

Export Control Basics for The Johns Hopkins University Community

Export Controls at JHU address issues related to:

1. shipping tangible items overseas,
2. sharing proprietary, confidential or restricted information or source code with Foreign Persons (as defined below) at Hopkins or abroad,
3. interactions with embargoed or sanctioned countries, organizations or individuals.

Federal regulations related to these topics are complex and changing. Individuals at Hopkins are therefore encouraged to view our online [Introduction to Export Controls](#) and to contact JHU's Export Control Officer whenever they expect to be involved with any of these issues:

Frank Barker, Export Control Officer
Wyman Park Center W-400
410-516-0415
fwb@jhu.edu

SUMMARY DESCRIPTION

Export controls, set forth in regulations administered by several Federal agencies, impose access, dissemination, and participation restrictions on the transfer and retransfer of "controlled" source code and technical know-how and on the export and reexport of tangible items.

An export is defined as the shipment of tangible items and the transmission or transfer of source code or technical know-how to another country, while a "deemed export" is the disclosure of source code or technical know-how to Foreign Persons in the US (see [DEFINITIONS](#), in Section I below). The US Commerce Department must issue an export license or provide an exception to, or exclusion from, license requirements before any tangible item, source code or information in the US and listed on the Commerce Control List (CCL) may be exported or reexported. Likewise, if a tangible item, source code or information is on the US Munitions List (USML), the US State Department must issue an export license or provide for an exception to, or exclusion from, licensing requirements. JHU must comply with all applicable export controls, as established by Federal regulations (see [REGULATIONS](#) in Section II below).

Export controls restricting a Foreign Person's participation in university research within the United States (i.e., "deemed export" restrictions) generally do not apply to the results of [fundamental research](#) – namely, openly-conducted basic and applied research in science and engineering that is not subject to access, dissemination, or participation restrictions. Export controls will also not apply to the technical know-how or other information that is used in the conduct of fundamental research, if that information is itself the result of prior fundamental research, or if it is not subject to publication or access restrictions.

JHU's stated commitment to "...academic freedom and to the public documentation and dissemination of the knowledge that it creates..." ensures that much of its academic work can be described as fundamental research, having results and content that are typically excluded from export controls. Nevertheless, research and other activity at JHU are systematically monitored for the instances in which proprietary or otherwise restricted information is introduced into otherwise fundamental research.

NOTE 1: As a "non-academic" affiliate of JHU, the Applied Physics Laboratory is free to perform work subject to restrictions – and export controls – that are typically rejected in JHU's academic divisions.

NOTE 2: Fundamental research conducted *outside* of the US remains subject to export controls.

In the case of shipments of certain tangible items or source code, or the transmission (physical or electronic) of information outside the U.S., Hopkins has the responsibility to either:

1. Document an express determination that no license is needed,
2. Document an express determination that an exception to export licensing requirements applies, or
3. Obtain an export license.

Of primary concern are transactions involving proprietary or confidential export-controlled information provided to Hopkins researchers and other employees by third parties, such as corporate or government sponsors and subcontractors. Introducing such information into our research and other activities is not only at odds with [JHU's Policy on Classified and Otherwise Restricted Research](#), but it also increases the likelihood that a license will have to be requested from the Federal Government before such information can be shared with our foreign-national co-workers and other collaborators.

Even if we determine that the tangible items, source code or information that we wish to export can be exported without a license, we are required to keep records that document our exports according to provisions in the export control regulations (see [RECORDKEEPING REQUIREMENTS](#) in Section V below).

I. DEFINITIONS

A. EXPORT

The Federal Government considers an "export" to be the sending or taking of tangible items, source code or information out of the United States in any manner; transferring ownership or control of tangible items, source code or recorded information to a Foreign Person; or disclosing technical information about tangible items or source code to a foreign government or Foreign Person. Tangible items, source code or information being sent or taken out of the United States are also referred to as "exports".

B. REEXPORT

"Reexport" means an actual shipment or transmission of tangible items, source code or information from one foreign country to another foreign country. The export or reexport of tangible items, source code or information that will transit through a country or countries, or that will be unloaded in a country or countries for reloading and shipment to a new country, or are intended for reexport to the new country, are deemed to be exports to the new country. One should note, however, that the export control regulations require licenses for some items to merely transit through certain countries.

