

Export Compliance Program Policies and Procedures Manual

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OVERVIEW OF EXPORT CONTROLS

I. INTRODUCTION

The export of certain items, including but not limited to technology, software and hardware, is regulated and controlled by federal law for reasons of national security, foreign policy, prevention of the spread of weapons of mass destruction and for competitive trade reasons. These regulations affect not only research conducted on campus, but also travel and shipping items outside the U.S. The export laws and regulations aim at achieving various objectives, such as preventing the proliferation of weapons of mass destruction, advancing the U.S. economic interests at home and abroad, aiding regional stability, implementing anti-terrorism and crime controls, and protecting human rights.

These controls generally restrict the export of items and services based on the type of item and the destination of the export. In both the defense and high-technology sectors, the U.S. Government tightly regulates the export not only of equipment and components, but also of technology. Technology includes technical data, such as blueprints and manuals, as well as design services (including the transfer of “knowledge”) and training. U.S. laws assert jurisdiction over U.S.-origin equipment and technology even after it is exported (i.e., restricting the re-export or re-transfer to third parties). In addition to general export licensing, the United States maintains economic embargoes against a number of countries whose governments consistently violate human rights or act in support of global terrorism. Such embargoes bar most transactions by U.S. persons with these countries.

Three principal agencies regulate exports from the United States: the U.S. Department of State Directorate of Defense Trade Controls (“DDTC”) administers export control of defense exports; the U.S. Department of Commerce Bureau of Industry and Security (“BIS”) administers export control of so-called “dual-use” technology exports; and the U.S. Department of the Treasury Office of Foreign Assets Control (“OFAC”) administers exports to embargoed countries and designated entities.

II. EXPORT CONTROLS AND UNIVERSITY RESEARCH

U.S. national security and economic interests are heavily dependent on technological innovation and advantage. Many of the nation's leading-edge technologies, including defense-related technologies, are being discovered by students and scholars in U.S. university research and university-affiliated laboratories. U.S. policymakers recognize that foreign students and researchers have made substantial contributions to U.S. research efforts, but the potential transfer of controlled defense or dual-use technologies to their home countries could have significant consequences for U.S. national interests. The U.S. export control agencies place the onus on universities to understand and comply with the regulations. *See* GAO Report “Export Controls: Agencies Should Assess Vulnerabilities and Improve Guidance for Protecting Export-Controlled Information at Universities,” December 2006, available at <http://www.gao.gov/new.items/d0770.pdf>.

Export controls present unique challenges to universities and colleges because they require balancing concerns about national security and U.S. economic vitality with traditional concepts of unrestricted academic freedom and publication and dissemination of research findings and results. University researchers and administrators need to be aware that these laws may apply to research, whether sponsored or not and the procurement of certain items. However, it also is important to understand the extent to which the regulations do not affect normal university activities.

III. EXPORT OF DEFENSE ARTICLES AND SERVICES – INTERNATIONAL TRAFFIC IN ARMS REGULATIONS

Under the International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 120-130, DDTC administers the export and re-export of defense articles, defense services and related technical data from the United States to any foreign destination, or to any foreign person, whether located in the United States or abroad. Section 121.1 of the ITAR contains the *United States Munitions List* (“USML”) and includes the commodities and related technical data and defense services controlled for export purposes. The ITAR controls not only end items, such as radar and communications systems, military encryption and associated equipment, but also the parts and components that are incorporated into the end item. Certain non-military items, such as satellites, chemical toxins and biological agents, are also controlled.

A. ITEMS CONTROLLED UNDER THE ITAR

The ITAR uses three different terms to designate export controlled items – defense articles, technical data, and defense services. With rare exceptions, if an item contains any components that are controlled under the ITAR, the entire item is controlled under the ITAR. For example, a commercial radio that would normally not be controlled under the ITAR becomes a controlled defense article if it contains an ITAR-controlled microchip.

- **Defense Article** means any item or technical data that is specifically designed, developed, configured, adapted, or modified for a military, missile, satellite, or other controlled use listed on the USML. 22 C.F.R. § 120.6. Defense article also includes models, mock-ups, or other items that reveal technical data relating to items designated in the USML.
- **Technical Data** means any information for the design, development, assembly, production, operation, repair, testing, maintenance, or modification of a defense article. Technical data may include drawings or assembly instructions, operations and maintenance manuals, and email or telephone exchanges where such information is discussed. However, technical data does not include general scientific, mathematical, or engineering principles commonly taught in schools, information present in the public domain, general system descriptions, or basic marketing information on function or purpose. 22 C.F.R. § 120.10. ITAR uses the term "blueprints" to cover drawings and assembly instructions.
- **Defense Service** means providing assistance, including training, to a foreign person in the United States or abroad in the design, manufacture, repair, or operation of a defense article, as well as providing technical data to foreign persons. Defense services also include informal collaboration, conversations, or interchanges concerning technical data. 22 C.F.R. § 120.9.

B. **UPDATED** THE UNITED STATES MUNITIONS LIST (USML) CATEGORIES

The USML designates particular categories and types of equipment as defense articles and associated technical data and defense services. *See* 22 C.F.R. § 121. The USML divides defense items into 21 categories, listed below.

I	Firearms, Close Assault Weapons and Combat Shotguns
II	Guns and Armament
III	Ammunition/Ordnance
IV	Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines
V	Explosives and Energetic Materials, Propellants, Incendiary Agents, and their Constituents
VI	Surface Vessels of War and Special Naval Equipment
VII	Ground Vehicles

VIII	Aircraft and Related Articles
IX	Military Training Equipment and Training
X	Personal Protective Equipment
XI	Military Electronics
XII	Fire Control, Range Finder, Optical and Guidance and Control Equipment
XIII	Materials and Miscellaneous Articles
XIV	Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment
XV	Spacecraft and Related Articles
XVI	Nuclear Weapons and Related Articles
XVII	Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated
XVIII	Directed Energy Weapons
XIX	Gas Turbine Engines and Associated Equipment
XX	Submersible Vessels and Related Articles
XXI	Articles, Technical Data, and Defense Services Not Otherwise Enumerated

C. CLASSIFICATION

While DDTC has jurisdiction over deciding whether an item is ITAR- or EAR-controlled, it encourages exporters to self-classify the item. If doubt exists as to whether an article or service is covered by the USML, upon written request in the form of a Commodity Jurisdiction (“CJ”) request, DDTC will provide advice as to whether a particular article is a defense article subject to the ITAR, or a dual-use item subject to the EAR. Determinations are based on the origin of the technology (i.e., as a civil or military article), and whether it is predominantly used in civil or military applications. University employees should contact the Office of Research and Economic Development and work with the Research Compliance Attorney to classify any items. If you need to obtain a CJ determination, please contact the Office of Research and Economic Development for further information.

D. DEFINITION OF EXPORT UNDER THE ITAR

The ITAR defines the term “export” broadly. The term applies not only to exports of tangible items from the U.S., but also to transfers of intangibles, such as technology or information. The ITAR defines an “export” as the passing of information or technology to foreign nationals even in the United States. 22 C.F.R. § 120.17. The following are examples of exports:

1. Exports of articles from the U.S. territory

- Shipping or taking a defense article out of the United States.
- Transferring title or ownership of a defense article to a foreign person, in or outside the United States.

2. Extra-territorial transfers

- The re-export or re-transfer of defense articles from one foreign person to another, not previously authorized (i.e., transferring an article that has been exported to a foreign country from that country to a third country).
- Transferring the registration, control, or ownership to a foreign person of any aircraft, vessel, or satellite covered by the USML, whether the transfer occurs in the United States or abroad.

3. Export of intangibles

- Disclosing technical data to a foreign person, whether in the United States or abroad, through oral, visual, or other means.

- Performing a defense service for a foreign person, whether in the United States or abroad.

E. AUTHORIZATION TO EXPORT

Generally, any U.S. person or entity that manufactures, brokers, or exports defense articles or services must be registered with DDTC. 22 C.F.R. § 122.1. Registration is required prior to applying for a license or taking advantage of a license exemption. 22 C.F.R. §§ 120.1(c) and (d); 122.1(c). Once the registration is complete, an exporter may apply for an export authorization by submitting a relatively simple license application for the export of defense articles or technical data, or a complex license application, usually in the form of a Technical Assistance Agreement (“TAA”), for a complex transaction that will require the U.S. entity to provide defense services. Most types of applications also contain additional certifications/transmittal letters, supporting documentation, and in some cases, non-transfer and use certification from the licensee and/or the foreign government of the licensee.

University researchers are usually engaged only in the creation of unclassified technical data or in the fabrication of articles for experimental or scientific purpose, including research and development. Therefore, the University is not usually required to register with DDTC. *See* 22 C.F.R. §§ 122.1(b)(3) and (b)(4).

However, if the University desires to involve foreign nationals in ITAR-controlled research or take ITAR-controlled equipment out of the U.S., it must register with the DDTC to apply for a license or take advantage of certain license exemptions. The University is registered with the DDTC and a copy of the registration is on file in the Office of Research and Economic Development. License exemptions specific to universities, as well as licensing procedures, are described in detail in the *Key Issues in University Research* section, below.

