

EXPORTING FROM UCSF TO A FOREIGN COUNTRY

STAYING IN COMPLIANCE IS NOT STRAIGHTFORWARD

PLEASE TAKE THE TIME TO READ THIS CAREFULLY

The University strives to maintain an open research environment where the right to publish and disseminate results of research are key. This is critical since information resulting from basic and applied research conducted in an open environment with no publication restrictions is excluded from Export Control Regulations under the Fundamental Research Exclusion described more fully below. Staying within the boundaries of this exclusion allows the University to avoid issues associated with “deemed exports” of technical data.

It is important to realize however, that equipment, software, data or other technologies acquired or developed under any research may still be subject to control by Export Control Regulations. Therefore, a license may be required if any of these items are to be exported from the U.S. to another country. For instance, equipment, computers, and software used in a given research project may be regulated. In addition, exports of biomaterials and chemicals used in fundamental research projects may require special permits or licenses. For example, you purchase a sophisticated analyzer from a company in England. You have an extensive project that requires that the analyzer be shipped to South Korea. Even though it was bought abroad, you may be restricted from sending it elsewhere abroad (countries used are for example only, not necessarily subject to restrictions).

The University will also acquire licenses as needed to conduct research or transfer of assets to countries, organizations or individuals on the Office of Foreign Assets Control list.

Finally, the University does not normally accept Export Controlled information under a duty not to disclose it from outside organizations. In unusual situations, an exception may be made on a case-by-case basis. Please contact your Contracts and Grants or Industry Contracts Officer for further information (please refer to contact information below). Faculty and others in the research community are reminded that they should not enter into any personal or private agreements to accept Export Controlled information outside the agreements negotiated by the Regents. Contact OEH&S for additional information.

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WHAT ARE EXPORT CONTROLS?

U.S. export control laws and regulations serve various Federal objectives, among them to protect national security, advance U.S. foreign policy and economic goals, and prevent the proliferation of weapons of mass destruction. Since September 11, 2001 export controls have been used as anti-terrorism tools. This has resulted in an increase in concern about enforcement and a greater focus on life sciences and biological materials.

WHAT ARE THE APPLICABLE REGULATIONS?

Department of State – International Traffic in Arms Regulations (ITAR) – regulates military or defense- related articles, technologies and services.

http://www.pmddtc.state.gov/consolidated_itar.htm

Department of Commerce – Bureau of Industry and Security (BIS) – Export Administration Regulations (EAR) – regulates commercial and “dual use” products and technologies.

<http://www.bis.doc.gov/licensing/exportingbasics.htm>.

Department of the Treasury – Office of Foreign Assets Control (OFAC) sanctions the conduct of research and the transfer of assets (defined very broadly as “something of value”) in those countries where the U.S. has imposed trade or economic sanctions or embargoes. Office of Foreign Assets Control regulations may also govern purchases from or the transfer of assets to certain individuals or organizations. <http://www.treas.gov/offices/enforcement/ofac/regulations/>.

WHAT IS AN EXPORT?

Traditionally, an export can be a particular item or items. In the University setting, collaborations with colleagues located in different countries often result in a need to send or receive these types of items both to and from other countries. Depending on the nature of a given item, there may be significant regulatory and other licensing required.

OTHER TYPES OF EXPORTS

It is VERY IMPORTANT to note that in addition to the above definition, "export" also means to send or take controlled articles out of the United States, to transfer ownership or control of a controlled article to a foreign person, or to disclose certain, defined information about a controlled article to a foreign government or foreign person. Although the export can take place when an article is carried out of the United States in luggage or sent by mail or courier, an export can also occur when performing services for the benefit of a foreign person or entity, sending a wire transfer, e-mail, or fax, or in a conversation. For instance, an email or conversation that contains pertinent information on a research study could be considered an “export” under the above definition.

"Deemed Export" is the transfer, release, or disclosure of technical data about controlled articles to foreign persons in the United States. For instance, discussions with a foreign-born person visiting a lab or attending a scientific conference in the U.S. involving controlled items would be considered a “deemed export.” PLEASE NOTE: Persons in the U.S. on H1b visas are exempt from the “deemed export” rule.

