

Export Control Regs & Other International Compliance Matters, Processes, and Issues

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Today's Plan

- What are Export Control laws?
- What do Export Control laws regulate?
- Why should academic institutions care about Export Control laws?
- What are the primary regulations governing Export Control?
- What are “Deemed” Exports?
- What is the Fundamental Research Exclusion?
- Identify common issues in Export Control.
- Review of other International Compliance Matters.
- Scenarios and Q & A.

What are Export Control Laws (ECLs)?

A group of federal laws & regulations designed to advance the **national security, foreign policy, and economic interests** of the United States

- These regulations have been around in some form for decades.
- They have become the subject of increased focus since 9/11/2001.
- These rules regulate **payments, transfer or shipment of goods, and transmission of sensitive information to non-US governments and persons.**
- May require a license prior to engaging in certain export activities.
- Export Controls are becoming commonly used by the Federal Government in response to global events (*e.g.*, Russia invading Ukraine).

What are Export Control Goals?

- Prevent Terrorism;
- Curtail export of technologies that assist the military potential of adversaries;
- Compliance with Trade Agreements; and
- Prevent development & spread of nuclear, chemical, and biological weapons.

What Do ECLs Regulate?

- Export Control Laws (ECLs)
 - laws which prohibit
 - the unlicensed “export” of certain controlled technologies
 - to *foreign persons* for reasons of national security and trade protection
- “Export”
 - is defined very broadly to include an oral or written disclosure of information, visual inspection, or actual shipment outside the U.S. of technology, software/code or equipment to a foreign person
- Any method of disclosure may apply:
 - email, telephone, websites, tours, training sessions

Why is there increased concern regarding the impact of ECLs on University research?

- Advanced technologies developed at universities may be subject to ECLs.
- ECLs are applicable to research fields not traditionally associated with the “military” such as life sciences materials (biological agents and toxins) and computers (encryption technology).
- University research relies on Federal funding which has increased its compliance requirements.
- Increased “globalization” of University research.
- Increased push for Research Security to protect American R&D.

Export Control Violation penalties

- **Civil & Criminal liability for individuals**
 - **Criminal: Up to \$1 million per violation and 20 years imprisonment (ITAR/EAR)**
 - Professor Roth (Univ. TN) sentenced on 7/1/09 to four years in prison
 - Thomas Butler (Tx. Tech) sentenced on 10/24/05 to two years in prison and \$37,400 fine
 - Amin Yu, (Univ of Central Florida) sentenced on 09/26/16 to 21 months in prison for attempting to obtain components for marine submersibles at direction of con-conspirators at Harbin Engineering University in China
 - **Civil: seizure and forfeiture of article, revocation of exporting privilege, up to \$500,000 fine per violation**
 - In 2013, UMass Lowell fined \$100,000 for export control violations (shipped instruments not usually requiring a license to a prohibited party in Pakistan)
 - In 2021, Princeton University fined \$54,000 for sending animal pathogens to foreign investigators without a license

Why do we care about Export Controls?

- **Penalties for Noncompliance**
- **Immigration**
 - I-129 Form (Petition For Nonimmigrant Worker)
 - H-1B Visa - Requires Certification of Review of Export Control Regulations & Determination Whether License is Required
 - *“I certify, under penalty of perjury, that I have reviewed this petition and that all of the information contained in the petition, including all responses to specific questions, and in the supporting documents, is complete, true, and correct.”*
- **Shipment of Items outside US Territory**
- **“Deemed” Exports**

Primary Regulations Governing ECLs

- **DEPT of STATE:** International Traffic in Arms Regulations (ITAR)
 - United State Munitions List
- **COMMERCE DEPT:** Export Administration Regulations (EAR)
 - Commerce Control List
- **TREASURY DEPT:** Office of Foreign Assets Control (OFAC)
 - Country specific sanctions and regulations
- Other Agencies
 - DEA (controlled substances, chemicals & precursors), FDA (certain drugs & medical devices), DOE (nat'l gas & power), NRC (nuclear materials & equipment), DOI (endangered species)

International Traffic in Arms Regulations (ITAR)

- Items on United States Munitions List (“USML”)



- Defense articles and technologies, e.g., missile, space, and laser technologies, chemical and biological agents and delivery systems, software
- Controls based primarily on whether an article or service is deemed to be military in character
- Includes technical services assistance, including design, engineering and use of defense articles that are controlled

Important ITAR Definitions

- **ITAR 120.9 Defense Service**
 - *Defense service* means: “The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design . . . operation OR use of defense articles.”

