

Recovery Through Discovery: New Challenges in Research Administration



LAUNCHING AN EXPORT MANAGEMENT AND COMPLIANCE PROGRAM

... or, how to get off the ground without going into orbit!

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Your Hosts for Today's Journey



- **Susan MacNally**
 - Export Control Officer
 - University of Kansas
- **Jennifer May**
 - Chief, Export Controls Compliance
 - University of Missouri

A Word of Thanks!



We would like to take this opportunity to thank the following colleagues for their assistance in putting this presentation together...

Robin Witherspoon, University of Tennessee
Mark Stomski, Duke University

Assumptions



- **We assume you are familiar with these basics...**
 - 3 main export control agencies and associated regulations
 - ✦ **BIS / EAR**
 - ✦ **DDTC / ITAR**
 - ✦ **OFAC**
 - Differences between EAR and ITAR
 - Exclusions, Exemptions and Exceptions, particularly FRE!
- **BUT! If you are an export control rookie, just hang on for the ride!**

Agenda



Building your Launch Pad: The EMCP

- Making the case for an Export Management and Compliance Program
- Core elements
- Strategies for success

Outside the Capsule: Working Outside FRE

- Contract/Grant Terms & Conditions
- Technical Data Transfers & TCPs
- Physical Shipments
- International Travel

Susan



• **Building your launch pad: The Export Management and Compliance Program**

- Mission, Goals
- Analyze, plan, balance
- Core elements
- Strategies for success

Mission: Launch an EMCP



Create a prioritized action plan,
based on EMCP best practices and
tailored to your campus needs,
while preventing violations and
without impeding research.

*...Did I mention we have no
extra resources?*



Gap Analysis



**Ideal
EMCP**

Your Campus :

- **Knowledge of EC**
- **Activities of risk**
- **Institutional context**



The Ideal...



An EMCP is

- a program to manage export-related decisions and transactions to ensure compliance.
- an organized, integrated system to capture
 - analysis,
 - decisions,
 - accountability and
 - implementing procedures.

Goals of EMCP



Export regulations compliance
Protection against violations
Service (speed, accuracy)



Risk of violations
Futile effort (ad hoc system)

In a nutshell



- **The purpose of an EMCP is to ensure**
 - that the right export decisions are consistently being made;
 - that employees know their export control responsibilities;
 - that the right procedures are being followed;
 - and that the right questions are being asked.

There is no ideal EMCP-in-a-can

Your Campus



Assessment : Institutional Context



- Structure – Centralized? Decentralized?
- Policies and Procedures
- Support
- Culture

Ask:

Is it adequate for EMCP needs?

How will it affect your program?

Assessment : Knowledge of EC



- Top Administrators
- Faculty, researchers
- Administrative staff
- Export compliance staff

Ask:

What do they know about the topic?

Do they know their responsibilities?

Do they know what to do?

Assessment: Risk Factors



- Restricted or classified research?
- Defense-based funding, proprietary projects
- Subjects of research, faculty expertise coincide with CCL/USML categories?
- CCL and USML-listed equipment, materials, technology, software
- ↑ ↓ **How do these two groups intersect?**
- International collaborations, research missions, travel
- Foreign campus or international seminars
- Foreign nationals on campus
- Interactions with highly restricted countries

Your Learning Curve



Determine what YOU need to learn

- Regulations
- Campus policies, procedures
- Key players on your campus
- Types of research on campus
- International activity

You can't manage what you don't know you have!

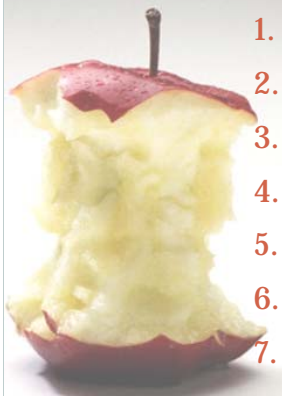
Plan and Balance



- Now that we've taken stock of where we are, let's look at how far we need to go and how to determine the best route to get there.



