

OGRD Guideline 27

A Question and Answer Guide on Export Controls of Research Projects

WASHINGTON STATE UNIVERSITY
The Office of Research
Office of Grant and Research Development
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SUBJECT: Applicability of Export Control Regulations to Research Projects and Results at Washington State University

The federal Export Administration Regulations ("EAR") and International Traffic in Arms Regulations ("ITAR") control the export of certain commodities, software, technical data and certain other information to foreign countries. The EAR and the ITAR can restrict the furnishing of information, technical data and software to foreign persons, whether this takes place abroad or in the United States. In the university context, these regulations can prohibit foreign persons from participating in research projects or having access to information resulting from research under some circumstances unless an export license has been obtained in advance. While most university activities are not governed by the EAR or the ITAR, where these rules do apply they must be followed. Punishment for violations can be severe.

Washington State University, courtesy of Purdue University and University of Washington, has developed guidance in the form of answers to Frequently Asked Questions to help researchers and others in the university community to recognize situations where EAR and ITAR may apply to research projects and results, but each individual is ultimately responsible for understanding and complying with the EAR and the ITAR when applicable to his or her activities. Considering the following points will help individuals determine whether or not the EAR or the ITAR may apply in particular situations and to identify situations which may require further guidance.

Frequently Asked Questions:

1. What are Export Control Regulations?

Export Control Regulations (ECR) are federal laws that restrict the flow of certain materials, devices and technical information related to such materials and devices outside the United States. Most important for our purposes are the International Traffic in Arms Regulations (ITAR – see 22 CFR Parts 120-130) and the Export Administration Regulations (EAR – see 15 CFR Parts 700-799), but there are others to be aware of as well (see, for example, 31 CFR Parts 500-599).

“Export” means an actual shipment or transmission of items, services, or technical data subject to either the EAR or the ITAR out of the United States, or release of technology, software, or technical data subject to either EAR or ITAR to a foreign national in the United States. Technology, software, or technical data is “released” for export through 1) visual inspection by foreign nationals of U.S.

origin equipment and facilities, 2) oral exchanges of information in the United States or abroad, or 3) the application to situations abroad of personal knowledge or technical experience acquired in the United States.

Note : You can find a searchable database of the CFR at [Available CFR Titles on GPO Access](#) .

2. What is the purpose of the Export Administration Regulations (EAR)?

The primary focus of the EAR is to control the export of dual use technologies — i.e., items that are used, or have the potential to be used, for military as well as non-military purposes if such export could adversely affect the national interests of the United States.

3. How do I know if Export Controls apply to a grant/contract?

Export controls apply if the topic of the research appears on either the ITAR Munitions List or the EAR Commerce Control List.

ITAR places strict controls on the export of “defense articles” and “defense services.” Defense articles include any item or technical data on the United States Munitions List (USML), and defense services include the furnishing of assistance to foreign persons, whether or not in the United States, with respect to defense articles, and the furnishing of any technical data associated with a defense article.

The following categories of defense articles and services are included on the ITAR Munitions List (USML):

- Firearms
- Artillery projectors and armaments
- Ammunition
- Launch vehicles, guided missiles, ballistic missiles, rockets, torpedoes, bombs, and mines
- Explosives, propellants, incendiary agents, and their constituents
- Vessels of war and special naval equipment
- Tanks and military vehicles
- Aircraft and associated equipment
- Military training equipment
- Protective personnel equipment
- Military electronics
- Fire control, range finder, optical and guidance and control equipment
- Auxiliary military equipment
- Toxicological agents and associated equipment
- Spacecraft systems and associated equipment
- Nuclear weapons, design, and testing equipment
- Classified articles, technical data and defense services not otherwise enumerated
- Directed energy weapons
- Submersible vessels, oceanographic and associated equipment

- Miscellaneous articles not listed above with substantial military applicability and which were designed or modified for military purposes.

For more details on the Munitions List contact the Office of Research Assurances at <http://www.research-compliance.wsu.edu/>.