C. DEEMED EXPORT

"Deemed Export" is a term used by the Commerce Department to describe the situation where a Foreign Person on US soil may be exposed to, or have access in any manner to, source code or technical know-how (referred to as "technology" by the Commerce Department). Although the State Department does not use this specific term (but it does include the underlying concept in its definition of an export), JHU will use the term "deemed export" when discussing access by Foreign Persons to source code or technical know-how on our soil, without regard to which agency may have cognizance over the transaction.

D. US PERSON/FOREIGN PERSON

A "US Person" is a) a citizen of the United States; b) a lawful permanent resident alien of the US (a "Green Card" holder); or c) a refugee, or someone in the US as a protected political asylee, or who is here under amnesty. US Persons also include organizations and entities, such as universities, incorporated in the US. Unless an exception or exclusion is available, the general rule is that only US Persons are eligible to receive controlled items, source code or technical know-how, unless the party releasing such items to a Foreign Person first obtains an export license.

A "Foreign Person" is anyone who is not a US person. A Foreign Person also means any foreign corporation, business association, partnership or any other entity or group that is not incorporated to do business in the US. Foreign Persons may include international organizations, foreign governments and any agency or subdivision of foreign governments such as consulates.

E. **FUNDAMENTAL RESEARCH**

The concept of "fundamental research" was established by *National Security Decision Directive 189* (NSDD 189), which establishes a national policy with regard to how such research shall be treated by the various export control regimes.

NSDD 189 defines fundamental research as:

"...basic and applied research in science and engineering where the resulting information is to be shared broadly within the scientific community."

NSDD 189 provides that the conduct, products, and results of fundamental research are to proceed largely unfettered by deemed export restrictions. It also states that the government must determine - before releasing a research opportunity - whether the research should be classified or otherwise kept secret. Research that carries access, participation, or dissemination restrictions will not qualify as fundamental research under the export control regulations.

Some export regulations expressly recognize "fundamental research" and exclude its results from regulation altogether, or from license or other authorization requirements. This means that much of our work with foreign-national colleagues and employees at JHU can go on without having to ask the Federal Government for permission. However, we must keep in mind that our research or other activity *may* from time to time require asking for permission, if such work is to be conducted outside of the US, or if it requires exposure of Foreign Persons to proprietary or confidential export controlled information. (Please see Section IV below for guidance on [ACCEPTING A THIRD PARTY'S CONTROLLED ITEMS OR DATA](#)).

II. REGULATIONS

A. STATE DEPARTMENT - [INTERNATIONAL TRAFFIC IN ARMS REGULATIONS](#) (ITAR) 22 CFR 120-130

The US Department of State, Directorate of Defense Trade Controls (DDTC), is responsible for items and information inherently military in design, purpose, or use. Referred to as "defense articles," such items are found on the US Munitions List, 22 CFR 121. Spacecraft and satellites, even if not for military use, are on the Munitions List, along with their associated systems and related equipment. Information related to Defense Articles is referred to as "technical data."

B. COMMERCE DEPARTMENT - [EXPORT ADMINISTRATION REGULATIONS](#) (EAR) 15 CFR 700-799

The US Department of Commerce, Bureau of Industry and Security (BIS), has export jurisdiction over most tangible and intangible items in the United States, although it does not require a license for every export. BIS controls goods and information having both civilian and military uses by including them on the Commerce Control List (15 CFR 774), also known as the "Dual Use List." BIS uses the term "technology" when referring to technical know-how associated with the items on the Commerce Control List.

C. TREASURY DEPARTMENT - [OFFICE OF FOREIGN ASSETS CONTROL](#) (OFAC) 31 CFR 500-599

The US Department of the Treasury oversees US economic sanctions and embargoes through its Office of Foreign Assets Control (OFAC). Authorized by the *Trading with the Enemy Act* and the *International Emergency Economic Powers Act*, OFAC enforces trade, anti-terrorism, narcotics, human rights and other national security and foreign policy based sanctions prohibiting the provision of anything of value, either tangible or intangible, to sanctioned countries, organizations or individuals. Even when the pertinent regulations do not expressly forbid our work in/with other countries or their citizens, the conditions under which we are allowed to do such work may be so restrictive as to make it impractical or unacceptably likely to violate OFAC regulations or other regulations (most notably, those issued by BIS).

The export control regulations summarized here each impose severe monetary and criminal penalties for failure to comply with their requirements (see [penalties](#) below in Section VI).