Core EMCP elements



1. Institutional commitment
2. Risk assessment
3. Written program
4. Training and Outreach
5. Processes, documentation, reporting
6. Program audits
7. Plan for adverse events

www.bis.doc.gov/complianceand enforcement/emcp.htm

1. High-level Institutional Commitment



Why?

- Empowered Official
- Policy setting
- Administrative backup
- Resources
- Applicability beyond research
- Nature and extent of penalties

Don't count on a grassroots approach

Institutional Commitment



Strong Institutional Commitment will affect

- Visibility, awareness, and profile of EC
- Level of compliance with regulations
- Available resources
- Traffic in your office (job security!)

But, what if you need to make the case for support?

Make the Case: First, find allies!



Who can help support your case?

- General or Corporate Counsel
- Director of Research Administration
- Internal Audit
- Faculty and Administrators
- International Office
- Human Resources
- Comptroller, Purchasing
- IT Security



Consider forming a task force or workgroup

Making the case: Perspective



Know your audience-

Address university mission-related issues

- Prevent research delays
 - EMCP can put proactive measures in place, improve compliance
- Avoid civil and criminal penalties
 - Evidence of strong EMCP is a mitigating factor, with great weight
- Scope of EC is broader than research
 - Campus-wide awareness and involvement is key
- Protect University identity, reputation

Make the case: Propose a plan



- Identify key risks and how Administration can help
- Use your assessment to show gaps
- Present broad strategies, best practices to overcome gaps
- Prioritize, budget, and create timeline

Show that you can achieve measurable objectives, with support

Propose a plan of action



Points to address:

- Policy development and dissemination
- Centralization of export compliance oversight
- Web resources for campus
- Procedure development, integration with other institutional processes
- Multi-tiered training opportunities
- Periodic risk assessment and self-audit
- Outside resources required – counsel, tools, training
- Budget - time required

2. Ongoing Risk Assessment



- **Will help identify**
 - Where to look for export issues
 - Where to build in proactive tools, safeguards and triggers
 - Who to train
 - What needs attention
- **Initial assessment = benchmark for an annual report**

Key resources:

BIS assessment tool-

<http://www.bis.doc.gov/complianceandenforcement/emcp.htm>

Your campus offices of Risk Management, Internal Audit

3. Written Program



What did we do before WWW?

- Put it all (or almost all) out there
- Basic EC information
- Policies, responsibilities
- Procedures, forms, decision tools
- Information on training
- Contact information
- Resources and agency links

Key resources:

Colleague web and print examples

Campus IT support, student programmers

4. Ongoing EC Training



- **Who?**
 - High level administrators
 - Faculty, researchers, research administrators, staff
 - Export Control staff
- **What?**
 - Tiered content relevant to group
 - Tailor information and provide discipline-specific examples
- **How?**
 - Consider delivery methods
- **When and Where?**
- **Who Says?**
 - Policy, requirement, documentation

4. Ongoing EC Training



Who + What...a tiered training program example

- High-level administrators
 - ✦ Scope of law, activity on campus, risk assessment, best practices, plan of action, penalties
- Faculty and staff
 - ✦ Law and processes, policy, responsibilities, relevance, triggers, procedures, contacts, penalties
- Export Controls staff
 - ✦ Detailed and comprehensive training from outside sources: BIS, State, SIA, SRA, NCURA, COGR, consultants

Key resources:
 Colleagues
 Professional organizations, government agencies

Good Educational Programs



- Emphasize what faculty and staff can know without being export experts
- How to qualify for exclusions
- When to get advice from the central office
- Know the risks and penalties of non-compliance
- Tailored presentations to departments
- Campus-wide training

5. Procedures, Operations



How do things ~~get done~~ get done right.

- Are responsibilities and procedures clear and available?
- How is training disseminated?
- What triggers have you integrated to identify export issues?
- What safeguards have you planted to prevent violations?
- What forms, decision tools, databases assist the process?
- Do you have protocols for record retention, risk assessment, self-audit reports, and adverse events?