“Technical Data” is technical information that goes beyond general and basic marketing materials about a controlled article. The term does not refer to the controlled equipment or the article itself, or to the type of information contained in publicly available user manuals. It means specific information necessary for the development, production, or use of the article. This information usually takes the form of blueprints, drawings, photographs, plans, diagrams, models, formulae, tables, source code, engineering specifications, and documentation. An outline of research

involving the production of a controlled item is a good example of “technical data” that would fall under the “deemed export” category.

WHAT IS THE FUNDAMENTAL RESEARCH EXCLUSION?

The “fundamental research” exclusion under both Export Administration Regulations and International Traffic in Arms Regulations applies to information resulting from or arising during basic and applied research in science and engineering conducted at an accredited institution of higher education located in the U.S. This exemption has been defined under the National Security Decision Directive Number 189 ([NSDD-189](#)) issued on September 21, 1985 and reaffirmed by the current administration.

For this exclusion to apply, the information must be published and shared broadly in the scientific community. General scientific, mathematical, and engineering principles fall under this exclusion. The information may not be subject to proprietary or U.S. government publication or access dissemination controls. This exclusion applies to information only, not to items or materials. Once created, the information may be transferred abroad without restriction.

Fundamental Research - Fundamental research is defined as basic and applied research in science and engineering conducted at an accredited U.S. institution of higher education where the resulting information is ordinarily published and shared broadly within the scientific community. Such research can be distinguished from proprietary research the results of which ordinarily are restricted for proprietary reasons or specific national security reasons. Under the export control regulations, U.S. universities performing fundamental research may allow foreign members of their communities (e.g., students, faculty, and visitors) to participate in research projects involving export-controlled technical information on campus in the U.S. without a deemed export license, as long as the technical information used in the project is publicly available. Further, technical information resulting from fundamental research may be shared with foreign colleagues abroad and shipped out of the United States without securing a license.

Do note however that under International Traffic in Arms Regulations certain disclosures of unclassified technical data may be made to bona fide full time regular University employees only if :

- (i) The employee's permanent abode throughout the period of employment is in the United States;
- (ii) The employee is not a national of a country to which exports are prohibited; and (iii) The institution informs the individual in writing that the technical data may not be transferred to other foreign persons without the prior written approval. See Sec. 125.4 in the following link for the original regulation:

[part 125 - Licenses for the Export of Technical Data and Classified Defense Articles](#)

ARE THERE ANY OTHER EXCLUSIONS?

Under Export Administration Regulations, publicly available information is excluded from control. Under International Traffic in Arms Regulations, public domain information is excluded from control. These exclusions involve information that is already published through specified means and found in libraries open to the public or unrestricted subscriptions available for a cost not exceeding reproduction and distribution costs. They also apply to published patent information and to information available on websites accessible to the public for free. Information distributed at conferences held in the U.S. (International Traffic in Arms Regulations) or anywhere (Export Administration Regulations) which are generally accessible to the public for a reasonable fee and where attendees may take notes, is also excluded from control. There is also an exclusion for educational information which covers general science, math and engineering commonly taught at schools and universities (International Traffic in Arms Regulations) and information conveyed in courses listed in course catalogues and in their associated teaching labs of any academic institution (Export Administration Regulations). There is also a license exemption for unclassified technical data provided to bona fide fulltime regular employees of U.S. institutions of higher learning with permanent abodes in the U.S. throughout their employment. Please note that in this

case, students are not considered employees. For further information on exclusions see <http://www.access.gpo.gov/bis/ear/pdf/734.pdf> and http://www.access.gpo.gov/nara/cfr/waisidx_05/22cfr120_05.html

GREAT, I'M HOME FREE! RIGHT?

Not exactly. If the University accepts restrictions on publication or dissemination of research results, the fundamental research/publicly available/public domain exclusions are lost. Investigators must also refrain from making side deals with sponsors to restrict publication or dissemination, as these will also negate the fundamental research exclusion. A short (30-90 day) pre-publication review period for patent protection or to permit a sponsor to remove inadvertently included sponsor-proprietary information does not negate the exclusion.

Note that the University can still agree to protect a sponsor's proprietary information that is not export controlled. What we cannot agree to do is to keep University research results confidential.

Please contact the UCSF Office of Sponsored Research, Division of Contracts, or your Industry Contract Manager in the UCSF Office of Technology Management for further information and assistance.

WHAT ARE SELECT AGENTS?