F. EMBARGOED COUNTRIES UNDER DDTC REGULATIONS

ITAR Prohibitions. In general, no ITAR exports may be made either under license or license exemption to countries proscribed in 22 C.F.R. § 126.1, such as Cuba, Iran, North Korea, Sudan, and Syria. Additional restrictions apply to other countries; a complete list of U.S. arms embargoes is available online at: http://pmddtc.state.gov/embargoed_countries/index.html.

IV. EXPORT OF COMMERCIAL DUAL-USE GOODS AND TECHNOLOGY – EXPORT ADMINISTRATION REGULATIONS

The Department of Commerce, through the Bureau of Industry and Security (“BIS”), regulates the export of commercial products and technology under the Export Administration Regulations, 15 C.F.R. §§ 730-774 (“EAR”). While there are some parallels to the ITAR, there also are some major differences in how the regulations and the relevant agencies function.

They are similar in that both agencies focus on “technology transfer” and have been increasingly focused on enforcement. They differ in that the EAR covers a wider range of products and technology, the product classification process is highly technical, and most importantly, the need for a license depends not only on the type of product but on its final destination and end user.

A. ITEMS CONTROLLED UNDER THE EAR

Generally, all items of U.S.-origin, or items physically located in the U. S., are subject to the EAR. Foreign manufactured goods are generally exempt from the EAR requirements if they contain less than a *de minimis* level of

U.S. content by value. Such *de minimis* levels are set in the regulations relative to the ultimate destination of the export or re-export.

The EAR requires a license for the exportation of a wide range of items with potential “dual” commercial and military use, or otherwise of strategic value to the United States (but not made to military specifications). However, only items listed on the [Commerce Control List](#) (“CCL”) require a license prior to exportation. Items not listed on the CCL are designated as EAR99 items and generally can be exported without a license, unless the export is to an embargoed country, or a foreign national from that country. 15 C.F.R. § 734. The following summarizes the types of items controlled under the EAR:

- **Commodities.** Finished or unfinished goods ranging from high-end microprocessors to airplanes to ball bearings.
- **Manufacturing Equipment.** Equipment specifically for manufacturing or testing controlled commodities, as well as certain generic machines, such as computer numerically controlled (“CNC”) manufacturing and test equipment.
- **Materials.** Certain alloys and chemical compounds.
- **Software.** Software specifically associated with particular commodities or manufacturing equipment, as well as any software containing encryption and the applicable source code.
- **Technology.** Technology, as defined in the EAR, includes both technical data, and services. Unlike the ITAR, there is generally no distinction between the two. However, the EAR may apply different standards to technology for “use” of a product than for the technology for the “design” or “manufacture” of the product.

B. UPDATED THE COMMERCE CONTROL LIST (CCL) CATEGORIES

The CCL provides a list of very specific items that are controlled. The CCL is similar to the "dual-use" list adopted by other countries under the Wassenaar Arrangement, although the CCL has additional items. The CCL is divided into the nine categories below. The CCL is available online at http://www.access.gpo.gov/bis/ear/ear_data.html.

CATEGORIES

0. Nuclear Materials Facilities and Equipment [and Miscellaneous Items]
1. Materials Chemicals Microorganisms and Toxins
2. Materials Processing
3. Electronics Design Development and Production
4. Computers
5. pt-1 Telecommunications
5. pt-2 Information Security (encryption)
6. Sensors and Lasers
7. Navigation and Avionics
8. Marine
9. Aerospace and Propulsion

C. CLASSIFICATION

As discussed in *Overview*, Section III.C, DDTC has jurisdiction to decide whether an item is ITAR- or EAR-controlled. DDTC encourages exporters to self-classify the product. If doubt exists, a CJ request may be submitted to DDTC to determine whether an item is ITAR- or EAR- controlled.

Once it is determined that an item is EAR-controlled, the exporter must determine its Export Control Classification Number (“ECCN”). BIS has two assistance procedures where the proper ECCN classification or licensing requirements are uncertain. *See* 15 C.F.R. § 748.3. To determine EAR’s applicability and the appropriate ECCN for a particular item, a party can submit a “Classification Request” to BIS. To determine whether a license is required or would be granted for a particular transaction, a party can request BIS provide a non-binding “advisory opinion.” While BIS provides assistance with determining the specific ECCN of a dual-use item listed on the CCL, if doubt exists as to whether an item is ITAR- or EAR-controlled, BIS will stay its classification proceeding and forward the issue to DDTC for jurisdiction determination.

D. DEFINITION OF EXPORT AND RE-EXPORT UNDER THE EAR

Similar to ITAR, EAR also defines the term “export” broadly. The term export is broken down into the following definitions:

- **Export.** Export is defined as the actual shipment or transmission of items subject to the EAR out of the United States. The EAR is similar to the ITAR in that it covers intangible exports of “technology,” including source code, as well as physical exports of items.
- **Deemed Export.** Under the EAR the release of technology to a foreign national in the United States is “deemed” to be an export, even though the release took place within the United States. Deemed exports may occur through such means as a demonstration, oral briefing, or plant visit, as well as the electronic transmission of non-public data that will be received abroad.
- **Re-export.** Similarly to the ITAR, the EAR attempts to impose restrictions on the re-export of U.S. goods, i.e., the shipment or transfer to a third country of goods or technology originally exported from the United States.
- **Deemed Re-export.** Finally, the EAR defines “deemed” re-exports as the release of technology by a foreign national who has been licensed to receive it to the national of another foreign country who has not been licensed to receive the technology. For example, ECCN 5E001 technology may be exported to a university in Ireland under the license exception for technology and software, but might require a deemed re-export license authorization before being released to a Russian foreign national student or employee of that university in Ireland.

E. UPDATED AUTHORIZATION TO EXPORT

Once it is determined that a license is required, an exporter can apply for export authorization from BIS. Unlike the ITAR, there is no requirement for formal registration prior to applying for export authorization. Additionally, the EAR has no equivalent to the TAA used in ITAR exports.

The EAR contains a number of exceptions. Determining whether a particular exception applies requires review of the specific application as detailed in 15 C.F.R. § 740, as well as review of the notes on applicable license exceptions following the ECCN entry on the CCL.

Each category of the CCL contains ECCNs for specific items divided into five product groups, A through E:

- "A" refers to Systems, Equipment and Components
- "B" refers to Test, Inspection and Production Equipment
- "C" refers to Materials
- "D" refers to Software
- "E" refers to Technology.

For example, most civil computers would be classified under ECCN 4A994. The "4" refers to Category 4, *Computers*, and the "A" refers to the subcategory, i.e., equipment. Generally, if the last three digits begin with a "zero" or "one" (e.g., 4A001), the product is subject to stringent controls, whereas if the last three digits are a "9XX" (e.g., 4A994), then generally there are fewer restrictions on export.

Once an item has been classified under a particular ECCN, a person can determine whether a license is required for export to a particular country. The starting place is the information following the ECCN heading. The "List of Items Controlled" describes the specific items covered or not covered by the ECCN.

(1) *Determine Reason for Controls.* The "License Requirements" section provides notations as to the reasons for control. These reasons include:

AT	Anti-Terrorism
CB	Chemical and Biological Weapons
CC	Crime Control
CW	Chemical Weapons Convention
EI	Encryption Items
FC	Firearms Convention
MT	Missile Technology
NS	National Security
NP	Nuclear Nonproliferation
RS	Regional Security
SS	Short Supply
UN	United Nations Embargo
SI	Significant Items
SL	Surreptitious Listening

The most commonly used controls are Anti-Terrorism and National Security, while other controls only apply to limited types of articles. For example, ECCN 4A994 lists "License Requirements: Reason for Control: AT" (i.e., anti-terrorism) and the following:

<u>Control(s)</u>	Country Chart
AT applies to entire entry	AT Column 1

(2) *Apply Country Chart.* Once an item is identified as meeting the criteria for a particular ECCN, the user can refer to the chart found at 15 C.F.R. § 738, Supp. 1. If the particular control applies to that country, a license is required. For example, Syria has an "X" under AT Column 1; therefore, a license would be required unless an exception applied.

(3) *Exceptions.* The EAR contains a number of exceptions. Determining whether a particular exception applies requires review of the specific application as detailed in 15 C.F.R. § 740, as well as review of the notes on applicable license exceptions following the ECCN entry. These exceptions include:

LVS	Items of limited value (value is set under each ECCN).
GBS	Items controlled for national security reasons to Group B countries.
CIV	Items controlled for national security reasons to particular countries where end-user is civilian.
TSR	Certain technology and software to certain countries.

APP	Computer exports to certain countries.
MI	Encryption exemption for key management.
TMP	Certain temporary exports, re-exports, or imports, including items moving through the U.S. in transit.
RPL	Certain repair and replacement parts for items already exported.
GFT	Certain gifts and humanitarian donations.
GOV	Exports to certain government entities.
TSU	Certain mass-market technology and software.
BAG	Baggage exception.
AVS	Aircraft and vessels stopping in the U.S. and most exports of spare parts associated with aircraft and vessels.
APR	Allows re-export from certain countries.
ENC	Certain encryption devices and software.
AGR	Agricultural commodities.
CCD	Authorization of certain consumer communication devices to Cuba.

License exceptions specific to universities, as well as licensing procedures, are described in detail in *Key Issues in University Research* below.