ITAR Commercial Items & Lab Equipment?

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Typical Stereo Microscope Installation
(with two OWLs and two 720C Adapters)

All products displayed are subject to U.S. Law and ITAR and require a license from the Department of State for export.

U·A·M·S

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NVD
NIGHT VISION DEVICES

Export of Night Vision Equipment or related accessories (such as manuals) is strictly regulated by the US Department of State in accordance with the guidelines of the International Traffic in Arms Regulations (ITAR). It is a major crime to ship or carry US manufactured night vision devices outside the borders of the United States, punishable by fines and prison sentences. Ignorance of these regulations will not hold up in court. By purchasing night vision equipment from Ready Made Resources, you attest that you will not attempt to export or carry this night vision equipment outside the borders of the United States. Also, it is illegal to allow a non-US Citizen to look through US Gen3 Night Vision Devices, even on US soil. Again, this is a crime punishable by fines and prison sentences.

U.S. Department of Treasury – Office of Foreign Assets Control (“OFAC”)

Enforces economic and trade sanctions against targeted:

- Foreign governments (*e.g.*, Iran, Cuba, Sudan, Russia, etc.)
- Individuals (*e.g.*, known and suspected terrorists, narcotics traffickers)
- Entities (*e.g.*, charities linked to terrorist groups, drug front organizations)
- Practices (*e.g.*, proliferation of WMD, trade in non-certified rough diamonds)



OFAC regulations prohibit trade and financial transactions with:

- Embargoed foreign governments
- Embargoed foreign organizations and companies, and
- Foreign nationals who are on an OFAC “Specially Designated Nationals” list (“SDN” list)



- » Financial transactions with foreign governments, companies, and individuals should be screened against OFAC lists
- » Includes purchases of equipment, payment of honoraria, etc.

U.S. Department of Commerce – Bureau of Industry and Security (“BIS”)

- **Export Administration Regulations (“EAR”)**
 - Includes Commerce Control List (“CCN”)
 - Export Controls Classification Numbers (“ECCN”)
- Responsible for issuance of export licenses when required



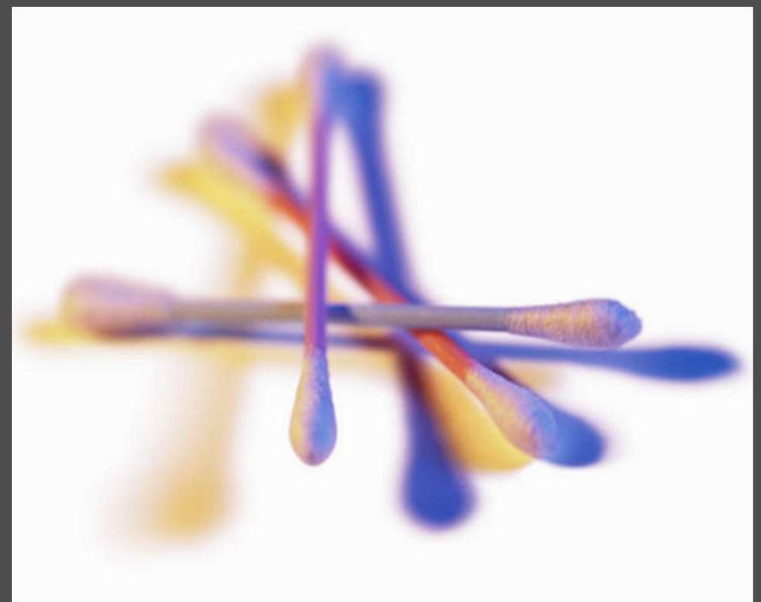
Export Administration Regulations (“EAR”)

15 CFR Parts 730-774

Regulate the export of “**Dual Use**” items

- Items that have both commercial and military or proliferation applications

Such items are considered
“subject to the EAR”



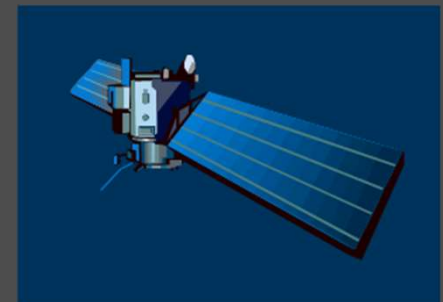
What does “subject to the EAR” mean?