On June 12, 2002, President Bush signed the "Public Health Security and Bioterrorism Preparedness and Responsibility Act of 2002". The purpose of this law is to prevent, prepare and respond to bioterrorism and other public health emergencies. The law requires that all persons possessing select biological agents and toxins deemed a threat to public health, animal or plant health register with the appropriate federal agency. Although this program is distinct from the export control program, it is important for campus to be aware of the regulations when conducting research or transferring materials. The select agent list contains organisms, viruses and toxins that could be used as biological weapons and can be found at <http://www.cdc.gov/od/sap/docs/salist.pdf>. Examples include botulinum toxin and *Bacillus anthracis*. The agents themselves, nucleic acid or genetic elements from any of the agents, and agent vaccines approved by USDA or FDA are restricted. There are criminal and civil penalties for failure to disclose possession or transfer of agents without registration. Please contact the Biosafety Officer at OEH&S for further information at 476-2097.

I WANT TO COLLABORATE WITH A FOREIGN UNIVERSITY AND SHIP ITEMS OUT OF THE U.S. WHAT DO I NEED TO KNOW?

Information created under the Fundamental Research Exclusion may be freely transferred outside the U.S. provided that the country, entity or individual to which the information is being transferred is not on an Office of Foreign Assets Control list. Licenses are required for all transactions under Office of Foreign Assets Control. In general, collaboration with foreign universities is allowed. For instance, information as described could be shared with colleagues in England provided that no individuals are specifically named on the Office of Foreign Assets Control list. However, if any materials are to be shipped abroad or if the research involves proprietary information, the exchange of researchers or faculty, or work in or transfer of funds to sanctioned nations, licenses may be required. For instance, any research materials to be shipped to Cuba would require a license as Cuba is an embargoed country.

WHAT ABOUT MATERIALS LEAVING THE CAMPUS? MATERIAL TRANSFERS? SHIPPING?

Shipments of tangible items out of the U.S. may require a license. Even an item resulting from fundamental research may require a license if it is to be shipped outside of the U.S.

Shipments of items controlled under International Traffic in Arms Regulations out of the U.S. always require a license. In all cases, if the shipment is to a sanctioned nation, entity, or individual, an Office of Foreign Assets Control license is required.

Shipping items controlled under Export Administration Regulations may also require an export license. It is critical to secure license approval or verify a license exception before shipping any controlled items. Contact the Office of Environmental Health & Safety (OEHS) at 476-1300 for guidance on verifying license exceptions and submission of any license applications.

Please see the UC Office of the President (UCOP) website at:

<http://www.ucop.edu/research/compliance/> for further assistance with shipping decisions. Also see the UCSF Office of Technology website at: <http://www.otm.ucsf.edu/docs/otmMta.asp> for information about material transfer agreements.

WHAT ABOUT INVENTIONS?

If you make an invention, please contact the UCSF Office of Technology Management (OTM) and file a [Technology Disclosure Form](#). Your Licensing Officer will help you determine if the invention described in your invention report is of the type which may be subject to export control regulations. If the technology is export controlled, it should be published or patented as soon as possible to stay within the Fundamental Research Exclusion. This does not mean that preliminary results must be published. It means that publication must take place in a timely manner as dictated by the standards of each discipline. Secrecy agreements with potential licensees must also be carefully structured to preserve the Fundamental Research Exclusion.

I WANT TO TRAVEL ABROAD FOR RESEARCH PURPOSES. ARE THERE RESTRICTIONS ON WHERE I MAY GO?

Do not travel to conduct research or educational activities to embargoed/sanctioned countries without first checking with the Office of Sponsored Research to secure a license from the Department of Treasury, Office of Foreign Assets Control as needed. Contact the Assistant Vice Chancellor – Sponsored Research (Joyce Freedman) at x6-1404 or email: joyce.freedman@ucsf.edu.

For a current list of embargoed countries please see

<http://www.ustreas.gov/offices/enforcement/ofac/programs/index.shtml>.