V. OFAC SANCTIONS PROGRAM AND BARRED ENTITIES LISTS

A. SANCTIONED COUNTRIES

U.S. economic sanctions broadly prohibit most transactions between a U.S. person and persons or entities in an embargoed country, including Cuba, Iran, North Korea, Syria, and Sudan. This prohibition includes importation and exportation of goods and services, whether direct or indirect, as well as "facilitation" by a U.S. person of transactions between foreign parties and a sanctioned country. For example, sending a check to an individual in Iran could require an OFAC license or be prohibited. More limited sanctions may block particular transactions or require licenses under certain circumstances for exports to a number of countries, including but not limited to Burma, Liberia, and Zimbabwe.

See <http://www.treas.gov/offices/enforcement/ofac/> for a full list of U.S. sanction programs. Because this list is not complete and subject to change, please visit <http://www.treas.gov/offices/enforcement/ofac/>.

While most sanctions are administered by OFAC, BIS has jurisdiction over certain exports prohibitions (via "embargo" regulations), as is the case with exports to Syria. See 15 C.F.R. § 746. In other words, a license from BIS would be required to ship most items to Syria and other OFAC sanctioned countries or could be prohibited. Economic sanctions and embargo programs are country-specific and very detailed in the specific prohibitions.

B. TERRORIST AND OTHER BARRED ENTITY LISTS

Various U.S. Government agencies maintain a number of lists of individuals or entities barred or otherwise restricted from entering into certain types of transactions with U.S. persons. Particularly since 9/11, U.S. companies are beginning to become more assertive in attempting to place contractual terms with foreign companies related to these lists. Such lists must be screened to ensure that the university does not engage in a transaction with a barred entity.

- **Specially Designated Nationals and Blocked Persons List ("SDN List").** Maintained by OFAC, this is a list of barred terrorists, narcotics traffickers, and persons and entities associated with embargoed regimes.

Generally, all transactions with such persons are barred. The *SDN List* is available at:

<http://www.treas.gov/offices/enforcement/ofac/sdn/index.shtml>.

- **Persons Named in General Orders (15 C.F.R. § 736, Supp. No. 1).** General Order No. 2 contains the provisions of the U.S. embargo on Syria; General Order No. 3 prohibits the re-exports to Mayrow General Trading and related parties. A link to the General Orders is available at: <http://www.access.gpo.gov/bis/ear/pdf/736.pdf>.
- **List of Debarred Parties.** The Department of State bars certain persons and entities from engaging in the export or re-export of items subject to the USML (available at: <http://www.pmdtc.state.gov/compliance/debar.html>). Note that the number of countries subject to a U.S. arms embargo is much broader than those subject to OFAC embargoes. *See* http://www.pmdtc.state.gov/embargoed_countries/index.html.
- **Denied Persons List.** These are individuals and entities that have had their export privileges revoked or suspended by BIS. The *Denied Persons List* is available at: <http://www.bis.doc.gov/dpl/Default.shtm>.
- **Entity List.** These are entities identified as being involved in proliferation of missile technology, weapons of mass destruction, and related technologies. The *Entity List* is available at: <http://www.bis.doc.gov/Entities/Default.htm>.
- **Unverified List.** These are foreign persons and entities for which BIS has been unable to verify the nature of their operations. While transactions with these entities are not barred, special due diligence is required. The *Unverified List* is available at: http://www.bis.doc.gov/Enforcement/UnverifiedList/unverified_parties.html.
- **Excluded Parties List.** These are entities that have been barred from contracting with U.S. Government agencies. In general, companies cannot contract with such parties in fulfilling a U.S. Government contract, either as prime or sub-contractor. The *EPLS* is available at: <http://www.epls.gov/>.
- **Nonproliferation Sanctions** maintained by the Department of State. These lists are available at: <http://www.state.gov/t/isn/c15231.htm>.

VI. ANTI-BOYCOTT RESTRICTIONS

The anti-boycott rules were implemented to prevent U.S. business from participating directly or indirectly in the Arab League's boycott of Israel. The laws prevent U.S. persons from doing business under terms that would restrict that person's ability to do business with other countries under a boycott not recognized by the U.S. The Arab League's boycott has lessened over the years, but still remains in effect in some countries. These restrictions are enforced by BIS. The applicable regulations are at 15 C.F.R. § 760.

Anti-boycott restrictions are most likely to appear in dealings with entities in certain Arab League countries. As of this writing, Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, the United Arab Emirates, and Yemen continue to impose boycott restrictions on Israel and companies that do business with Israel. *See* Department of Treasury List of Countries Requiring Cooperation with an International Boycott, 78 Fed. Reg. 32011 (May 28, 2013).

Note that there are strict reporting requirements even where the U.S. person refuses to participate in a requested boycott action.

A. JURISDICTION

These laws generally apply to any person or entity in the U.S., and to U.S. persons or entities abroad. As examples, the laws apply to:

- A foreign company's affiliate or permanent office in the U.S.

- A U.S. company's foreign affiliate's transaction with a third-party if that affiliate is controlled by the U.S. company and involves shipment of goods to or from the U.S.

B. RED FLAGS

The Commerce Department has set forth the following red-flags to look for as signs of anti-boycott restrictions:

- Agreements to refuse or actual refusals to do business with Israel or with blacklisted companies.
- Agreements to discriminate or actual discrimination against other persons based on race, religion, sex, national origin, or nationality.
- Furnishing information about business relationships with Israel or with blacklisted companies.
- Furnishing information about the race, religion, sex, or national origin of another person.
- Paying or otherwise implementing letters of credit that include requirements to take boycott-related actions prohibited by the anti-boycott regulations.

These restrictions may appear on pre-printed portions of agreements.

C. EXCEPTION

A major exception to the anti-boycott rules is the provision that permits compliance with the import requirements of a boycotting country. This exception permits firms to comply with import restrictions that prohibit imports from Israel or Israeli firms. The exception does not permit compliance with a boycott of blacklisted firms outside of Israel, nor does it allow for the issuance of a negative certificate-of-origin of any type. Other exceptions allow firms to provide country-of-origin information on the shipping documents, or information required for immigration or employment purposes. The exceptions can be found at 15 C.F.R. § 760.3.

D. REPORTING

Any U.S. person or entity who is asked to enter into an agreement or provide information that would violate anti-boycott laws must report this quarterly to BIS using a form BIS-621-P for single transactions or BIS 6051P for multiple transactions in accordance with 15 C.F.R. § 760.5. Information regarding the reporting of suspected anti-boycott activities can be found at <http://www.bis.doc.gov/ComplianceAndEnforcement/index.htm>. In addition, the U.S. Internal Revenue Service (IRS) requires U.S. taxpayers to report operations in or relating to boycotting countries and nationals and request to cooperate with boycott activities. *See* IRS Form 5713, located online at: <http://www.irs.gov/pub/irs-pdf/f5713.pdf>.

These reporting requirements apply even where the U.S. person or entity refuses to participate. Crossing out the boycott language in a proposed contract does not end the matter. The duty to report remains even where the requesting foreign entity accepts the redaction of the boycott language. For more information on anti-boycott rules see: <http://www.bis.doc.gov/complianceandenforcement/antiboycottcompliance.htm>. The Office of Boycott Compliance has also set up an advice line for questions about the anti-boycott rules, which can be reached at (202) 482-2381.

VII. PENALTIES FOR EXPORT VIOLATIONS

A. GENERAL OVERVIEW

Generally, any person or entity that brokers, exports, or attempts to export a controlled item without prior authorization, or in violation of the terms of a license, is subject to penalties. Violators may incur both criminal and civil penalties. Although there is a maximum amount for a civil or criminal penalty, the actual penalty imposed is often multiplied. For instance, each shipment might be considered a separate violation, and BIS will often find multiple violations of related restrictions in connection to each shipment (e.g., export without a license, false representation, actions with knowledge of a violation, etc.). A series of violations occurring over a period of time may result in hundreds of thousands or even millions of dollars of penalties.

B. DEFENSE EXPORTS

The Arms Export Controls Act and the ITAR provide that willful violations of the defense controls can be fined up to \$1,000,000 per violation, or twenty years of imprisonment, or both. 22 U.S.C. § 2778(c) and 22 C.F.R. § 127.3. In addition, the Secretary of State may assess civil penalties, which may not exceed \$500,000 per violation. 22 U.S.C. § 2778(e) and 22 C.F.R. § 127.10. The civil penalties may be imposed either in addition to, or in lieu of, any other liability or penalty. The articles exported or imported in violation, and any vessel, vehicle or aircraft involved in such attempt is subject to seizure, forfeiture and disposition. 22 C.F.R. § 127.6. Finally, the Assistant Secretary for Political-Military Affairs may order debarment of the violator (i.e., prohibit the violator from participating in export of defense items). 22 U.S.C. § 2778(g) and 22 C.F.R. § 127.7.

While imposing criminal liability is fairly rare, many major U.S. companies have been assessed significant civil penalties in the millions of dollars. For example, an investigation into the export practices of ITT Corporation, the leading manufacturer of military night vision equipment for the U.S. Armed Forces, resulted in the company's Night Vision Division being debarred from export of defense items for three years. In addition, pursuant to a plea agreement ITT agreed to pay a total of \$100 million for its violations of defense export laws, one of the largest penalties ever paid in a criminal or civil case. For a detailed account of the ITT Corporation investigation, *see* the U.S. Department of Justice press release "ITT Corporation to Pay \$100 Million Penalty and Plead Guilty to Illegally Exporting Secret Military Data Overseas" (March 27, 2007), available at: http://www.usdoj.gov/opa/pr/2007/March/07_nsd_192.html.

