, technology, data, or software involved
- The participants in the research -- Different standards for different countries and foreign nationals
  - Rogue states or parties in U.S. policy (e.g., Syria)
  - Countries of concern (different levels) (e.g., China, India, Pakistan, Russia)
  - “Friends and allies”
- The destination of the “export” (country, institution, and individual)
- Intended or suspected end use or end-user, plus any reasonably foreseeable re-export
- The applicability of an exclusion or exemption from licensing

## Why The Growing Concern with Academic Research? – A Confluence of Factors Set the Context

- Changing calculus of national security – 9/11 and post-Cold War era have changed everything, but the export control laws were established for a different world and are struggling to adjust
- Growing concern with research universities and institutes as a focal point for U.S. government security concerns (openness; access; international; hub of the global knowledge commons)
- Increasing intersection of cutting-edge science, technology and engineering research with national security/foreign policy/homeland security in many fields

## The Growing Concern with Academic Research – A Confluence of Factors

- Globalization of American research institutes and the internationalization of S&T capabilities
- Shifts in cutting-edge research (global in scope, multidisciplinary, challenges of “dual use” research, emergence of “big science” and larger projects, creation of international centers and collaborations, blurring boundaries in categorizing research)
- Cumulative impact of intersection of export controls and post-9/11 regulatory framework as scope of national/homeland security restrictions broadens
  - Linkage of foreign visa issues and Technology Alert List/MANTIS
  - Patriot Act Select Agent regs are not coextensive with export controls
  - “Sensitive but unclassified” proposals

## The Growing Concern with Academic Research – A Confluence of Factors

- Changing nature of innovation and the Triple Helix: evolving views of innovation as a complex system rather than a linear process from basic research to products
- Government and some corporate concerns that universities/institutes misusing the FR exemption
- Perception by some in the security community that the academic research community “is not serious” about export control compliance/security
- U.S. government has made it clear in last few years that enhanced university and individual PI export control compliance are “non-negotiable” – Universities no longer are held to a different standard

## The Growing Concern with Academic Research – Four Specific Examples

- Interagency export control review of research universities and independent research centers highlighted “deemed export” compliance problems and questioned academic exemptions and exceptions (2004)
- Wide-variety of Science and Security reviews (ex., NAS) and recent Deemed Export Advisory Committee (DEAC) Report (2008)
- Recent criminal prosecution and conviction of U.Tennessee electrical engineering professor
- Significantly expanded university/institute compliance efforts and controls for export controls – including audits, compliance visits, and increased “troublesome clauses”

## Guiding Policy Principle – NSDD-189, But...

- President Reagan National Security Directive in 1985 (and reaffirmed repeatedly)
  - “To the maximum extent possible, the products of fundamental research should remain unrestricted”
  - If national security requires control, then “the mechanism for control of information generated during federally-funded research in science, technology and engineering at colleges, universities and laboratories is classification”
  
- BUT ... NSDD-189 is a statement of Administration policy and NSDD-189 is not the same as a Congressional statute or agency regulations, such as the EAR and ITAR

# Export Controls 101 – Agency Responsibilities

- Commerce Department: Commercial and “Dual-Use” Items (the Export Administration Regulations or “EAR”)
  - Licensing: Bureau of Industry and Security (“BIS”)
- State Department: Defense and Space-related Technologies (the International Traffic in Arms Regulations or “ITAR”)
  - Licensing: Directorate of Defense Trade Controls (“DDTC”)
- Treasury Department: Trade Sanctions for Services to Countries, Institutions or Individuals Subject to Prohibitions
  - Licensing: Office of Foreign Assets Control (“OFAC”)
- Defense Department: active role in ITAR/EAR decisions
  - Licensing: Defense Trade Security Administration (“DTSA”)
- Specific exports also covered by other agencies and regulations, such as dangerous pathogens and nuclear-related exports