Key resources:

Campus Units

Colleague web and print examples

Commercial screening and decision tools, outside counsel

BIS resources

Procedural Tactics



- Uniform application of Export Control Policy
- Compliance screening
- Proposal and contract review
- Dedicated web site
- Establish checkpoints and triggers
 - Add questions to internal proposal routing form.
 - Develop a check list for contract/grant administrators.
 - Develop purchasing and travel checklists
 - Develop and implement processes for deciding if a project is controlled and whether an exclusion applies.
- Data collection and retention
- Plan for adverse events

7. Adverse Events



Some questions to discuss with upper management...

- Who decides to stop an activity?
- What conditions will stop an activity?
- Who decides to report a violation?
- Who is involved with response to federal investigation?

Strategy: Share the Load



- **Engage stakeholders and helpers**

- Department Research Administrators
- Researchers and technicians
- Department and Center heads
- Central IT, Purchasing, Travel, Comptroller, Audit
- Environmental Safety, IT security, Public Safety
- Human Resources, International Office, Admissions
- General Counsel
- Interns and student help

Campus awareness
Information feeds
Integrate EC into processes

Strategy: Centralize EC Compliance



Export Control officer:

key knowledge, decision-making, point of contact

- Knowledge of regulations: ITAR, EAR, OFAC
- Submissions and contact with agencies
- Resource for faculty, staff
- Contact with outside counsel
- Record retention and reporting
- Training
- Coordinate policy and program implementations
- Advise Administration of program status, best practices

Strategy: Setting Priorities



- **Most sensitive technologies and equipment**
 - Space technology, Engineering, hard sciences, encryption, BSL3 labs, telecommunications
- **Most restrictions imposed**
 - Classified, no foreign access, publication approval
- **Most exposed to international transfer**
 - Collaborations, research abroad, non-US person population on campus, what nations/nationalities involved, security infrastructure

Export Management and Compliance Program



**A Strong Export Control
Management Program is a
Great Mitigating Factor in the
University's Favor!**

When you are not putting out fires...



- Put the program and policy in writing
- Centralize oversight
- Good legal counsel
- Good educational programs
- Good record keeping
- Ask the right questions
- Not just sponsored research

Jennifer



Outside the Capsule: Working Outside FRE

- Contract/Grant Terms & Conditions
- Technical Data Transfers & TCPs
- Physical Shipments
- International Travel

Exclusions, Exemptions & Exceptions



- EXCLUSION = Regulation Simply Doesn't Apply
- EXEMPTION = Regulation Generally Applicable, but May Not Apply if Certain Circumstances Exist
- EXCEPTION = An Exception is Available, but May be Overcome or Lost if Other Conditions Not Met

**Fundamental Research is EXCLUDED
from
Export Control Regulations**

We Like...



- ITAR Fundamental Research – 22 CFR 120.11(8)
 - The conduct, products, and results of
 - public domain basic and applied research
 - in science and engineering
 - unfettered by deemed export restrictions.
- EAR Fundamental Research – 15 CFR 734.8
 - Basic and applied research
 - in science and engineering
 - where the resulting information is ordinarily published
 - and shared broadly within the scientific community.

We don't like...



- Participation, Access, and Dissemination Restrictions:
 - Prepublication reviews
 - U.S. citizen only (aka foreign national restrictions)
 - Classified, proprietary or otherwise secret work
 - Other “national security” controls
- NEGOTIATE
 - Demonstrate PUBLIC DOMAIN nature of work
 - Offer Alternative Clauses

THE TROUBLESOME CLAUSES



couple-up at your own risk!

DFAR 252.204-7000



DISCLOSURE OF INFORMATION (DEC 1991)

- (a) The Contractor **shall not release** to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, **unless— (1) The Contracting Officer has given prior written approval;** or (2) The information is otherwise in the public domain before the date of release. ...