C. DUAL-USE ITEMS EXPORTS AND ANTI-BOYCOTT VIOLATIONS

Similar to the ITAR, violations of the EAR are subject to both criminal and administrative penalties. Fines for export violations, including anti-boycott violations, can reach up to \$1,000,000 per violation in criminal cases, and \$250,000 per violation in most administrative cases. In addition, criminal violators may be sentenced to prison time up to twenty years, and administrative penalties may include the denial of export privileges. A denial order would bar a U.S. company from exporting for a period of years or bar a foreign entity from buying U.S. origin products for such period. 15 C.F.R. § 764.3.

In most instances, BIS reaches negotiated settlements in its administrative cases, as a result of voluntary self-disclosures of violations by companies and individuals. Voluntary disclosures constitute a major mitigating factor in determining penalties, reducing the amount of penalty by up to 50 percent, provided certain conditions are met, such as the implementation of a comprehensive compliance program. *See* "Don't Let This Happen to You! Actual Investigations of Export Control and Anti-boycott Violations" at http://www.bis.doc.gov/index.php/forms-documents/doc_view/535-don-t-let-this-happen-to-you-2010.

D. EXPORTS TO A SANCTIONED COUNTRY

Although potential penalties for violations of U.S. export laws vary depending on the country and product involved, an exporter may be subject to a maximum civil penalty of \$250,000 per violation under OFAC regulations, with the exception of exports to Cuba. Violations of the Cuban sanctions are subject to a maximum penalty of \$65,000 per violation. *See* United States Department of the Treasury, *Office of Foreign Assets Controls (OFAC) FAQs*, http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques_index.aspx (last updated November 16, 2007).

The U.S. Government can also seek to criminally prosecute conduct where violations are willful and knowing. Such violations may reach \$1,000,000 per violation and imprisonment of up to 30 years. In addition, where there is egregious conduct by the offender, BIS (who assists OFAC in enforcing sanctions) may suspend the export privileges of a company. *See* United States Department of the Treasury, *Office of Foreign Assets Controls (OFAC) FAQs*, http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques_index.aspx (last updated February 24, 2014).

In assessing penalties, DDTC, BIS, and OFAC will consider a number of factors, both aggravating and mitigating. Mitigating factors include (1) whether the disclosure was made voluntarily; (2) whether this was a first offense; (3) whether the company had compliance procedures; (4) whether steps were taken to improve compliance after discovery of violations; and (5) whether the incident was due to inadvertence, mistake of fact, or good faith misapplication of the laws. Aggravating factors include: (1) willful or intentional violations; (2) failure to take remedial action after discovery; (3) lack of a compliance program; and (4) deliberate efforts to hide or conceal a violation.

KEY ISSUES FOR UNIVERSITIES

I. DEEMED EXPORTS

While exports are commonly associated with the shipment of a tangible item across the U.S. border, export controls have a much broader application. One of the most difficult issues with respect to export controls is the fact that an export is defined to include the transfer of controlled *information or services* to foreign nationals even when the transfer takes place within the territory of the U. S. Though taking place inside the U.S., the transfer is “deemed” to be an export (as if exporting to the country of the foreign national). The term “deemed export” is unique to the EAR.

Both the ITAR and the EAR provide for deemed exports, even though in the case of defense exports the regulations generally speak of exports. While the ITAR distinguishes between the transfer of *technical data* and *defense services*, the EAR generally provides for the release of *technology*. Such transfer or release may be made through oral, visual, or other means. An export may occur through:

1. a demonstration;
2. oral briefing;
3. telephone call or message;
4. laboratory or plant visit;
5. presenting at conferences and meetings;
6. faxes or letters;
7. hand-carried documents, hardware or drawings;
8. design reviews;
9. the exchange of electronic communication;
10. posting non-public data on the Internet or the Intranet;
11. carrying a laptop, flash drive, smart phone, etc. with controlled technical information or software to an overseas destination; and/or
12. collaborating with other universities/research centers through research efforts.

The issue of deemed exports is particularly relevant to university research because of the activities that normally take place at a university. While a university may be involved in the shipment abroad of equipment or machinery to participate in a conference, a joint project, or equipment loan programs, most often faculty and students are engaged in teaching and research. Whenever teaching or research are related to controlled equipment or technology, foreign students' or researchers' involvement may trigger export control compliance issues.

II. U.S. AND FOREIGN PERSONS

For purposes of defense and dual-use exports, a *U.S. person* is defined as a U.S. entity or a U.S. citizen, a person lawfully admitted for permanent residence in the United States (i.e., green card holder), or a person who is a protected individual under the Immigration and Naturalization Act (8 U.S.C. § 1324b(a)(3) (i.e., certain classes of asylees). 22 C.F.R. § 120.15; 15 C.F.R § 734.2(b). A U.S. person may be engaged in activities that are export controlled, unless there are some additional restrictions that limit participation to U.S. citizens.

The regulations define foreign person as anyone who is not a U.S. person. BIS looks at the person's most recent citizenship or permanent residence. DDTC looks at the person's country of origin (i.e., country of birth) and all current citizenships. Note that the definitions for a U.S. and a foreign person differ for purposes of the OFAC sanctions. For a discussion, see *Overview of Export Controls*, Section V, above.

III. INFORMATION NOT SUBJECT TO OR EXCLUDED FROM EXPORT CONTROLS

It is important to note that most of the activities that the University of Wyoming engages in are fundamental research. As such, most activities are not subject to export controls, or even if controlled, do not require licensing. Both the ITAR and the EAR have special provisions relating to **information** that is not subject to export controls, including limited exclusions regarding the release of information in the context of university research and educational activities. Additionally, the embargo regulations have exceptions for certain information and informational materials.

A. PUBLICLY AVAILABLE

The ITAR and the EAR do not control information which is published and generally accessible or available to the public. Note that even though the two regimes have similar scope, the ITAR and the EAR vary in the specific information that qualifies as publicly available.

ITAR provision: The ITAR describes such information as information in the *public domain*. 22 C.F.R. §§ 120.10(a)(5) and 120.11. The information in the public domain may be obtained through:

- sales at newsstands and bookstores;
- subscription or purchase without restriction to any individual;
- second class mailing privileges granted by the U.S. Government;
- at libraries open to the public;
- patents available at any patent office;
- unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, **in the United States**;
- public release in any form after approval of the cognizant U.S. Government agency; or
- *fundamental research* in the U.S. (*See Key Issues in University Research, Section III.C. Fundamental Research, below.*)

EAR provision: The EAR does not control publicly available technology if it is already published or will be published. 15 C.F.R. §§ 734.3(b)(3) and 734.7. Information is published when it becomes generally accessible to the interested public in any form, including:

- publication in periodicals, books, print, etc., available for general distribution **free or at cost**;
- readily available at libraries open to the public or university libraries;
- patents and open patents applications available at any patent office; or
- release at an open conference, meeting, seminar, trade show, or other gathering open to the public.

The EAR requires that the publication is available for distribution free or at price not to exceed the cost of reproduction and distribution; however, the ITAR does not have such a requirement.

Note also that the EAR does not specify where an open conference, meeting, seminar or trade show must take place, and thus allows, for example, participation at a foreign conference so long as the conference is open to all technically qualified members of the public, and attendees are permitted to take notes. Unlike the EAR, the ITAR limits participation in conferences and similar events to those that are taking place in the United States.

B. EDUCATIONAL INFORMATION

Both the ITAR and the EAR address the issue of general educational information that is typically taught in schools and universities. Such information, even if it relates to items included on the USML or the CCL, does not fall under the application of export controls.

- **ITAR provision:** The ITAR specifically provides that the definition of "technical data" does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities. 22 C.F.R. § 120.10(a)(5).
- **EAR provision:** The EAR provides that publicly available "educational information" is not subject to the EAR, if it is released by instruction in catalogue courses and associated teaching laboratories of academic institutions. 15 C.F.R. §§ 734.3(b)(3) and 734.9.

Therefore, a university graduate course on design and manufacture of very high-speed integrated circuitry will not be subject to export controls, even though the technology is on the CCL. The key factor is the fact that the information is provided by instruction in a catalogue course. Foreign students from any country may attend this course because the information is not controlled.

The information will not be controlled even if the course contains recent and unpublished results from laboratory research, so long as the university did not accept separate obligations with respect to publication or dissemination (e.g., a publication restriction under a federal funding). 15 C.F.R. § 734, Supp. No. 1, Questions C(1) to C(6).

C. FUNDAMENTAL RESEARCH

During the Reagan administration, several universities worked with the Federal government to establish national policy for controlling the flow of information produced in federally funded fundamental research at colleges, universities and laboratories resulting in the issuance of the National Security Decision Directive 189 ("NSDD"), National Policy on the Transfer of Scientific, Technical and Engineering Information on September 21, 1985. In a letter dated November 1, 2001, President George W. Bush's administration reaffirmed NSDD 189. NSDD 189 provided the following definition of *fundamental research* that has guided universities in making licensing decisions relative to fundamental research exclusions provided under both the EAR and ITAR.

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.