## EAR – Basic Operational Coverage

- Regulates items designed for commercial purpose but that can have military or security applications (e.g., sensors, nanotechnology materials, computers, pathogens, test equipment, materials)
- Provides certain General Prohibitions for all exports
- Also covers “re-export” of “U.S.-origin” items outside United States because U.S. legal jurisdiction follows the item or technology worldwide – wherever it is located
- Additional “Catch-all” category for items “subject to the EAR” but not on CCL going to certain countries or individuals which require a license

# Export Controls 101 – EAR/ Commerce Control List (CCL)

- Covers dual-use items: 10 Commerce Control List (CCL) categories of different technologies covering equipment, tests, materials, software and technology (includes information, technical data and technical assistance)
- 0. Nuclear Materials, Facilities & Equipment
- 1. Materials, Chemicals, Microorganisms & Toxins
- 2. Materials Processing
- 3. Electronics Development
- 4. Computer
- 5. Telecommunications and Information Security
- 6. Sensors and Lasers
- 7. Navigation and Avionics
- 8. Marine
- 9. Propulsion Systems, Space Vehicles and Related Equipment

## Export Controls 101 – Example: CCL and Life Sciences

- EAR controls are technology-specific, country-specific and, sometimes, entity- or person-specific
- All equipment, chemicals, reagents, toxins/pathogens or microorganisms must be reviewed by ECCN – exs.
  - Group 1: Materials, Chemicals, Microorganisms and Toxins (79 pages)
  - Group 2: Materials processing (63 pages)
  - Equipment includes items such as fermenters, centrifugal separation, cross-flow filtration, freeze drying equipment, etc.
  - Covers certain human, animal and plant materials and equipment including certain genetically modified material
- Each ECCN contains: (1) reasons for control; (2) cost thresholds; (3) units (volume or mass); and (4) related controls
- Also controls on certain computers, software, servers and IT increasingly used in life sciences research
- And don't forget Material Transfer Agreement exchanges and terms!

## Export Controls 101 – ITAR/ State Dept.

- Covers military items (“munitions” or “defense articles”); 22 categories and few exemptions
- Regulates goods and technology designed for military purposes
- Includes all space-related technology and research – Category XV, Spacecraft Systems and Associated Equipment
- Creates “defense articles” (includes tech data which encompasses software unlike EAR) and “defense services” (certain information to be exported may be controlled even if in public domain) related to covered articles
- Covers some university research as “defense services”
- Increasing ITAR application to university activities

## Export Controls 101 – OFAC Restrictions May Apply Even if an EAR/ITAR Exclusion or Exemption Applies

- U.S. economic sanctions focus on the transaction with the end-use or country rather than the technology
- OFAC administers embargoes and sanctions
  - Prohibitions on trade with countries such as Iran or Cuba – includes conference sponsorships
  - Travel restrictions – e.g., Cuba
  - Covers payments, services, honoraria and anything else of “value”
- OFAC prohibits payments or providing “value” to nationals of sanctioned countries or specified entities/persons even if their country is not subject to sanctions
- OFAC prohibitions are separate from ITAR/EAR and may “trump” them
  - Sanctions/licensing requirements may differ
  - Multiple lists must be checked for EAR/OFAC/ITAR compliance
- Obligation to check multiple lists -- e.g., “Specially Designated Nationals and Blocked Persons List”

## Export Controls 101 – Overview of Penalties for Noncompliance

- Individual and institutional liability
- Severe criminal and civil penalties (large fines and jail time; usually multiple violations from same acts)
- Puts any federal funding at risk – for the institution and for the PI
- Often results in draconian compliance obligations and reporting requirements
- Public relations and media attention; settlements public
- Loss of “exporting” privileges can cripple int’l activities, collaborations and “deemed exports” of the university
- Recordkeeping lapses and “false statements” in federal documents also constitute violations

## Export Controls 101 -- Key Areas for University Compliance Focus

- Deemed exports – research projects with foreign nationals on campus
- Sponsored research contracts, terms and conditions –
  - Corporate and university subcontracts
  - Master sponsored research agreements (corporate and govt.)
  - Federal government funding
  - Contractual terms invalidating the FR exemption
- International research collaborations, centers and projects – the globalization of SUNY
- Beyond Research Labs – HR, Library-IT system/servers, Shipping and related support functions
- Special attention on ITAR-related areas such as “defense services” and defense-related research