Negotiation Tools



- **204.404-70 Additional contract clauses**
 - (a) Use the clause at 252.204-7000, Disclosure of Information, in solicitations and contracts when the contractor will have access to or generate unclassified information that **may be** sensitive and inappropriate for release to the public.
- Provide copies of publications/information to the contracting officer for “review and comment” at least 30 days prior to any such release.
 - Typically no more than 60-day review window
- Use language like, “shall be free to publish, permit to be published, distribute for public consumption results of conclusions made pursuant to performance of the contract” ...

Negotiation Tools



“Academic Institutions are expected to generate fundamental research results which are not related to performance characteristics of government or defense systems or manufacturing technologies while performing research on their campuses. Therefore, with respect to university participation under this contract, all papers of research and other activities may be published in accordance with academic standards provided that:

- (1) The Contracting Officer has been provided a copy of any such report or paper for review, comment, or classification determination; or
- (2) The information is otherwise in the public domain as defined in 22 CFR 120.11.
- (3) The copy of the report or paper has been provided to the Contracting Officer and Government Program Manager at least X days before the date of release”

PLEASE NOTE: DoD ANPR!



- On 3 March 2010, the Department of Defense issued an advance notice of proposed rulemaking (75 Fed. Reg. 9563, 3 March 2010).
 - The proposed rule **MODIFIES** the instructions for using the 7000 clause:
 - ✦ “... use ... in solicitations and contracts where the contractor will have access to or generate DoD information.”
 - ✦ “... use ... 252.204-7XXX, Basic Safeguarding of Unclassified DoD Information Within Industry, when ... the contractor or subcontractor at any tier will potentially have DoD information resident on or transiting its unclassified information systems.
 - ✦ “... use ... 252.204-7YYY, Enhanced Safeguarding and Cyber Intrusion Reporting of Unclassified DoD Information Within Industry...

DFARS 252.204-7008



~~REQUIREMENTS FOR CONTRACTS INVOLVING EXPORT CONTROLLED ITEMS
(JUL 2008)~~

Whoops! Scratch that... This changed on 8 April 2010!

252.204-7008 Export-Controlled Items.

...

- (b) The contractor shall comply with all applicable laws and regulations regarding export-controlled items, including, but not limited to, the requirement for Contractors to register with the Department of State in accordance with the ITAR. ...
- (c) The Contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items exists independent of, and is not established or limited by, the information provided in this clause. ...

Negotiation Tools



~~252.204-7000 Requirements Regarding Potential Access to
Export-Controlled Items. ...~~

OH NEVER MIND! THIS ONE'S GONE, TOO!!

Why is the new 7008 so bad?? It sounds OK to me!

- While the rule does not impose any new requirement because all are already required to comply with U.S. export regulations, the rule does impose additional risks and liabilities on defense contractors because a violation of U.S. export laws could now also result in a breach of contract.
- **204.7304 Contract clauses.** Use the clause at 252.204-7008, Export-Controlled Items, in all solicitations and contracts.
- There is nothing to negotiate. You need to assess your risk.

A moment of pause...



- A reference to export control laws (e.g. 7008) by itself does not preclude the use of the Fundamental Research Exclusion but it is a red flag that something in the contract may need a closer look.
 - Red Flags –
 - ✦ “Export Controls”
 - ✦ ITAR (22 CFR ...)
 - ✦ EAR (15 CFR ...)
 - ✦ OFAC (Office of Foreign Assets Control)
 - ✦ “Foreign Nationals”

ARL 52.005-4401



- Procurement instruments and solicitations (including grants, cooperative agreements, etc.), abstracts, papers, technical reports, articles, point papers, news releases, short items to be included in other publications, academic papers on work-related subject matter, speeches, briefings, media presentations, training materials, munitions cases, environmental impact statements, and other forms of information, including film, audio tapes and video cassettes which could divulge non-releasable, unclassified information.
- ...
- Army policy is to make available to the public the maximum accurate information ... confer and consult with each other prior to publication or any other disclosure ... offer the other party ample opportunity to review the proposed publication or disclosure, to submit objections, and to file application letters for patents in a timely manner ... 60 days