Research conducted by scientists, engineers, or students at a university normally will be considered fundamental research. University based research is **not** considered *fundamental research* if the university or its researchers accept (at the request, for example, of an industrial sponsor) other restrictions on publication of scientific and technical information resulting from the project or activity. Scientific and technical information resulting from the research will nonetheless qualify as fundamental research once all such restrictions have expired or have been removed.

Both the ITAR and the EAR provide that information published and generally accessible to the public through fundamental research is not subject to export controls. However, there are certain restrictions. In order to take advantage of this exemption:

- such information must be produced as part of basic and applied research in science and engineering and must be broadly shared within the scientific community (i.e., no restrictions on publication/dissemination of the research results) (ITAR § 120.11(a)(8); EAR §§ 734.3(b)(3) and 734.8(a));
- is essential to distinguish the information or product that results from the fundamental research from the conduct that occurs within the context of the fundamental research;
- **while the results of the fundamental research are not subject to export controls, an export license may be required if during the conduct of the research export controlled technology is to be released to a foreign national.** Such export controlled technology may come from the research sponsor, from a research partner institution, or from a previous University of Wyoming research project. *See* BIS Revisions and Clarification of Deemed Export Related Regulatory Requirements, 71 Fed. Reg. 30840, 30844 (May 31, 2006). This interpretation of fundamental research by BIS, while not binding, is instructive as to how DDTC might interpret its regulations.

One major difference is that the ITAR requires that to qualify as fundamental research, research must be performed at accredited institutions of higher learning in the United States. Under the EAR, fundamental research may occur at facilities other than accredited institutions of higher learning in the United States.

Under both the ITAR and the EAR, **research performed at universities will not qualify as fundamental if the university (or the primary investigator) has accepted publication or other dissemination restrictions.**

- **ITAR provision:** the fundamental research exception does not apply to research the results of which are restricted for proprietary reasons, or specific U.S. Government access and dissemination controls. 22 C.F.R. §§ 120.11(a)(8) and 120.10(a)(5).
- **EAR provision:** the fundamental research is distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary reasons or specific national security reasons. Under the EAR, university-based research is not considered fundamental research if the university or its researchers accept restrictions (other than review to ensure no release of sponsor-provided proprietary or patent information) on publication of scientific and technical information resulting from the project. EAR § 734.8(b)(5). However, once the sponsor has reviewed and approved the release, the results may be published as fundamental research.

The EAR instructs that prepublication review by a sponsor of university research solely to ensure that the publication would not inadvertently divulge proprietary information that the sponsor has initially furnished, or compromise patent rights, does not constitute restriction on publication for proprietary reasons.

The EAR also has provided examples of "specific national security controls" which will trigger export controls. These include requirements for prepublication review and approval by the Government, with right to withhold permission for publication; restriction on prepublication dissemination of information to non-U.S. citizens or other categories of persons; or restrictions on participation of non-U.S. citizens or other categories of persons in the research. EAR § 734.11(b).

While the ITAR does not contain such descriptive provisions, the EAR is instructive as to interpreting the limitations on fundamental research.

D. FULL-TIME UNIVERSITY EMPLOYEES

Under a specific exemption, the ITAR allows a university to disclose unclassified technical data in the U.S. to a foreign person who is the university's *bona fide* and full time regular employee. The exemption is available only if:

1. the employee's permanent abode throughout the period of employment is in the United States;
2. the employee is not a national of a country to which exports are prohibited pursuant to ITAR § 126.1 (See current list of countries at <http://www.gpo.gov/fdsys/granule/CFR-2004-title22-vol1/CFR-2004-title22-vol1-sec126-1>);
3. the university informs the individual in writing that the technical data may not be transferred to other foreign persons without the prior written approval of DDTC; and
4. the university documents the disclosure of technical data under the exemption providing: (1) a description of the technical data; (2) the name of the recipient/end-user; (3) the date and time of export; (4) the method of transmission (e.g., e-mail, fax, FedEx); and (5) the ITAR reference, i.e., ITAR § 125.4(b)(10), *Full-Time University Employee*.

Note that the "full-time *bona fide* employee" requirement will preclude foreign students and postdoctoral researchers from qualifying for access to technical data under this exemption. Generally, a H1B work visa would be required.

This exemption only applies to the transfer of *technical data* and discussions related to the data. Discussions may occur between the foreign full-time employee and other university employees working on the project. Additionally, the outside company (sponsor of the research) would have to apply for a DSP-5 license to provide technical data directly to the foreign national employee, and if the outside party and the employee are to engage in discussions and interchange concerning the data, then the proper authorization would be a Technical Assistance Agreement (TAA) rather than the DSP-5.

UNIVERSITY OF WYOMING EXPORT CONTROL PROCEDURES

I. COMMITMENT TO EXPORT CONTROL COMPLIANCE

The export of certain items, including but not limited to software, hardware, and pathogens, is regulated and controlled by Federal law for reasons of national security, foreign policy, prevention of the spread of weapons of mass destruction and for competitive trade reasons. The University of Wyoming and all its employees are required to comply with the laws and implementing regulations issued by the Department of State, through its International Traffic in Arms Regulations (“ITAR”), the Department of Commerce, through its Export Administration Regulations (“EAR”) and the Department of the Treasury through its Office of Foreign Asset Controls (“OFAC”).

While most research conducted on U.S. college and university campuses is excluded from these regulations under the Fundamental Research Exclusion, university research involving specified items controlled under the EAR and/or ITAR, or transactions and exchanges with designated countries, individuals and entities may require the University of Wyoming to obtain prior approval from the appropriate agency before allowing foreign nationals to participate in controlled research, collaborating with a foreign company and/or sharing research—verbally or in writing—with persons who are not United States citizens or permanent residents. The consequences of violating these regulations can be quite severe, ranging from loss of research contracts and exporting privileges to monetary penalties and jail time for the individual violating these regulations.

The export control regulations affect not only research conducted on campus, but also travel and shipping items outside the U.S. Simply traveling to certain sanctioned countries could require a license from OFAC. OFAC sanctions prohibit transactions and exchange of goods and services in certain countries and with designated persons and entities. Multiple lists of denied individuals and parties are maintained and enforced by federal agencies including the Departments of State, Commerce, and Treasury. Shipping items outside the U.S. as well as taking controlled items on a flight, even if shipping or traveling in the conduct of research, could require a license from these agencies.

The University of Wyoming is committed to export controls compliance, and the Office of Research and Economic Development is staffed to advise and assist faculty in conducting activities related to research and sponsored projects. More information and resources regarding these and other regulations that impact university activities can be found at <http://www.uwyo.edu/research/compliance/export%20control/index.html> , or by contacting the Office of Research and Economic Development at 307-766-5320.

II. KEY ACTORS RESPONSIBLE FOR EXPORT CONTROL COMPLIANCE

A. EMPOWERED OFFICIALS

The Vice President for Research and Economic Development is the University of Wyoming's Empowered Official for export control matters. In this capacity, the Empowered Official has the authority to represent the university before the export control regulators in matters related to registration, licensing, commodity jurisdiction requests, or voluntary disclosures. While certain oversight functions may be delegated, only the Empowered Official has the power to sign such paperwork and bind the university in any proceeding before DDTC, BIS, OFAC, or any other government agency with export control responsibilities.

B. UNIVERSITY RESEARCH COMPLIANCE ATTORNEY

The University Research Compliance Attorney reports to the Office of General Counsel. The University Research Compliance Attorney has the authority and the responsibility for the implementation of the procedures set forth in this Export Compliance Program.

The University Research Compliance Attorney works closely with the Associate Vice President for Research and Economic Development in performing his or her responsibilities. The University Research Compliance Attorney:

1. identifies areas at the University that are impacted by export control regulations;
2. develops control procedures to ensure the University remains in compliance;
3. recommends procedures to the Associate Vice President and Vice President for Research and Economic Development to strengthen University's compliance;
4. educates inventors, principal investigators, centers, and academic units about export control regulations and procedures;
5. educates other units within the University such as Academic Affairs, Accounting, Procurement, International Programs, and Human Resources about export control regulations and procedures;
6. monitors changes to the regulations;
7. works with others on campus to facilitate understanding and compliance with export controls;
8. conducts training and outreach on export controls;
9. assists investigators, researchers and offices within the University when research or research results are export controlled;
10. seeks assistance from the Office of General Counsel when uncertain about classification and in filing license applications; and
11. develops a Technology Control Plan ("TCP") for each export-controlled project consistent with these procedures to aid the principal investigator ("PI") or employee in meeting his or her export control responsibilities.

C. OFFICE OF RESEARCH AND ECONOMIC DEVELOPMENT

The Office of Research and Economic Development provides assistance and expertise with export controls by working closely with the University Research Compliance Attorney in identifying export control issues and providing support for the solution. The Office of Research and Economic Development:

1. provides assistance to PIs and employees in reviewing the terms of contracts, sponsorship agreements, or grants to identify restrictions on publication and dissemination of the research results, and to help PIs and employees negotiate out such restrictions;
2. is responsible for maintaining a centralized database of documentation relating to a research project or education activity; and
3. coordinates with the PI or employee and the University Research Compliance Attorney to ensure that foreign nationals will be isolated from participation in an export-controlled project in accordance with the TCP, unless the university applies for and obtains a license from the relevant agency.