Items are under the regulatory jurisdiction of the EAR

– Includes all “**items**” in the United States,

except:

- Publicly available technology and software (EXCLUDING encryption technology)
- Items subject to the exclusive jurisdiction of another Federal Department or Agency
- Publications that are artistic or non-technical in nature



Definition of “Items”

ITEMS – May consist of tangible things, such as equipment or hardware, but also includes **technology**, in the form of:

- **INFORMATION** – “Technical Data” such as models, formulae, engineering designs, or “Technical Assistance” such as training or instruction.
 - Very concerned about encryption technology.
- **SOFTWARE** – Computer programs or microprograms in either “Source Code” (programming statements) or “Object Code” (machine-readable instructions)

Commerce Control List (CCL)

Commerce Control List Categories	
0	Nuclear & Miscellaneous
1	Materials, Chemicals, Microorganisms and Toxins
2	Materials Processing
3	Electronics
4	Computers
5 Part 1	Telecommunications
5 Part 2	Information Security
6	Sensors and Lasers
7	Navigation and Avionics
8	Marine
9	Aerospace and Propulsion

Five Product Groups	
A	Systems, Equipment and Components
B	Test, Inspection and Production Equipment
C	Material
D	Software
E	Technology

3 = Electronics
A = Systems, Equipment & Components

3A001

Commerce Control List (CCL)

- Dept of Commerce Maintains Commerce Control List (CCL)
- Key to Determine Whether License Required:
 - Does item have a specific Export Control Classification Number (ECCN) listed on the CCL?
- If item falls under U.S. Department of Commerce jurisdiction and is not listed on the CCL, it is designated as “EAR99.”
 - “EAR 99” items: low-technology consumer goods
 - Generally no license required to export UNLESS:
 - 1) “end-user of concern”
 - 2) embargoed country
 - 3) in support of “prohibited end use”

Examples of Items on Commerce Control List (CCL)

- 2B352 Equipment capable of use in handling biological materials
 - Complete P3 or P4 facilities
 - Fermenters – Including single use or disposable systems
 - Centrifugal Separators
 - Cross-flow Filtration Equipment & Components
 - Freeze-drying equipment
 - Spray drying equipment
 - Protective Suits and Class III safety cabinet
 - Aerosol Challenge Chambers
 - Aircraft Spraying or Fogging Systems

Examples of Items on CCL

- Human and Animal Pathogens (1C351 & 1C360)
- Toxins and “subunits” thereof (1C351 & 1C360)
- Genetic elements and genetically-modified organisms (1C353)

ECL Summary

<u>Commerce Department</u>	<u>State Department</u>	<u>Treasury Department</u>
Export Control Act of 2018 & remaining sections of Export Administration Act of 1979	Arms Export Control Act	Trading With the Enemy Act, Int'l Emergency Economic Powers Act & Others
Export Administration Regulations ("EAR") 15 CFR Parts 700-799	International Traffic in Arms Regulations ("ITAR") 22 CFR Parts 120-130	Iraq Sanctions Regulations, Terrorism Sanctions Regulations & Others 31 CFR Parts 500-599
Commerce Control List ("CCL")	US Munitions List ("USML")	List of Specially Designated Nationals & Blocked Persons

What constitutes an “**export**” under these regulations?