Negotiation Tools



- Where's the Kitchen Sink?
 - Time to streamline!
- Parties will “confer and consult” regarding information disclosures to ensure no classified or proprietary information is released.
- “Review” opportunity for the other party when one party proposes submission of a manuscript for publication
 - 30-60 day maximum

ARL 52.004-4400



In accordance with Title 8 U.S.C. 1324a, local Foreign Disclosure Officers (FDOs) may approve access by foreign nationals working on unclassified public domain contracts for the duration of the contract, provided the foreign nationals have appropriate work authorization documentation.

Negotiation Tools



- Other than whole-sale removal of this clause, there is not much you can do to fix this.
- If you cannot remove it by emphasizing the fundamental nature of the work, NSDD 189, etc., you'll need to discuss all potential export control aspects with the PI.
 - Licensing of foreign nationals
 - Technology Control Plan
 - Is the project worth it?

AFMC 5352.227-9000



- (d) Equipment and technical data generated or delivered under this contract are controlled by the International Traffic in Arms Regulation (ITAR), 22 CFR Sections 121 through 128. **An export license is required before assigning any foreign source to perform work under this contract or before granting access to foreign persons to any equipment and technical data generated or delivered during performance (see 22 CFR Section 125)**

Negotiation Tools



- Try this: “The proposed subcontractor is not expected to perform research or receive/generate information that is controlled by the International Traffic in Arms Regulation (ITAR), 22 CFR Sections 121 through 128. Therefore, the Contractor is not required to place a clause in the university subcontracts containing appropriate export control restrictions, set forth in this clause.”
- **WARNING!** Ensure that your PI is not “providing names” to the contracting officer for approval of foreign national students, otherwise all the work you did to exclude export controls was wasted!

Technical Data Transfers



*Can you really transfer something you
can't see, hold, touch, feel? Yep!*

Deemed Exports & Technology Control Plans

What is a “Deemed Export?”



- An export of technology or source code (except encryption source code) is "deemed" to take place when it is released to a foreign national within the United States. §734.2(b)(2)(ii) Such transfer may require a license depending on the technology and the country involved.
- Technology is "released" for export when it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.); when technology is exchanged orally; or when technology is made available by practice or application under the guidance of persons with knowledge of the technology. See §734.2(b)(3)

Are all foreign nationals included?



Any foreign national is subject to the deemed export rule except:

- Foreign nationals granted U.S. citizenship;
- Foreign nationals granted permanent residence status; or,
- Foreign nationals granted political refugee status or political asylum.

Non-immigrant visa holders must satisfy export controls (H1B, F1). These are typically your post-docs!

Examples of Deemed Export Situation



- Visit of foreign scientists for technical conferences and exchanges.
- Visual inspection (as reading technical specifications, plans, blueprints, etc.) by foreign nationals.
- Providing technical assistance (including verbal exchanges) to foreign nationals.
- Tours of laboratories
- Foreign national employees involved in certain research, development, and manufacturing activities
- Foreign students or scholars conducting research

Export Controlled Technology



- The EAR refers to specific information “required” for the “development,” “production,” or “use” of specific items.
- “Required” technology refers only to that portion of technology peculiarly responsible for achieving or exceeding controlled characteristics.
- The use of export controlled equipment is not a deemed export.
- Deemed exports occur only if controlled technology is transferred.

Clarification of “Use” Technology



- The use of export controlled equipment is not a deemed export.
- Deemed exports occur only if controlled technology is transferred. “Required” use technology is rarely transferred during the operation of an export controlled item.
- The regulatory definition of “use” is technology for “operation, installation (including on-site installation), maintenance (checking), repair, overhaul *and refurbishing*.”
- All six attributes of the definition must be present in order to qualify as controlled “use” technology.
- Otherwise the technology is likely EAR99.