D. KEY UNIVERSITY MANAGERS

Academic deans, directors, and department heads will assist in export control compliance in their respective schools, departments, centers, or institutes and will support the Office of Research and Economic Development in

implementing procedures as deemed necessary by the Office of Research and Economic Development for export control compliance.

In addition, the vice presidents and reporting directors of other offices or units on campus including, but not limited to: Academic Affairs, Accounting, Environmental Health and Safety, Human Resources, International Programs, and Procurement share the responsibility of overseeing export control compliance in their units and supporting the Office of Research and Economic Development in implementing procedures as deemed necessary by the Office of Research and Economic Development for export control compliance.

E. UPDATED PRINCIPAL INVESTIGATOR (“PI”) OR EMPLOYEE

PIs and employees working with export controlled information or items have expert knowledge of the type of information and technologies involved. PIs and employees must ensure that they do not send export controlled items outside the United States or disclose controlled information to a foreign national without prior authorization as required. To meet his or her obligations, each PI or employee working with export controlled information or items:

1. must understand his or her obligations under export controls, and if required by this policy, complete export training to help him or her identify export control issues;
2. must assist the Office of Research and Economic Development to classify the technology involved in the research or other University activity;
3. identify foreign nationals that may be involved and, if export control is likely, initiate the process of clearing foreign national participation well in advance to ensure that a license is obtained in a timely manner, or implement proper measures to isolate foreign nationals from participation;
4. must, if undertaking an export controlled project, with the assistance of the University Research Compliance Attorney, brief the students and other researchers involved in the project of their obligations under export controls; and
5. cooperate with the University Research Compliance Attorney and the Office of Research and Economic Development in determining whether a Technology Control Plan (TCP) and if a TCP is necessary, develop a TCP, which the PI or employee has the responsibility to follow and implement. The TCP template is located in Appendix B or <http://www.uwyo.edu/research/compliance/export%20control/index.html> ; and
6. Notify the University Research Compliance Attorney, if he/she intends to take or ship any University owned items outside the U.S., even if the items will only be outside of the U.S. for a limited amount of time.

III. EXPORT CONTROL ANALYSIS

An export control analysis should be performed when University faculty, staff, or students submit a proposal, receive an award, change the scope of an existing project, or purchase an item that is export controlled. The University Research Compliance Attorney will work with the faculty or staff member to conduct an export control analysis to determine whether a license and/or Technology Control Plan (TCP) is necessary.

A. UPDATED INITIAL REVIEW

If an item is export controlled the faculty or staff member will need to work with the University Research Compliance Attorney to determine next steps. Depending on the export classification, the faculty or staff member may be asked to complete the University Export Control Questionnaire (Appendix A) and submit that document to the University Research Compliance Attorney for further review. The Questionnaire can be found at:

<http://www.uwyo.edu/research/compliance/export%20control/index.html> . During the initial review, the University Research Compliance Attorney will look for the following red flags indicating possible export control issues:

1. restrictions on publication or dissemination of the research results;
2. pre-publication approval from sponsor;
3. proprietary or trade secret claims on project results;
4. restriction of access or participation to U.S. citizens only;
5. involvement of foreign sponsors or collaborators;
6. travel, shipping, or work performed outside the U.S.;
7. military applications of the project results;
8. access to technical data or source code; or
9. funding from the Department of Defense, including funding for Service branch sources, CAFOSR, ONR, etc., the Department of Energy, NASA, the National Reconnaissance Office, or other U.S. government agencies.

B. FINAL REVIEW

If the initial review flags a possible export control issue, the University Research Compliance Attorney will work with the faculty or staff member to develop and implement a TCP to secure the controlled technology from access by unlicensed non-U.S. citizens. The template for the TCP can be found in Appendix B or at <http://www.uwyo.edu/research/compliance/export%20control/index.html> . If necessary, the University Research Compliance Attorney will also work with the faculty or staff member to obtain a license from the Department of Commerce or Department of State.

IV. TECHNOLOGY CONTROL PLAN (TCP)

A. DEVELOPMENT

If a TCP is necessary, the TCP will include the following:

1. a commitment to export controls compliance;
2. identification of the relevant export control categories and controlled technologies;
3. identification of the project's sponsors;
4. identification and nationality of each individual participating in the project;
5. appropriate physical and informational security measures;
6. personnel screening measures; and
7. appropriate security measures for and following project termination.

B. APPROPRIATE SECURITY MEASURES

The TCP will include physical and informational security measures appropriate to the export control categories involved in the project. Examples of security measures include, but are not limited to:

- Laboratory Compartmentalization. Project operation may be limited to secured laboratory areas physically shielded from access or observation by unauthorized individuals. These areas must remain locked at all times.
- Time Blocking. Project operation may be restricted to secure time blocks when unauthorized individuals cannot observe or access.

- **Personnel Identification.** Individuals participating in the project may be required to wear a badge, special card, or other similar device indicating their access to designated project areas. Physical movement into and out of a designated project area may be logged.
- **Locked Storage.** Tangible items such as equipment, associated operating manuals, and schematic diagrams should be stored in rooms with key-controlled access. Soft and hardcopy data, lab notebooks, reports, and other research materials should be stored in locked cabinets.
- **Electronic Security.** Project computers, networks, and electronic transmissions should be secured and monitored through User Ids, password controls, 128-bit Secure Sockets Layer encryption or other federally approved encryption technology. Database access should be managed via a Virtual Private Network.
- **Confidential Communications.** Discussions about the project must be limited to the identified and authorized project participants, and only in areas where unauthorized individuals are not present. Discussions with third party sub-contractors must occur only under signed agreements which fully respect the non-U.S. citizen limitations for such disclosures.

C. TRAINING & CERTIFICATION

If a TCP is required, before any individual may observe or access the controlled technology, other than ordinary use, he or she must complete export control training. The export control training can be completed online through the export control training module at <https://www.citiprogram.org/> or live with the University Research Compliance Attorney.

In addition to the training, if a TCP is required, before any individual may observe or access the controlled technology, other than ordinary use, he or she must be briefed on the procedures authorized under the TCP, certify his or her agreement to comply with all security measures outlined in the TCP, and have his or her certification authorized by the Associate Vice President for Research and Economic Development. A copy of the signed TCP will be kept on file in the Office of Research and Economic Development for a minimum of five years after the project's TCP termination date or license termination date, whichever is later.

V. LICENSING

If an item or information is export controlled and a license is required to allow a foreign person access to that item or information, the Empowered Official may apply for an export license. Note that each foreign student must be specifically licensed for each controlled project. Also note that a TCP, as described in Section IV above, must be implemented. The University Research Compliance Attorney, in coordination with the Office of Research and Economic Development and the Office of General Counsel, will prepare and sign the necessary documentation for obtaining a license.

VI. NEW TRAVELING OR SHIPPING ITEMS OUTSIDE THE U.S.

If an individual plans to ship University owned items outside the U.S. or will be traveling outside the U.S. and plans to take University owned items with him or her, an export license may be required. All University employees are required to contact the University Research Compliance Attorney as soon as possible before shipping or taking University owned items outside the U.S. The University Research Compliance Attorney can be reached at (307) 766-4123 or aguritza@uwyo.edu.

VII. LICENSE EXCEPTIONS AND EXEMPTIONS RELATED TO TRAVEL OUTSIDE THE U.S.

Travel or transmissions to destinations outside the U.S. can also implicate export control regulations. A license may be required depending on which items are taken, which countries are visited, or whether defense services are provided to a foreign person. However, an exception or exemption from license requirements may exist.

A *License Exception* (see 15 C.F.R. § 740.1) may be available for EAR controlled items, technology, or software if the individual travelling outside the U.S. uses the instrument as a “tool of trade” and can certify that he or she:

1. will ship or hand-carry the items, technology, or software for University of Wyoming business only;
2. will return or certify the destruction of the items, technology, or software within 12 months of leaving the U.S.;
3. will keep the items, technology, or software within his or her effective control;
4. will take necessary security precautions to protect against the unauthorized export of the technology; and
5. will not ship or hand-carry the items, technology, or software to Iran, Syria, Cuba, North Korea, or Sudan without first consulting with the University Research Compliance Attorney. This list is subject to change. For the most current list, see 15 C.F.R. § 742.1.

A *License Exemption* (see 22 C.F.R. § 125.4.) may be available to ITAR controlled technical data transmitted outside the U.S. if the individual transmitting the technical data can certify that:

1. the technical data is to be used overseas solely by a U.S. person(s);
2. the U.S. person overseas is an employee of the University or the U.S. Government and is not an employee of a foreign subsidiary;
3. if the information is classified, it will be sent overseas in accordance with the requirements of the Department of Defense Industrial Security Manual; and,
4. no export will be made to countries listed by 22 C.F.R. § 126.1.48. The full list of proscribed countries may be found at http://www.pmdtdc.state.gov/regulations_laws/itar_consolidated.html.

Please note that other exceptions or exemptions may be available.

Any individual intending to travel or transmit controlled data outside the U.S. should first consult with the University Research Compliance Attorney. All exceptions or exemptions must be documented with the Office of Research and Economic Development and the record maintained for at least five years after the termination of the project or the travel return date.