An export is an actual shipment or transmission of **items** outside of the United States



Exports

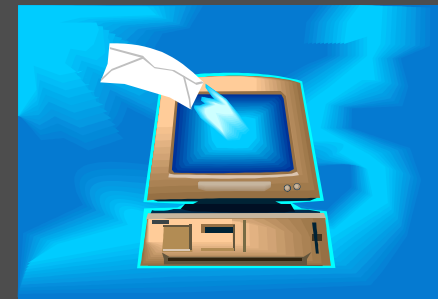
Export of items to foreign countries requires an analysis of whether the item is subject to a license requirement

- License requirement can be triggered by **academic travel** that includes shipping or taking along research equipment that is “subject to the EAR”
- **License requirement is dependent upon the item’s classification under the EAR and its destination country**



Exports

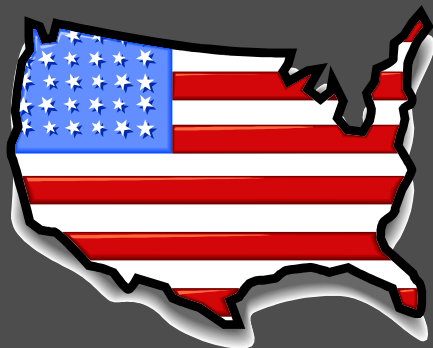
- Remember, *electronic transmission of items subject to the EAR* (such as technical information) outside of the U.S. can trigger a license requirement, *e.g.*, sharing technology information via Email outside of U.S.
- A license requirement is dependent upon the item's classification, the destination country, intended end use, and/or end user
- Most exports **WILL NOT** require a license



Deemed Exports

A type of export under this regulatory scheme that is very significant to higher education.

- Deemed exports occur **INSIDE** of the United States



What is a Deemed Export?

“Releasing or otherwise transferring ‘technology’ or source code (but not object code) to a foreign person in the US”



The transfer or release of information is “deemed” to be an **export to the home country of the foreign national**

A **deemed export** may occur through an oral or written (including electronic) transmission of information, or through visual inspection

- Includes Email, telephone, websites, laboratory tours, foreign national research collaborations occurring in the U.S.
- This is a very challenging export controls compliance issue for higher education



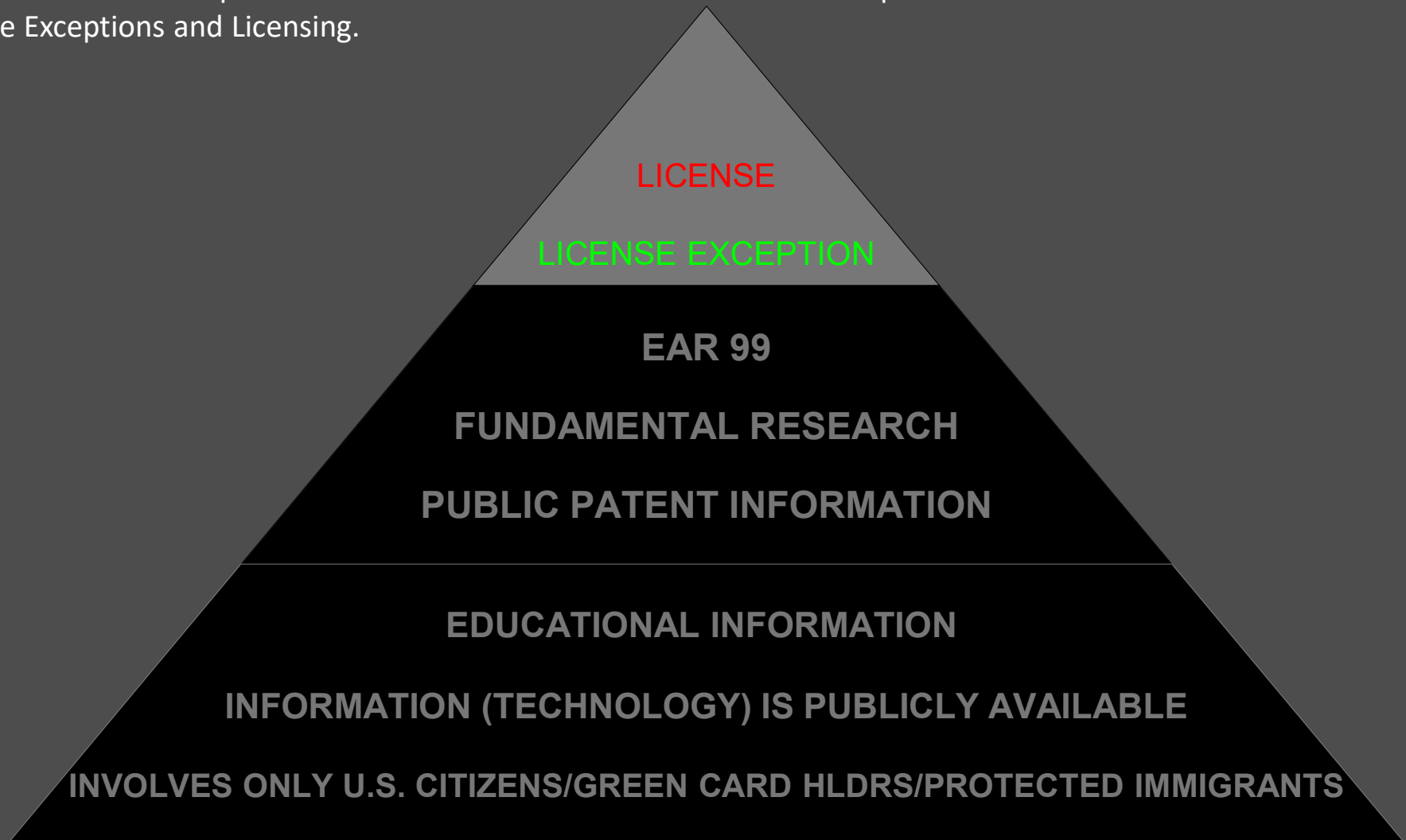
Deemed Export rules DO NOT Apply To:

- U.S. citizens, including naturalized U.S. citizens
- Permanent residents (“Green Card” holders)
- Individuals granted legal status as political refugees or political asylum holders

And, there are certain “**exclusions**” from these regulations that often apply....

Sequence of Analysis for Deemed Exports

1. Begin at bottom of pyramid - determine if the first category applies to your deemed export situation.
2. If not, move up to next category. Keep moving up the pyramid to find a category that applies to your export. If one of the categories on the black portion of the pyramid applies, it is likely that no license is required.
3. Contact Office of Export Control for confirmation that no license is required or for assistance with License Exceptions and Licensing.



Four+ Questions to Consider When Thinking About Export Controls

(1) What is it?

(2) Where is it going?

(3) To whom it is going?

(4) What are they going to do with it?

AND/OR

(5) Is it a “deemed” export to a foreign person in the USA?

OTHER EXCLUSIONS

- **Information that is published (EAR 734.7)**
 - Generally accessible to the interested public
 - Found in periodicals, books, print, electronic and other media forms
 - Found in Libraries
 - Shared at open conferences
- **Educational Information (EAR 734.3(b)(3)(iii))**
 - Released by instruction in catalog courses or through associated teaching laboratories of academic institutions
- **Patent Information (EAR 734.10)**
 - Information available through published patents
- **Fundamental Research (EAR 734.8)**
 - *Very important* **exclusion** for higher education

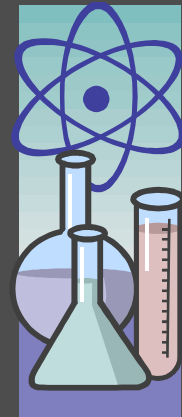


Fundamental Research Exclusion

- **What is fundamental research?**

“research in science, engineering, or mathematics, the results of which ordinarily are **published** and **shared broadly** within the research community, and for which the researchers **have not accepted** restrictions for proprietary or national security reasons”

- A large portion of academic research conducted in the United States is covered by this exclusion



What is NOT Fundamental Research?