III. EXPORT LICENSES FOR OVERSEAS SHIPMENTS / TRANSMISSIONS

The Commerce Department has export jurisdiction over all goods and "technology" in the United States, unless some other agency has expressly been given such authority. However, this does not mean that a license must be obtained before any commodity or information can be shipped or transmitted.

In order to determine whether it is necessary to obtain an export license to send tangible items or to transfer or transmit source code or technical know-how outside the United States, the researcher preparing the shipment or transfer needs to consider the following:

- whether the source code or technical know-how is proprietary or disclosure-restricted, and thus possibly export controlled, or
- whether the source code or know-how resulted from fundamental research,
- the description of the tangible item, source code or technical know-how,
- the technical characteristics and specifications of the item, source code or technical know-how
- the intended end-use and end-user of such items, and
- their destination.

All tangible items, source code and technical know-how that are not on a US export control list may be shipped or transmitted to any country, individual or entity that is not sanctioned, embargoed or otherwise restricted for export. Such items, code and technical know-how may be exported under "No License Required" (NLR) provisions. Questions about the applicability of NLR to a proposed export should be directed to your Export Control Office at (410) 516-3295 or <mailto:ECO@jhu.edu>.

JHU has two recommended agents who can assist with the logistics involved in exporting items abroad. They can arrange for shipment of your items and will work with your Export Control Office to ensure that your exports are in compliance with Federal export regulations and any other regulations that may apply. The two recommended agents are:

Logenix International, LLC
Contact: Dave Byford, Business Development Manager
(P) 703-256-4884; (Direct) 703-256-5313
Email: dbyford@logenix-intl.com
www.logenix-intl.com

Priority Worldwide Services
Contact: Kelly Danks, Import Manager or Phil Roth, Exports Manager
(410-766-7470
Email: kdanks@priorityworldwide.com
Email: proth@priorityworldwide.com
www.priorityworldwide.com

Note also that specific training and documentation in areas additional to export controls is needed whenever you are shipping chemicals, biologicals or other dangerous materials. See JHU's Health, Safety and Environment web site for assistance in getting the appropriate guidance and training in these areas:

<http://www.hopkinsmedicine.org/hse/biosafety/index.html>

IV. ACCEPTING A THIRD PARTY'S CONTROLLED ITEMS OR DATA

The conduct and results of fundamental research may usually proceed openly and be shared freely with Foreign Persons in the United States without concern for deemed export restrictions. However, there are instances in which export-controlled items, source code or technical know-how provided to you by a third party may not be openly shared with certain Foreign Persons, even though those individuals may be important contributors to the performance of the fundamental research. For example, a corporate sponsor or a research partner may have to disclose the proprietary tolerances of a piece of hardware being provided for use in carrying out a fundamental research experiment. Proprietary or restricted information that is *required* for the development, production or use (at a very advanced level) of an export-controlled item (e.g., equipment or substance) is itself export-controlled. It carries with it export control requirements that must be honored by the researcher who agrees to be a recipient of such information.

Before a researcher decides to accept restrictions on the information that she receives (or produces for that matter), she should review the conditions of [JHU's Policy on Classified and Otherwise Restricted Research](#). If the receipt of restricted information is in compliance with University policy, the researcher should contact the Export Control Office to ensure that the export control regulations will allow the information to be freely shared with Foreign Persons with whom the researcher would like to share it. Even if a proposed recipient is determined to be a Foreign Person and is eligible to receive export-controlled information, the primary researcher and the Export Control Office should document the available license exclusion or license exception that applies to the release of the information (see Section V below on [RECORDKEEPING REQUIREMENTS](#)).

A. JHU POLICY ON CLASSIFIED AND RESTRICTED RESEARCH

JHU is committed as an institution to openness in documentation and dissemination of research results in its "academic divisions" (ie, an exception is made for the Applied Physics Laboratory). This does not mean that entering into non-disclosure agreements is forbidden, but it does require that non-disclosure agreements be entered into only if the restrictions therein do not hinder dissemination of the intellectually significant portions of our research and other work.

Once it is determined that a non-disclosure commitment does not violate JHU's openness policy, it must be determined whether a license will be required to share the restricted information with any Foreign Persons associated with the research or other activity.

B. EXPORT CONTROLS ON INDIVIDUAL ELIGIBILITY AS A RECIPIENT

Generally, Federal regulations allow only US persons to be provided with export-controlled items, source code or technical know-how without an export license. Nonetheless, there are some specific exemptions (ITAR) and license exceptions (EAR) available to the academic community that can make such licenses unnecessary.