VIII. NEW VISITORS ON CAMPUS

The University fully supports collaboration with other individuals and entities. However, certain security measures must be in place if a University employee will be hosting Non-UW employees/students on campus and those individuals will have access to University labs or scientific facilities. If Non-UW employees/students will be given access to University labs or scientific facilities, the individual hosting the visitors must contact the University Research Compliance Attorney as soon as possible at (307) 766-4123 or aguritza@uwyo.edu. Visitors will be required to sign the University of Wyoming Visitor Agreement. The Visitor Agreement Template is located in Appendix C or <http://www.uwyo.edu/research/compliance/export%20control/index.html>

IX. TRAINING PROGRAMS

Training is the foundation of a successful export compliance program. Well-informed employees minimize the likelihood that inadvertent violations of the law will occur.

The University Research Compliance Attorney will prepare updated training materials and will ensure that employees or students engaged in an export controlled project receive the appropriate briefing. The Office of Research and Economic Development will also maintain records of training or briefings provided. General export control information and presentations will be available for the university community online at <http://www.uwyo.edu/research/compliance/export%20control/index.html> .

Academic deans, directors, or department heads will assist the University Research Compliance Attorney in implementing the export control training sessions or briefings relative to their respective colleges, departments, centers, or institutes. In addition, the directors of other offices or units on campus including, but not limited to: Academic Affairs, Accounting, Human Resources, International Programs, and Purchasing will assist the University Research Compliance Attorney in implementing the export control training sessions or briefings relative to their units.

X. RECORDKEEPING

The University of Wyoming's policy is to maintain export-related records on a project basis. Unless otherwise provided for, all records indicated herein shall be maintained consistent with the University's record retention policy, and shall be retained no less than five years after the project's TCP termination date or license termination date, whichever is later.

If ITAR-controlled technical data is exported under an exemption, certain records of the transaction must be kept for a period of five years from the expiration of the license or other approval, to include exports using an exemption. *See* 22 C.F.R. §§ 122.5 and 123.26. Those records include:

1. a description of the unclassified technical data;
2. the name of the recipient/end-user;
3. the date/time of export;
4. the method of transmission (e.g., e-mail, fax, telephone, FedEx); and
5. the exemption under which the export took place.

Note that information which meets the criteria of being in the public domain, being educational information, or resulting from fundamental research is not subject to export controls under the ITAR. Therefore, the special requirement for recordkeeping when using an exclusion, exception, or exemption may not apply. However, it is a good practice to provide such description for each project to establish a record of compliance.

BIS has specific record-keeping requirements. *See* 15 C.F.R. § 762.6. Generally, records required to be kept by EAR must be kept for a period of five years from the project's termination date. However, if BIS or any other government agency makes a request for such records following a voluntary self-disclosure, the records must be maintained until the agency concerned provides written authorization otherwise.

XI. MONITORING AND AUDITING

In order to maintain the University of Wyoming's export compliance program and ensure consistent adherence to U.S. export laws, the University Research Compliance Attorney may conduct internal reviews of TCPs and certain projects. The purpose of the reviews is: (i) to identify possible violations; and (ii) to identify deficiencies in training, procedures, etc., that can be rectified.

XII. DETECTING AND REPORTING VIOLATIONS

It is the policy of the University of Wyoming to voluntarily self-disclose violations as required. Any individual who suspects a violation has occurred must immediately notify the Vice President or Associate Vice President for Research and Economic Development by calling (307) 766-5320. The Office of Research and Economic Development will then send an initial notification about the suspected violation to the appropriate government agency. For EAR violations, see 15 C.F.R. § 764.5. For ITAR violations, see 22 C.F.R. § 127.12(c). The Office of Research and Economic Development will conduct an internal review of the suspected violation by gathering information about the circumstances, personnel, items, and communications involved. Once the review is complete, the Office of Research and Economic Development will provide the government agency with a supplementary letter with a thorough narrative account of:

1. the project's description and background;
2. a description of the suspected violation;
3. which items and controlled categories were involved;
4. which dates the violations occurred on;
5. which countries were involved;
6. who was involved and their citizenships;
7. an explanation of why the violation occurred;
8. any corrective actions taken; and
9. the University of Wyoming's commitment to export controls compliance.

Once the initial notification and supplementary letter have been sent, the Office of Research and Economic Development will follow the government agency's instructions.

XIII. DISCIPLINARY ACTIONS

In recognition of the seriousness of non-compliance with export controls, the University of Wyoming will address non-compliance in accordance with the University's Employee Handbook and UW Regulations. Further, all University employees responsible for export controls compliance or participating in export-controlled projects must be aware of the substantial criminal and civil penalties imposed for violation of the export regulations including personal liability, monetary fines and imprisonment. No individual shall be punished solely because he or she reported what was reasonably believed to be an act of wrongdoing or export control violation. However, a University employee will be subject to disciplinary action if the employee knowingly fabricated, knowingly distorted, or knowingly exaggerated the report.

LIST OF ABBREVIATIONS

BIS	Department of Commerce Bureau of Industry and Security
CCL	Commerce Control List
CJ	Commodity Jurisdiction
DDTC	Department of State Directorate of Defense Trade Controls
EAR	Export Administration Regulations
ECCN	Export Control Classification Number
ITAR	International Traffic in Arms Regulations
OFAC	Department of the Treasury Office of Foreign Assets Control
PI	Principal Investigator
SDN	List Specially Designated Nationals and Blocked Persons List
TAA	Technical Assistance Agreement
TCP	Technology Control Plan
USML	United States Munitions List

APPENDIX A

UNIVERSITY OF WYOMING
OFFICE OF RESEARCH AND ECONOMIC DEVELOPMENT
EXPORT CONTROL QUESTIONNAIRE

To better understand the technology or software that you are using and to expedite the export control process, please fill out this brief questionnaire. If you have any questions, please contact Ashley Guritza, the University Research Compliance Attorney, at aguritza@uwyo.edu or (307) 766-4123.

CONTACT INFORMATION

Name: _____

Unit/Department: _____

Supervisor: _____

Contact Number: _____

Email: _____

Product: _____

SOFTWARE1. Is Software involved? YES NO *Please only answer the next three questions in this section if the product is or contains software.*2. Will you or anyone using the software have access to source code? YES NO 3. Are there any physical copies of the software (i.e. disks)? YES NO 4. Will you or anyone using the software have access to technical data (i.e. nonpublicly available blue prints, diagrams, manuals, etc.) related to the software ? YES NO **RESEARCH**5. Is research involved? YES NO *Please only answer the next two questions in this section if research is involved.*6. Will the resulting information from the research be published and/or shared broadly within the scientific community? YES NO 7. Is the research sponsored? (If no, please move to question 8.) YES NO a. Is the research funded by the U.S. Government? YES NO b. Are the research results subject to prepublication review? YES NO c. Is prepublication review limited to preventing disclosure of the sponsor's proprietary information or to protect patent rights? YES NO

d. Is there a non-disclosure agreement with the sponsor? YES NO

e. Does the sponsor have the right to withhold permission for publication? YES NO

EXPORT TO A FOREIGN COUNTRY

8. Do you plan to take the software or technology out of the U.S.? YES NO

a. If so, please list the countries where you plan to take the software or technology (attach additional pages if necessary): _____

EXPORT TO A FOREIGN NATIONAL IN THE UNITED STATES

A Foreign national is defined as anyone who is not a (1) permanent resident, (2) a citizen or national of the United States, or (3) a "protected person" under 8 U.S.C. 1324b(a)(3).

9. Will any foreign nationals be using (ordinary use) the software or technology? YES NO

10. Will any foreign nationals have access to technical data? YES NO

a. If the answer to 10 is yes, please check all that apply:

- | | | |
|---|--|-----------------------------------|
| <input type="checkbox"/> Blueprints | <input type="checkbox"/> Source Code of software | <input type="checkbox"/> Diagrams |
| <input type="checkbox"/> Drawings | <input type="checkbox"/> Photos | <input type="checkbox"/> Plans |
| <input type="checkbox"/> Formulae | <input type="checkbox"/> Tables | <input type="checkbox"/> Models |
| <input type="checkbox"/> Engineering specifications | | |

b. If the answer to 10 is yes, please lists the foreign national(s) (attach additional pages if necessary):

Please return the completed questionnaire to Ashley Guritza at aguritza@uwyo.edu .

APPENDIX B

**THE UNIVERSITY OF WYOMING
OFFICE OF RESEARCH AND ECONOMIC DEVELOPMENT
TECHNOLOGY CONTROL PLAN (TCP) CERTIFICATION**

PART I

Individual Requesting and Responsible for TCP:		
Telephone Number		
E-mail Address		
Request Date		
Description of Controls and Item (EAR/ITAR Category)		
Location(s) Covered by TCP (add additional rows if needed)	Building	
	Room(s)	
Project Personnel	List Name(s) below:	List citizenship(s) / Permanent Res. Status:
Personnel who will have access to export controlled subject matter (add additional rows if needed)		
Is sponsored research involved?	Yes/No	
If yes, identify sponsor:		
Project Number and projected end date of project		
Is a non-disclosure agreement involved?	Yes/No	
If yes, identify the parties:		
Contact Information:		
Attachments:	1. Denied Parties Screening 2. Contract	
Approved:	_____ Dorothy C. Yates Associate Vice President for Research and Economic Development	_____ Date

PART II BRIEFING AND CERTIFICATION ON THE HANDLING OF EXPORT-CONTROLLED INFORMATION

This project involves the use of Export-Controlled Information. As a result, the project implicates either the International Traffic in Arms Regulations (ITAR) under the jurisdiction of the Department of State, or the Export Administration Regulations (EAR) under the jurisdiction of the Department of Commerce.