The EAR Commerce Control List is more complicated. Restricted technologies are divided into ten broad categories, and the specific restrictions depend on the specifics of the technology and where it's being exported. Just so you know, here are the categories:

0 - Nuclear Materials, Facilities and Equipment and Miscellaneous

1 - Materials, Chemicals, "Microorganisms," and Toxins

2 - Materials Processing

3 - Electronics

4 - Computers

5 - Telecommunications and Information Security

6 - Lasers and Sensors

7 - Navigation and Avionics

8 - Marine

9 - Propulsion Systems, Space Vehicles and Related Equipment.

For more details on the Commerce Control List contact the Office of Research Assurances at <http://www.research-compliance.wsu.edu/>.

Going back to the original question, there is one crucial thing to remember:

You cannot depend on the contract terms to know whether or not export controls apply.

Whether or not the agreement specifically invokes or refutes a particular export control regulation is irrelevant to the question of whether or not the export control applies. For example:

The contract says, "This work may be subject to ITAR," but the work has nothing to do with anything on the ITAR Munitions List. Since the technology is not on the list, ITAR doesn't apply.

The contract says, "This work is exempt from ITAR," but the work is researching defensive measures against biological weapons. This technology is on the ITAR Munitions List (Category XIV, Section C) so ITAR applies.

4. What do I do if I think Export Controls may apply to a grant/contract?

Do everything you can to make sure that the work performed at WSU falls within the parameters of the following exclusions:

Fundamental Research Exclusion (FRE) - applies for basic and applied research in science and engineering performed by universities so long as that research is carried out openly and without restrictions on publication or access to or dissemination of the research results.

Public Domain Exclusion - applies if the information is in the public domain, i.e., if it is published

and generally accessible to the public through unlimited and unrestricted distribution.

Teaching Exclusion - authorizes the disclosure of educational information released by instruction in catalog courses or general scientific, mathematical, or engineering principles commonly taught in universities without a license.

5. Is there more information on the “Fundamental Research Exception”?

Both ITAR and EAR include language that exempts “fundamental research” from export control. Using ITAR as an example, while the regulations restrict the flow of technical data they also stipulate (Sec 120.10) that the “definition [of technical data] does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain as defined in Sec. 120.11 .”

Section 120.11, then, defines information in the public domain to include fundamental research, which “is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community.” But, per Section 120.11, Subsections 7(i) and 7(ii), our work is no longer considered “fundamental research” if a) we accept restrictions on the publication or dissemination of scientific or technical data, or b) the work is funded by the US Government and either access or dissemination controls are applied.

So, as long as we can freely present/publish, and, in the case of federally funded work, there are no access restrictions, we’re well within the FRE.

6. So I should focus on the publication clauses in the grant/contract?

Yes. If you suspect a project may be subject to export control, the first, best way to deal with this is to make sure there are absolutely no restrictions of any kind on our ability to publish the work. Review and comment are okay, limited-time delay for patent protection is okay, but don’t give the sponsor the right to remove information of any sort from the publication. And watch out for dissemination restrictions in other parts of the agreement. The Office of Grant and Research Development will assist in this review.

Remember: Any information the sponsor can require be removed from a publication or otherwise restrict from dissemination will be information that falls outside the FRE.

But once you have publication nailed down, don’t forget the access issue. If the project is funded by the Feds – and this includes flow-through funding – access restrictions also kick us out of the FRE. To remain safely within the FRE, you’ll need to get any restrictions on the kinds of personnel can work on the project (e.g., no foreign nationals) out of the agreement.

7. What are some grant/contract clauses to look for that WSU will not agree with?

"The parties acknowledge that the subject of this agreement may be subject to ITAR, EAR and/or other export control regulations as mandated by Federal law. University agrees to indemnify, defend and hold Sponsor harmless from any and all suits, damages or other liabilities resulting

from the violation of such regulations.”

DFAR 252.204-7000, Disclosure of Information

“(a) The Contractor shall not release to anyone outside the Contractor’s organization any unclassified information...”

FAR 52.227-17, Rights in Data – Special Works

“...(d) Release and use restrictions. Except as otherwise specifically provided for in this contract, the Contractor shall not use for purposes other than the performance of this contract, nor shall the Contractor release, reproduce, distribute, or publish any data first produced in the performance of this contract, nor authorize others to do so, without written permission of the Contracting Officer...”