## Key Exclusions and Exemptions Applicable to SUNY Research and Activities

- Growing amount of SUNY research is subject to Export Controls but most does not require a license:
  - Publicly available
  - Fundamental Research Exemption
  - Educational Instruction Exemption
  - License Exception TMP (Temporary Exports)
  - Bona Fide Employee Exemption (ITAR)
  - EAR 99 – “Subject to EAR” but no prior approval required because item falls below an applicable CCL/ECCN threshold
    - (Value, volume, units, or country coverage)

## Publicly Available Exclusion – Outside Scope of Export Controls

- Broadest exclusion under EAR – it allows deemed exports or exports without controls for information ordinarily published (EAR) and that is generally accessible to the public in any form, e.g.,
  - libraries open to public; unrestricted subscriptions; published patents
  - generally accessible free websites without knowledge by host about who visits
  - published patents and open patent applications
  - Conferences or seminars in the United States accessible to public for a reasonable fee – or also abroad if technology covered by EAR
  - Note: closed conferences do not qualify under either EAR or ITAR
- Preconditions
  - No equipment or encrypted software involved
  - No reason to believe information will be used for WMD
  - U.S. government has not imposed any access and dissemination controls as a funding condition

## Fundamental Research Exemption (FRE)

- The Fundamental Research exclusion (FRE) provides the basis for exempting most on-campus university research from export control licensing requirements
- EAR: FR exemption covers: (1) information (not items); (2) resulting from “basic and applied research in science and engineering; (3) at an “accredited institution of higher education” (EAR); (4) “located in the United States” ; (5) that is “ordinarily published and shared broadly within the scientific community”
- Note : Does not apply to sponsor’s existing export-controlled or proprietary information
- Key: FRE does NOT apply to FR information or software generated outside the United States
- Applies only to FR information – not to physical items or services such as training; Also, does not apply to development information

## “Use” of Research Equipment and Tools and Training of Foreign Nationals in FRE Projects

- Even in a research project covered by the Fundamental Research Exception (and exempt from licensing) – the transfer or disclosure of controlled technology or source code related to the “Use” of export-controlled equipment or tools by a foreign national still may trigger a licensing requirement
  - “Use” has a technical definition; does not cover normal operation but extends to a manufacturer’s proprietary manual
  - Controversial in research community but Commerce Department position is clear
  - A Deemed Export License may be required

## EAR Fundamental Research Exemption Is Invalidated If SUNY or You Agree to Certain Conditions

- FR exemption, however, is invalidated if the university or the PI accepts any of the following conditions regardless of sponsor:
- (1) prepublication reviews
  - But brief publication delay permitted: (a) to ensure no inadvertent release or proprietary information from a sponsor or others; or (b) to decide whether to patent
- (2) sponsor approvals or conditions on publication or information
- (3) foreign national controls or approvals, including limiting the participation of foreign nationals in your lab or center
- (4) access and dissemination controls on the research; or
- (5) national security controls
- But a few technologies are ineligible for FR exemption under any condition (e.g., advanced encryption, nuclear)
- **AVOID SIDE DEALS or AGREEMENTS**: individual actions by a PI and/or SUNY employee bind the university

## Troublesome Clauses and Contract Restrictions Invalidate FRE

- Regulation by Contract – access and dissemination controls; restrictions on foreign nationals; publication reviews or delays
- DFAR – e.g., DFAR 252-204-7000 Disclosure of Information: cannot release any unclassified information that is part of the contract or program without prior written approval of the Contracting Officer
- Foreign Nationals Performing Under Contract
- Export-controlled Data Restrictions
- Flow down or Flow-through clauses from Prime Contracts are a growing problem

## National Security Contract Controls as Substitute for Export Controls and FRE in Certain Federally-Funded Research

- EAR: FRE-like exclusion may apply if university accepts and strictly follows all specific national security contract controls for federally-funded research (only)
  - Export controls do not apply; National Security Controls govern
  - Failure to comply with all national security Contract Controls means you cannot fall back on the FRE or other EAR exclusions
- ITAR: no exclusion; FRE not applicable if any national security controls accepted