For questions regarding the use of "No License Required," Non-Disclosure Agreements, license exceptions and exemptions, or recordkeeping, please contact the JHU Export Control Office at 410-516-3295, or ECO@jhu.edu).

V. RECORDKEEPING REQUIREMENTS

Each of the relevant export control regulations contain specific recordkeeping requirements that must be satisfied. In addition, JHU maintains its own recordkeeping requirements in order to document its commitment to, and compliance with, export control regulations generally.

Departments or programs must keep soft or hard copies of all export documentation, including financial records and shipping documentation (Commercial Invoices, Shipper's Export Declarations), in their research project files for a period of five years from the date of the export, reexport or controlled deemed export.

VI. PENALTIES

A. EXPORT ADMINISTRATION REGULATIONS (EAR)

Criminal Penalties

- University -- A fine of up to \$1,000,000 per violation
- Individuals --A fine of up to \$1,000,000 and up to 20 years' imprisonment per violation

Civil Penalties

- University --A fine of \$250,000 per violation, or twice the amount of the transaction that is the basis of the violation, whichever is greater. May also include the denial of export privileges and the seizure and forfeiture of the goods involved in the transaction.
- Individuals --A fine of \$250,000 per violation, or twice the amount of the transaction that is the basis of the violation, whichever is greater. May also include the denial of export privileges and the seizure and forfeiture of the goods involved in the transaction.

Examples

- Bass-Pro - \$510K for shipping guns without a license.
 - Dr. Thomas Butler, Texas Tech – 2 years in prison for making fraudulent claims and unauthorized exports (plague bacteria).
 - ITT fined \$100M for exporting night vision materials without license.
-

B. OFFICE OF FOREIGN ASSETS CONTROL (OFAC)

Criminal Penalties

- University -- A fine of up to \$1,000,000 fine per violation
- Individuals -- A fine of up to \$1,000,000 and up to 20 years' imprisonment per violation

Civil Penalties

- University -- A fine of up to \$250,000 per violation. May also include the denial of export privileges and the seizure and forfeiture of the goods involved in the transaction.
- Individuals --A fine of up to \$250,000 per violation. May also include the denial of export privileges and the seizure and forfeiture of the goods involved in the transaction.

Examples

- Augsburg College, Minneapolis, MN fined \$9,000 for 4 trips to Cuba; attorney negotiated reduction in fine from \$36,000.
- Thermon Manufacturing, San Marcos, Texas, fined \$14,613 for three shipments to Sudan. Fine significantly reduced because they disclosed to OFAC.
- Discover Financial Services ended up paying a penalty of \$8,720 after violating the Foreign Narcotics Kingpin Sanctions Regulations when they processed 28 credit card transactions (\$23,252 in total) for a person designated by OFAC as a "Specially Designated Narcotics Trafficker." Discover voluntarily disclosed the violations to OFAC.
- Wells Fargo Bank, N.A. paid \$67,500 to settle allegations that they violated the Iranian Transactions Regulations by performing financial services in the US for an account holder who was currently located in Iran. OFAC apparently advised Wells Fargo about the account holder but the bank never looked into the situation until several years later. It's no surprise that Wells Fargo did not voluntarily disclose the violations to OFAC since they didn't take OFAC's guidance to begin with.

C. INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (ITAR)

Criminal Penalties

- University --A fine of up to \$1,000,000 per violation.
- Individuals --A fine of up to \$1,000,000 per violation, and up to 10 years' imprisonment.

Civil Penalties

- University --A fine of up to \$500,000 per violation. May also include the denial of export privileges and the seizure and forfeiture of the goods involved in the transaction.
- Individuals --A fine of up to \$500,000 per violation. May also include the denial of export privileges and the seizure and forfeiture of the goods involved in the transaction.

Examples

- Professor Roth (Univ. of TN) convicted on 9/3/08 and recently sentenced to four years.
- Raytheon fined \$25M
- Hughes Electronics and Boeing Satellite Systems - \$32M
- Boeing - \$4.2M
- Lockheed Martin - \$13M

QUESTIONS

Inquiries concerning the applicability of the export control regulations to any specific set of facts should be directed to

JHU Export Control Office
Wyman Park Center W-400
(410) 516-3295, ECO@jhu.edu