- Research that is “proprietary”, *i.e.*, restricts publication and other forms of sharing research results
- Industrial development, design, production, and product utilization
- Such activities usually restrict dissemination of research results for proprietary or national security reasons
 - Another important reason to resist publication restrictions in research agreements; publication restrictions can destroy the Fundamental Research exclusion



Other Common Issues

- Equipment “Use” under EAR
 - The transfer of controlled technology or source code of a controlled item to a non-US person may require a license, NOT the normal operation of the item or piece of equipment
 - Technology that is subject to export controls is “use” technology (i.e. operation, installation, maintenance, repair, refurbishing, AND overhaul) (Compare ITAR)
- Shipping/Material Transfer
- Travel
- Payment to Vendors
- Foreign Visitors

Will an Export License be Required?

- Items “subject to the EAR” may require a license from the BIS/Commerce
- License considerations include:
 - the sensitivity of the information or technology
 - destination country
 - proposed end use and/or end user
- A substantial portion of items that are “subject to the EAR” are classified as “EAR 99” usually will not require a license in order to export except:
 - To OFAC embargoed countries, or
 - For prohibited uses and/or end users

In fact, MOST exports WILL NOT require a license, but the analysis must be conducted and documented

NOTE: Exports (including “deemed exports”) to Cuba, Iran, North Korea, Syria and Sudan will likely require a license if there is no available exemption and they do meet the requirements for an exception

Export Control = Documentation

- Export Control is about DOCUMENTATION
 - For UAMS, most likely scenario: documenting why an export license was NOT necessary for any particular individual and/or project
 - 5-year records retention period
 - US Dept of Commerce may ask to review export records
 - “When voluntary cooperation is not forthcoming, the Office of Export Enforcement and the Office of Antiboycott Compliance are authorized to issue subpoenas requiring persons to appear and testify, or produce books, records, and other writings.” Part 762.7 EAR

Other International Compliance Issues

- Undue Foreign Influence in Research and Disclosing Certain International Activities
 - UAMS Administrative Guide 4.4.26
 - UFI defined: *activities by International actors that are intended to gain unfair advantage in research, activities that violate UAMS' values of research integrity, and/or activities that may be prohibited by law or pose a risk to UAMS or to national security.*
 - *Examples of UFI include:*
 - *Diversion of funding proposal or manuscripts submitted for review;*
 - *Hacking of unpublished research data or methods;*
 - *Illicit acquisition of software or proprietary information;*
 - *Contracts that ask parties not to disclose financial or other support; or*
 - *Incentives, financial or other, that might tempt researchers to violated the ethical foundation of research*

Other International Compliance Issues

- What does UAMS Administrative Guide 4.4.26 say?
 - Disclose and Obtain Prior Approval
 - Transparency with respect to certain activities and relationships involving Foreign actors and activities is required.
 - Mitigation of the risks of UFI is accomplished, in part, through disclosure to UAMS and to Federal funding agencies.
 - UAMS personnel and UAMS affiliated visitors are prohibited from engaging in the activities that constitute violations of Arkansas state or Federal law.
 - The activities described in the definition of UFI are prohibited.
 - Researchers must provide their Federal sponsors with accurate reporting of all sources of research support, financial interest, and affiliations.
 - Foreign activities may be subject to disclosure to UAMS pursuant to the UAMS COI policies.

Other International Compliance Issues

- What does UAMS Administrative Guide 4.4.26 require?
 - Prior approval from the Vice Chancellor of Research and Innovation for “Certain International Activities.”
 - Proper disclosure to the COI Office.
 - Proper disclosure on all grant proposal submissions.
 - Proper disclosure during all reporting phases to Federal agencies.

Other International Compliance Issues

- UAMS Administrative Guide 4.4.26 Procedure
 - Prior approval must be obtained by all UAMS personnel who wish to:
 - Establish a research lab outside the US;
 - Engage in research physically located at a Foreign institution;
 - Enter into any written agreement with a Foreign entity that provides for the exchange of money, items, data, IP (including “know-how”), research collaboration, or any proprietary information;
 - Enter into an agreement with a Foreign Government Talent Recruitment Program;
 - Enter into a written agreement with a foreign entity that does not constitute an agreement with UAMS and is entered into in the employee’s individual capacity.
 - Any such agreement must also be reviewed and approved by the OGC.
 - Any actual or suspected policy violation involving a Foreign entity, regardless of the type of agreement, must be reported to the UAMS Office of General Counsel.