8. But as long as there are no publication restrictions and no personnel restrictions I can be confident the FRE applies, right?

One more question. Does the project require us to produce and/or deliver any actual materials – i.e., equipment, devices or other embodiments of the technology at hand?

Recall that the FRE is extracted from the provisions that exempt from “technical data” information that is in the public domain and that information in the public domain includes fundamental research. Accordingly, the FRE applies only to data/information. Equipment and other materials can’t be exempted under the FRE.

So, for example, while data relating to a system for defending against anthrax could, depending on the publication and personnel terms, stay within the bounds of the FRE, as soon as we actually build an anti-anthrax device, we’re back under the export controls.

Said another way - the availability of an exemption for fundamental research relating to defense articles and defense services controlled under ITAR is highly limited. Therefore, any work being conducted in the areas covered by the USML must be restricted so that foreign nationals do not have access to the work being conducted or to the resulting data, unless either:

- an export license has been obtained;
- governmental approval to proceed without an export license has been obtained; or
- the Director, Office of Grant and Research Development and the Vice President for Research have determined that the ITAR does not impose restrictions under the facts of the particular situation.

NOTE: If the work is going to be subject to export control regulations, and can’t be covered under the FRE, there are a few things that will likely need to happen.

First, WSU is probably going to have to produce a Technology Control Plan that explains how we’re going to ensure that we don’t violate any of the export controls. This will necessarily involve WSU’s Office of Research Assurances, Assistant Attorney General, the Director of OGRD, and the Vice-Provost for Research.

Second, at the very least, the PI’s chair and dean are going to need to sign off on the project and do so in a way that explicitly acknowledges the export control issue. (The REX form alone is not

enough.)

Third, it's possible that the project will need to be reviewed and approved by the Faculty Senate, the Vice President or someone else at the University with the authority to put the UW's reputation and finances on the line.

Details of these responsibilities will be managed on a case-by-case basis.

9. What is involved in obtaining an export license?

A request must be submitted to either the Department of Commerce for EAR controlled items or the Department of State for ITAR controlled items. Export licenses can take up to 3-6 months for review before a final determination is made. A request for an export license would be initiated through the office of the Vice President for Research.

10. So I have a project that might be subject to ITAR, but the publication language is perfect, there are no restrictions on project personnel, and we're not producing anything other than a report. What do I do?

Treat the award as you would any other. Since we're clearly under the FRE, there's nothing to worry about vis-à-vis export control.

11. What's the Summary?

Export regulations are federal law. Don't rely on the agreement terms to tell you when the export regulations will apply. (The agreement can actually be misleading.)

Never agree to offer indemnification for violations of the export regulations.

If you think a project could be subject to export regulations your first, best move is to make sure the work stays within the Fundamental Research Exception. This means:

1. There are no restrictions (at all) on publications; and
2. If the money's coming from the feds, there are no restrictions on the personnel we can use.

Watch out for flow-down clauses that bring publication/personnel restrictions into the agreement. Some are obvious, others may be less so.

Also remember that the FRE won't apply to projects where we're going to be producing and/or delivering an actual device, piece of equipment or other embodiment of the technology. The FRE only applies to information.

12. Who do I call if I have further questions?

Office of Grant and Research Development: Dan Nordquist, Director (509) 335-9661

Office of Research Assurances: Dave Clark (509) 335-1585

Additional Information:

22 CFR Section 121.1

The Code of Federal Regulations Title 22, Foreign Relations; Chapter I, Department of State; Section 121.1, The U.S. Munitions List (General).

Export Administration Database

This database maintained by the Bureau of Industry and Security, Department of Commerce, is a complete collection of regulations relating to EAR. Supplement 1 of 15 CFR Section 774 is represented by Categories 0-9.

Bureau of Industry and Security, Department of Commerce

The Bureau of Industry and Security is the ultimate authority on all issues relating to EAR. This site should be considered the most current source of EAR regulations and information.

American Association of Universities

The American Association of Universities provides timely and accurate analysis of federal policies impacting extramural research at universities in the United States.

Council on Government Regulations

The Council on Government Regulations (COGR) provides further analysis and interpretation on a wide spectrum of government regulations. A copy of COGR's current export control booklet is available [here](#).