## Educational Information Exception

- EAR – All information taught in catalog-listed classes, and released in associated teaching laboratories, at accredited institutions of higher learning are exempt from export licensing while the same information transferred to a foreign national outside class may require a license
  - For example, a professor in class can disclose export-controlled technology and information to a Chinese national but if she is not his student and he releases the same information to her in a non-class setting, then a U.S. government license may be required
  - Includes regular distance learning/on-line courses
  - Professors classroom lecture excluded but bloggers re-transmission of information in the lecture may not be
  
- ITAR – only covers general science, math and engineering principles commonly taught in universities

## License Exception TMP (Temporary Exports)

- SUNY faculty and personnel can ship or hand-carry certain “tools of the trade” to perform SUNY-related fundamental research or educational activities to most countries, provided
  - the property will remain under their “effective control” throughout their stay abroad, and
  - it will be returned to the U.S. within 12 months or will be consumed/destroyed abroad

## ITAR Exemption for Full-Time Employees

- ITAR (but not EAR) exemption for disclosures in the U.S. by U.S. universities of unclassified technical data to foreign nationals -- provided:
  - Bona-fide, full-time university employees (post-docs, students and visiting researchers usually do not qualify)
  - Employee must have permanent U.S. residence during period of employment (some visas do not permit; H-1B status allows this)
  - Employee is not a foreign national of an embargoed country
  - University notifies employee in writing that technical data cannot be transferred or re-exported to other foreign nationals without prior government approval

## Specific Examples of When a License or Approval May Be Required for SUNY Research

- 1. You need to ship abroad or hand-carry research equipment, biological samples, engineering prototypes, encrypted software or laptops with certain research data or proprietary software
- 2. You plan to disclose a sponsor's controlled proprietary information to a foreign national in the U.S. (even in your own lab) or to anyone outside the United States as part of a research project or collaboration (Make sure you know whether you are receiving any "export-controlled information" or "controlled proprietary info")
- 3. You are presenting information at an international symposium or meeting that is not open or that limits registration and/or note-taking
- 4. You are developing proprietary or non-public software involving controlled-technology or encryption technology

## Specific Examples of When a License or Approval May Be Required for SUNY Research

- 5. You are teaching foreign nationals or collaborators about the “use” or “design” of export-controlled equipment/tools, or related technologies
- 6. You see possible “red flags” that the foreign national recipient/end-user of information to whom you are disclosing or releasing may be violating U.S. export laws, including re-exporting controlled technology or information without prior U.S. government approval
- 7. One of the key licensing exclusions and/or exemptions does not apply to your situation
- 8. You are providing any service or anything of value to a sanctioned country, entity or individual on the OFAC lists

## Examples of When a License or Approval May Be Required for SUNY Research

- 9. Your research involves commercial or research equipment, components and applications involving foreign national restrictions
  - Licensing Agreements or Confidentiality Agreements
  - Material Transfer Agreement terms
- 10. You are dealing in any way with Embargoed or Sanctioned Countries
- 11. You are making vendor payments to entities/persons on a restricted list
- 12. You are working with any item or technology that:
  - Was designed or modified for military or defense uses
  - Involves outer-space, such as satellites or launch systems
  - Provides a “defense service”, or
  - Relates to the design, development, production or use of weapons of mass destruction (nuclear, chemical, biological, missiles)

## If a License is Required, Then Plan Ahead

- It is not the end of the world or of your research – If a license is required, it only means that you must obtain the necessary U.S. government approval and build the time for obtaining an EAR license into your timetable
- BEFORE any controlled item/technology can be exported abroad or on the Stony Brook campus to a foreign national (even if in your own lab)
- BEFORE the transfer of information required to develop research proposals
- BEFORE undertaking the international collaboration or activity