You may bring the usual and reasonable kinds and quantities of items that will be used by you or your employees in a lawful enterprise. These are known as “tools of the trade”. These items must remain under your effective control and include computers/laptops, handheld devices, and other equipment. This means that they must either be in your physical possession, locked in the hotel safe or guarded. Encryption commodities and software may be pre-loaded onto any of these aforementioned items. Tools of trade may accompany an individual departing the US or may be shipped unaccompanied within one month before the individual’s departure, or at any time after departure. These items, if not consumed or destroyed, must be returned to the U.S. as soon as practicable, but in no event later than one year after the date of export. No tools of the trade may be taken to Cuba or Sudan. Please see 15CFR Part 740(a)(2)(i) for “Tools of Trade” License Exception: <http://www.access.gpo.gov/bis/ear/pdf/740.pdf>.

WHAT ABOUT MONEY?

Office of Foreign Assets Control monitors the transmission of cash through wire transfers made from U.S. banks. Payments to sanctioned nations or individuals of these nations are also prohibited without a license. Bringing cash into sanctioned nations and paying individuals there directly is also prohibited. Please see <http://www.ustreas.gov/offices/enforcement/ofac/index.shtml> for information on restricted nations, entities and individuals as well as procedures for obtaining licenses to transact business with embargoed nations.

WHAT WILL HAPPEN IF I FAIL TO COMPLY WITH EXPORT CONTROL REGULATIONS?

Failure to comply with U.S. export control rules can result in severe penalties, criminal and civil as well as institutional and individual.

International Traffic in Arms Regulations: (Individual and Entity)
Criminal Fines of up to \$1 million and up to 10 years in prison
Civil Fines of up to \$500,000

Export Administration Regulations:
(Entities –criminal) The greater of fines of up to \$1 million or 5X the value of the export
(Individual – criminal) Fines of up to \$250,000 and/or up to 10 years in prison
(Civil) Fines \$10,000-\$100,000

Office of Foreign Assets Control: (Individual and Entity)
Criminal Fines of up to \$1 million and up to 10 years in prison. Civil Fines of \$12,000-\$55,000
Violators may also face loss of reputation and export privileges.

For some actual examples of persons and corporations who have been convicted of violations that have resulted in both fines and incarcerations, please see the MSR Global Customs Group website at: http://www.visualcompliance.com/export_penalties.cfm.

DO'S AND DON'TS:

Do not ship any item outside of the U.S. without first determining if the item is controlled under International Traffic in Arms Regulations and Export Administration Regulations. This applies to outgoing materials under MTA's, software and other deliverables.

Publish early and often to ensure all technical data about export-controlled commodities qualifies as "publicly available".

Do not accept publication restrictions or access/dissemination restrictions.

Do not accept prior approval requests for use of foreign nationals.

Do not enter into secrecy agreements or otherwise agree to withhold results in research projects conducted at the University or that involve University facilities, students, or staff.

Do not accept proprietary information that is marked "Export Controlled". Return to the manufacturer any materials they provide to you about export-controlled equipment that is marked "Confidential" unless it is covered by a specific non-disclosure agreement. Confidentiality/Non-Disclosure Agreements must be reviewed by Office of Sponsored Research or the Office of Technology Management (OTM) to insure that UC and you are not assuming the burden of restricting dissemination based on citizenship status or securing licenses. Please contact the Director, Contracts & Grants at x6-8156 or e-mail: joan.kaiser@ucsf.edu or the Industry Contract Manager Kate Low at 353-4436 or e-mail: kate.low@ucsf.edu.

Do not provide citizenship, nationality, or visa status information for project staff to parties outside the University or include such information in proposals. It is contrary to University policy to discriminate on this basis or to select research project staff on any basis other than merit. (See <http://www.ucop.edu/raohome/cgmemos/04-02.html>). It is also a violation of INS regulations, of the federal Privacy Act, and the California Information Practices Act to provide this information.

Do not agree to background checks or other arrangements where the external sponsor screens, clears, or otherwise approves project staff. University policy allows for background screening conducted by the University when appropriate to the position.

Do not attend meetings where foreign nationals are prohibited from attending. Do not sign the DD2345, Militarily Critical Technical Data Agreement, as a condition of attending a conference or receiving materials from the government.

If you encounter an RFP from a sponsor (either government or private) that mentions export controls, prior approval of publications or restrictions on citizenship, please discuss this with your OCGA officer as soon as possible.

Contact the Office of Sponsored Research to ascertain whether a license from the Department of Treasury, Office of Foreign Assets Control, is required to conduct research or education activities in an embargoed country or before traveling to an embargoed country to conduct research or educational activities.

HELPFUL CONTACTS:

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