Technology Control Plan



- A Technology Control Plan should be in place with the following essential elements:
 - Statement of commitment to export compliance
 - Physical security plan
 - Information security plan
 - Procedural security
 - Personnel screening procedures
 - Training and awareness program
 - Self evaluation program
- Elements Look Familiar?? Sentencing guidelines...

Other Export Control Considerations



What else can I jam in my cargo bay?

- Physical Exports
- International Travel

Exports not protected by the Fundamental Research Exclusion



- The Fundamental Research Exclusion only covers research results.
- The following are still export controlled:
 - Physical Exports
 - ✦ Physical shipments of goods or “matter”
 - ✦ Re-Exports (sending to one country knowing that they will send it to another)
 - Technology
 - ✦ Sending technical data overseas (e.g., sponsor information to international collaborators)
 - ✦ Orally disclosing technical information which are not research results
 - ✦ Exposing controlled goods to foreign nationals
 - ✦ Encrypted software

Physical Exports



- **Could be anywhere:**
 - Contracts / Sales
 - Donations
 - Laboratory / Office Move
 - Hand carried goods
 - Research Equipment
- **The notorious “Fed Ex” package...**
- **NOTES:**
 - An international shipment to a US person is still an export
 - A domestic shipment to a foreign national may still be an export

Monitoring Physical Exports



- **Check them all out! ☺ ... or Audit!**
- **Work with local freight forwarders to obtain lists of exports from your institution**
- **Audit a sample based on:**
 - High risk shipments (e.g. OFAC countries, China, high volume)
- **Develop a checklist to verify compliance**
- **Follow-up on concerns**
- **If necessary, file a voluntary disclosure**

International Travel



- **Whenever a contract calls for international travel, several things need to be considered:**
 - Who?
 - What?
 - Where?
 - What will be imported / exported?
 - Who's getting money?

Research Conducted Outside the US



- **Research conducted outside of the United States does not qualify for the Fundamental Research Exemption**
- **For example:**
 - Your P.I. is working on a fundamental research project on hetero-epitaxial material (semi-conductor wafers)
 - A portion of the research will be conducted at a foreign facility
 - Despite the fundamental research exemption, your P.I. will probably need a license to conduct the research at the foreign facility

International Conferences



Do:

- Participate in conferences that are open to the public
- And at which attendees are permitted to take notes
- Held in the U.S.

Don't:

- Participate in conferences that are "closed" to the public
- Where note taking is not permitted

Travel to OFAC* Countries



- Does your institution have an OFAC Educational License for Cuba?
- OFAC countries may have additional restrictions:
 - Imports
 - Exports
 - Financial Transactions
 - Prohibited Parties

*Belarus, Burma, Congo, Cuba, Iran, Ivory Coast, Liberia, North Korea, Sudan, Syria, Zimbabwe

Collaborating with OFAC nationals



- Normal editorial activities that occur during the peer review process do not constitute prohibited activities
 - Provided that no substantive or artistic alterations or enhancements of the manuscript result.
- Collaborative research activities DO constitute a prohibited activity in some instances.

Working with the Arab League? Anti-Boycott Language



- It is illegal for a US person or a person in the US to accept terms which support a boycott of Israel.
- The law also requires US persons to report any such language to the US government.

Monitoring International Travel



- If you have a central travel service provider, contact them for a list of all recent international travel
- If there is no central service, follow-up with Procurement to obtain all expenditures for international travel
- Follow same logic for physical export monitoring

Questions?



Susan MacNally
Export Control Officer, Assistant
Director

Research & Graduate Studies
University of Kansas
Phone: 785.864.4148
Fax: 785.864.5049
Web: www.rcr.ku.edu

Jennifer P. May, J.D.
Chief, Export Controls Compliance

Office of Research
University of Missouri
Phone: 573-882-3841
Fax: 573-884-8371
Web: research.missouri.edu