# Application of U.S. Export Controls and Trade Sanctions to University Research

- **Overview of Agency Jurisdiction**
- **Differences Between ITAR and EAR Applicable to Universities**
- **Compliance Best Practices**
- **Determining Whether Licenses are Necessary and Steps to Obtain Licenses**
- **Enforcement Issues Applicable to Research Universities**

# **U.S. Export Controls and Trade Sanctions**

## **Overall Differences Between ITAR and EAR**

- **International Traffic in Arms Regulations (ITAR)**
  - **Covers military items (“munitions” or “defense articles”)**
  - **Regulates goods and technology designed to kill people or defend against death in a military setting (e.g., tank, fighter aircraft, nerve agent defensive equipment)**
  - **Includes most space-related technology because of application to missile technology**
  - **Includes technical data related to defense articles and defense services (furnishing assistance including design, engineering, and use of defense articles)**
  - **Strict regulatory regime.**
  - **Purpose is to ensure U.S. security**
    - No balancing of commercial or research objectives

# **U.S. Export Controls and Trade Sanctions**

## **Do We Need an Export License?**

- **Complicated and time-consuming process to determine need for export license**
- **Literally thousands of pages of regulations could apply**
- **Written compliance policies and procedures critical .  
SUNY is developing policies and procedures designed to help**
- **Leverage university export control resources by coordinating inquiries through central offices**

# **U.S. Export Controls and Trade Sanctions**

## **Export License Steps**

- **Determine whether the activity is subject to U.S. jurisdiction (U.S. universities are subject to U.S. jurisdiction as are any foreign nationals in the U.S.; overseas operations may be subject to U.S. jurisdiction)**
- **Classify the technology or goods involved (i.e., subject to State Department ITAR controls, Commerce Department EAR controls, or other controls)**
- **Commerce Department provides a useful classification guide**
- **Determine if a license is needed for the particular technology and particular end-use and end-user**
- **Determine whether any license exemptions or exceptions are available (e.g., public domain, fundamental research, etc.)**

# U.S. Export Controls and Trade Sanctions

## Export License Steps (cont'd)

- Determine whether any embargoes apply or whether any prohibited parties or destinations are involved
- Determine whether there are any “red flags” or other warning signs of possible diversion of the goods or technology
- If a license is required, apply promptly. Keep records in any case
- State Department licensing requirements and forms available at: <http://www.pmddtc.state.gov>
- Commerce Department licensing requirements and forms available at: <http://www.bis.doc.gov>
- Treasury (OFAC) licensing requirements available at: <http://www.ustreas.gov/offices/enforcement/ofac/>

# **Sending Goods & Technology Abroad**

- **Is it Specifically Designed, Configured, Modified or Adapted for a Military or Space Application? If so an ITAR License or Exemption May be Necessary**
- **If Not, Classify the Article or Data Under the Commerce Control List (Check the Categories, Index, Specifications)**
- **Check the Reason for Control (Anti-Terrorism, National Security, Etc.)**
- **Check Country List for License Requirements**
- **End-User and End-Use Prohibited? (Check for Red Flags, Proliferation or Terrorist Uses, Prohibited Destination, General Prohibitions)**
- **Need to File a Shipper's Export Declaration or AES Reporting, Need a Destination Control Statement? (EAR 758.6; ITAR 123.9)**
- **DOUBLE CHECK--HAVE YOU CHECKED THE LISTS!!**  
(<http://www.bis.doc.gov/complianceandenforcement/ListsToCheck.htm>)

# U.S. Export Controls and Trade Sanctions

## Penalties for Noncompliance

- **State Department (ITAR)**
  - **Criminal violations: up to \$1,000,000 per violation, up to 10 years imprisonment**
  - **Civil penalties: seizure and forfeiture of the articles and any vessel, aircraft or vehicle involved in attempted violation, revocation of exporting privileges, fines of up to \$500,000 per violation**
- **Commerce Department (EAR)**
  - **Criminal violations: \$50,000 to \$1,000,000 or up five times the value of the export, whichever is greater per violation (range depends on the applicable law), up to 20 years imprisonment**
  - **Civil penalties: loss of export privileges, fines up to \$250,000 per violation or up to twice the value of the export**