It is unlawful under ITAR or EAR to send or take Export-Controlled Information out of the U.S.; disclose, orally or visually, or transfer export-controlled information to a foreign person inside or outside the U.S. without proper authorization. Under ITAR or EAR, a license may be required for foreign nationals to access Export-Controlled Information. A foreign person is a person who is not a U.S. citizen or permanent resident of the U.S. The law makes no exceptions for foreign graduate students.

In general, Export-Controlled Information means activities, items, and information related to the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, operation, modification, demilitarization, destruction, processing, or use of items with a capacity for military application utility. Export-Controlled Information does not include basic marketing information on function or purpose; general system descriptions; or information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges and universities or information in the public domain. It does not matter if the actual intended end use of Export-Controlled Information is military or civil in nature.

Researchers may be held personally liable for violations of the ITAR and EAR. As a result, you should exercise care in using and sharing Export-Controlled Information with others. Technical information, data, materials, software, or hardware, i.e.; technology generated from this project, must be secured from use and observation by unlicensed non-U.S. citizens. Both civil and criminal penalties may be imposed for unlawful export and disclosure of Export-Controlled Information up to and including incarceration.

Security measures will be appropriate to the classification involved. Examples of security measures are (but not limited to):

Project Personnel – Authorized personnel must be clearly identified.

Laboratory “work-in-progress” - Project data and/or materials must be physically shielded from observation by unauthorized individuals by operating in secured laboratory spaces or during secure time blocks.

Work Products - Both soft and hardcopy data, lab notebooks, reports, and research materials are stored in locked cabinets; preferably located in rooms with key-controlled access.

Equipment or internal components – Such tangible items and associated operating manuals and schematic diagrams containing identified “export-controlled” technology are to be physically secured from unauthorized access.

Electronic communications and databases – Appropriate measures will be taken to secure controlled electronic information. Such measures may include: User ID, password control, SSL or other approved encryption technology. Database access may be managed via a Virtual Private Network (VPN). Only authorized users can access the site and all transmissions of data over the internet will be encrypted using 128-bit Secure Sockets Layer (SSL) or other advanced, federally approved encryption technology.

Conversations – Discussions about the project or work products are limited to the identified contributing investigators and are held only in areas where unauthorized personnel are not present. Discussions with third party sub-contractors are only to be conducted under signed agreements that fully respect the non-U.S. citizen limitations for such disclosures.

Department(s):

Project Title:

Sponsor:

Project Number:

Certification: I hereby certify that I have read and understand this Briefing, and that I understand and agree to follow the procedures outlined in the TCP. I understand that I could be held personally liable if I unlawfully disclose, regardless of form or format, Export-Controlled Information to unauthorized persons.

Signature:

Date:

PART III TECHNOLOGY CONTROL PLAN (TCP)

1) COMMITMENT

The University of Wyoming (UW) is committed to export controls compliance. The Office of Research and Economic Development is responsible for implementation of technology control plans as applicable. The Empowered Official for export controls is Dr. William Gern, Vice President for Research and Economic. The University Research Compliance Attorney, is the main contact for export control issues. The individual responsible for and committed to ensuring compliance with this TCP is [INSERT Name of Responsible Party].

2) BACKGROUND AND DESCRIPTION OF THE USE OF CONTROLLED ITEMS AND INFORMATION [INSERT]

3) PHYSICAL SECURITY

[INSERT description of how equipment, technology, data and other controlled information will be shielded from unauthorized persons including descriptions of relevant security systems such as badging, escorts, visitor logs and other types of building access restrictions.]

4) INFORMATION SECURITY

[INSERT an outline of additional measures that will be taken to ensure information access controls that will be utilized to ensure the requirements are met including use of passwords and encryption protection. The data discard policy and relevant information technology policies and procedures should be included, as well as other plans for controlling access to controlled information. These procedures should address system backup and who will have access, transmission procedures, how computers on which sensitive digital data will be stored will be sanitized upon completion of the project, and other procedures necessary to provide the necessary security].

5) PERSONNEL SCREENING

All personnel with access to the controlled technology and their nationality are listed in the TCP Certification Form. [Insert any information on the type of background check and any additional required reviews that will be employed beyond the University's standard background check procedures for all employees.]

6) TRAINING AND AWARENESS

All personnel with access to controlled information on this project have completed export control training and have read and understand the "Briefing and Certification on the Handling of Export-Controlled Information." Additional export control training for this project may be conducted by the Compliance Attorney. The Compliance Attorney also provides periodic training sessions to members of the UW community.

7) COMPLIANCE ASSESSMENT

As a critical component to the University's ongoing compliance monitoring, self-evaluation is an internal assessment process whereby procedures are reviewed and any findings reported to the Compliance Attorney at 307-766-4123 or to the Empowered Official for export controls at 307-766-5320. The Compliance Attorney may also conduct periodic evaluations and/or training to monitor compliance of the TCP procedures. Any changes to the approved procedures or personnel having access to controlled information covered under this TCP will be cleared in advance by the Compliance Attorney or the Empowered Official for export controls.

8) PROJECT TERMINATION

Security measures, as deemed appropriate, will remain in effect after the project has ended in order to protect the export-controlled information unless earlier terminated when the information has been destroyed or determined to be no longer export-controlled.

NEW APPENDIX C**University of Wyoming
Visitor Agreement**

I, the undersigned, accept and agree to the following terms and conditions in consideration of the opportunity to visit facilities, including research laboratories located at the University of Wyoming (University).

- 1. Access to Facilities.** The facilities are being made available to me as an educational or research opportunity. I am not a student, employee or affiliate of the University.
- 2. Restricted Party Screening.** I understand that I will be subject to Restricted Party Screening before and during the term of my visit and that, in relation to this screening, the University, at its sole discretion and at any time, may deny me access to the facilities at the University.
- 3. Export Control.** I agree to comply with any and all applicable United States export control laws and regulations, as well as any and all embargoes and/or other restrictions imposed by the Treasury Department's Office of Foreign Asset Controls. I agree to not seek unauthorized access to any University facilities or information stored on the University's computer systems, or make unauthorized use of such information.
- 4. Appropriate Conduct.** I agree to observe all applicable governmental, University and departmental policies, rules and regulations that pertain to my conduct on campus and in University facilities. I agree to comply with all applicable United States laws and Wyoming laws that pertain to my conduct on campus and in University facilities. I agree that University officials may require me to leave the facilities if they believe that I have violated a policy, rule or regulation or if they believe that my conduct is inappropriate.
- 4. Health and Safety Risks.** I understand that the facilities, including the laboratories may contain hazardous substances and equipment. I will take every precaution necessary to protect my health and safety, and the health and safety of others. I will acquaint myself with and conduct my activities in accordance with all applicable University safety regulations, policies, procedures. I recognize that by being in a laboratory I may be subjected to potential risks, illnesses, and injuries. I understand these risks and assume them knowingly and willingly.
- 5. Insurance Coverage.** I understand that I am not covered by University insurance of any kind. I understand that I am not covered by University insurance for medical or non-medical situations, including, but not limited to, evacuation, repatriation, damage to or loss of property, or changes in plans regardless of cause. I understand that it will be my responsibility to pay for emergency room care, doctors' services, hospitalization, and any other medical or non-medical related costs.
- 6. Assumption of Risk and Release of Claims.** Knowing the risks described above, I agree, on behalf of my family, heirs and personal representative(s), to assume all the risks and responsibilities surrounding my use of and access to the University's laboratories. I recognize that visiting laboratories may be dangerous and involve A RISK OF INJURY ranging from minor injury to serious injuries such as paralysis or event death. I am aware that such an injury

can limit my future life activities, including future earning capacity. Because of the potential dangers and risks, I recognize the importance of following instructions provided and I agree to follow all directions. I hereby grant permission for the University to give or authorize emergency medical treatment, if necessary. I understand and agree that the University assumes no responsibility for any injury or damage, which might arise out of or in connection with such authorized emergency medical treatment. In consideration of the University, providing me with the opportunity to visit University owned research laboratories, **I hereby assume all the associated risks and agree to hold the University, its trustees, officers, employees, agents, representatives, instructors, and volunteers and the State of Wyoming harmless from any and all liability, actions, causes of action, debts, claims, or demands of any kind and nature whatsoever which may arise by or in connection with my participation.** The terms hereof shall serve as a release and assumption of risk for myself, my heirs, estate, executor, administrator, assignees and for all members of my family.

7. Indemnification. I agree to defend, indemnify and hold harmless the University and its public employees from any and all claims related to my visit, but only in proportion to and to the extent that such claims result from or are caused by my own negligent or intentional acts or omissions.

I have carefully read this agreement before signing it. This agreement shall be governed by the laws of Wyoming any questions arising hereunder shall be construed according to such laws. This Agreement has been negotiated and executed in the State of Wyoming and is enforceable in the courts of Wyoming.

Signed: _____ Date: _____

Name (print): _____

Date of Arrival: _____

Date of Departure: _____