Other International Compliance Issues

Research Security

In response to the National Security Presidential Memorandum (NSPM-33), the Division of Research and Innovation launched the [Research Security](#) website showcasing the UAMS Research Security Network. The National Science Foundation published four [Research Security courses](#) covering the key concepts of understanding federal disclosure requirements and managing and mitigating risk without losing international collaborations. These classes are available for UAMS employees in Workday and accessible via the URLs below.

[NSF Research Security Training Module 1: What is Research Security?](#)

[NSF Research Security Training Module 2: Disclosure](#)

[NSF Research Security Training Module 3: Manage and Mitigate Risk](#)

[NSF Research Security Training Module 4: International Collaboration](#)

CITI Program offers two courses, *Export Control for Researchers* and *Export Control for Research Administrators*, without requiring UAMS faculty and staff to complete the entire Export Control module. The Muse Research Suite has a custom report showing an itemized list of all Senior/Key Personnel documented on Funding Proposals, alongside their timestamped completed courses from the CITI Program and Workday.

Questions? Contact: arevatt@uams.edu

Other International Compliance Issues

- Foreign Gifts & Foreign Contracts
 - Transparency in Foreign Investment Act (Ark. Code Ann § 6-60-1201)
 - Imposes certain requirements on Arkansas Institutions of Higher Education regarding their foreign contracts.
 - Requires reporting of foreign gift/contracts over certain monetary amounts on an ANNUAL basis.
 - Section 117 of the Higher Education Act
 - Requires reporting of foreign gift/contracts over certain monetary amounts on a BIENNIAL basis.

Revisiting the Four (or Five) Questions

- What is it?
- Where is it going?
- To whom it is going?
- What are they going to do with it?

AND/OR

- Is it a “deemed” export to a foreign person in the USA?

Scenario 1

- Sara, a post-doc from South Korea, applies for an H1B visa to work with a US-based professor
- Research project re: improving treatment for *Yersinia Pestis*
- Her research is funded by a grant from a US gov't agency
- As part of the project, she will be employing certain scientific equipment, including a double-door pass through decontamination autoclave, designed for fixed installation in a BSL 4 lab
- Following completion of certain tests and after sterilization, the PI plans to sell (assuming she obtains appropriate permissions from UAMS to dispose of this equipment) the autoclave to a researcher in Ghana
- What, if anything, changes if she is a North Korean citizen?

Discussion

- Country of Citizenship of non-US person
 - North Korea vs South Korea
- Nature of Project
 - Y. Pestis
 - Select agent-Export Controlled Item under ECCN 1C351
- Grant
 - FRE or not?
- Shipment of items/Deemed export (“release” of “technology”)
 - “Use” v. Operation: “Deemed” Export or not for autoclave?
 - If so, is “deemed” export license required?
 - Shipment is export-Is export license required?

Scenario 2

- Jana is an Assistant Professor who is Iranian citizen & a permanent resident of the US (green card holder)
- Obtains funding from a private corporation that is working on novel treatments for antibiotic resistant *Staphylococcus aureus*. The grant requires prior approval by the corporation before the research results can be published.
- Another professor at UAMS would like her to test a new type of fermenter with a capacity of over 20 liters capable of cultivation of micro-organisms and provides her all technical specs & data for that item
- Jana also desires a collaborative research agreement with Northern University in China, a university on the OFAC barred entity list, as well as with Bangkok University in Thailand
- As part of these agreements, she will ship strains of *Staphylococcus aureus* and *Staphylococcus aureus* enterotoxins to both China & Thailand
- What, if anything, changes if she not a permanent resident, but is a H1B visa holder?

Discussion

- Country of Citizenship of Professor
 - “Green Card” Holder=“US Person” for export controls
- “Deemed” Export?
 - Technology for “use”= “operating, installing, maintaining, repairing, overhauling, and refurbishing”
- Grant
 - FRE or not? Publication Restrictions? Propriety info? Foreign national restrictions?
- OFAC Sanctions
 - Barred entity-need OFAC license
- Shipment
 - Is export license required? Staph aureus “EAR 99”
 - But Staph enterotoxin controlled under under ECCN 1C351

Questions?

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