# U.S. Export Controls and Trade Sanctions

## Penalties for Noncompliance (cont'd)

- Treasury Department (OFAC)
  - Criminal violations: up to \$1,000,000 per violation, up to 10 years imprisonment
  - Civil penalties: \$55,000 to \$250,000 fines (depending on applicable law) per violation
  - Violation of specific sanctions laws may add additional penalties
  
- *Most settlements with the Commerce, State or Treasury Departments generally become public. Court cases are always public!*

# U.S. Export Controls and Trade Sanctions

## Enforcement Case Studies

- **Restrictions on Exports Not Always Intuitive**
  - Bayer \$200,000 Fine for Illegal Exports of Glucose and Other Reagents
  - Alcoa \$750,000 Fine for Chemical Exports to Jamaica
  - Boeing Fine for Transfers to Australia
  - Specific Transfers to Canada
- **Universities Face Specific Challenges**
  - UCLA Fine for Financial Dealings with Iran
  - University Professor Case for ITAR Violations Involving China
  - Texas Case Involving Unauthorized Export of Biological Materials

# **U.S. Export Controls and Trade Sanctions**

## **Risks Faced by Universities**

- **Universities largely immune from past export control enforcement**
- **This is changing**
- **Increasing scrutiny post-9/11**
- **Agencies criticized for failure to enforce “deemed exports”**
- **Acting under a government grant is no defense**
  - **Los Alamos and Lawrence Livermore National Labs investigated for their role in providing a 486 computer and other items to a Russian nuclear lab to help control Russian fissile material under a U.S. government program!**
  - **Universities fined for activities in Iran, Cuba**
  - **Universities have dealt with prohibited entities in India**
  - **Universities cited for failure to obtain licenses for access by foreign nationals to military technology**

# **U.S. Export Controls and Trade Sanctions**

## **Actions Against Research Universities**

- **ITAR Enforcement for Unauthorized Transfers Abroad, Unauthorized Access by Foreign Nationals on Campus**
- **EAR Enforcement for Unauthorized Transfers Abroad, Unauthorized Access by Foreign Nationals on Campus**
- **OFAC Enforcement for Exchange Programs with Cuba, Iran, Syria**

# **U.S. Export Controls and Trade Sanctions**

## **Special Considerations for Universities**

- **Universities pride themselves on non-discrimination based on nationality and a free and open campus to encourage the exchange of ideas**
- **U.S. export controls largely incompatible with this goal**
- **To preserve ability to limit discrimination requires active university management of export control requirements**
- **Cannot always tell export classification of item by intuition. Less sophisticated items can be subject to more stringent controls**
- **Just because information is in the public domain does not mean it is free from controls**

# Importance of Planning, Coordination

- **Export Authorities Expect All Involved (Including University Administration and PI's) to Understand Export Control Requirements and Take Responsibility for Compliance**
- **Export Authorities Also Require Central Point of Contact**
  - “Empowered Official” Must Have Authority to Stop Transfers
  - Centralization May Appear Onerous--But it is Really for Researchers' Benefit
- **Encourage Early Contacts to Compliance Officials**
  - License Approvals Can Take Months; Failure to Obtain Licenses Can Trigger Enforcement Actions That Span Years
  - Enforcement Actions Take Your Time and University Resources; In Serious Cases, Personal Liability Possible

- **Actions of Individuals Can Bind University**

# Commitment Important

- **Universities with Proven Track Record and Commitment Will Be Able to Withstand “Anomalies” In Export Compliance**
  
- **But Perception of Ignorance or Circumvention of Requirements Could Result in Treatment of Minor Infractions as Major Violations**
  - Companies With Questionable Records Frequently Lose Their Ability to Export (the “Pocket” Veto)
  - Spending Millions of Dollars on Remedial Action May Not Be Sufficient
  - Research Institutions Not Immune (e.g., Enforcement Against U.S. National Labs, Justice Department, and the Air Force. ITAR Violations by NASA, OFAC Violations by University)
  
- **Institutional Coordination and Planning Critical**