

Information and Guidelines: Federal Export Control Laws and Regulations

I. PURPOSE AND INTRODUCTION

This document is designed to provide guidance to Carnegie Mellon University (“University”) personnel in the application of the various United States export regulations to University activities. Applicable laws and regulations include the Export Administration Regulations (“EAR”) established under the U.S. Department of Commerce, the International Traffic in Arms Regulations (“ITAR”) established under the U.S. Department of State, and the embargo controls administered by the U.S. Department of the Treasury’s Office of Foreign Asset Controls (“OFAC”).

Carnegie Mellon’s Core Principles

It is the goal of the University to allow faculty to explore their research interests and disseminate their research results. It is also a goal to allow faculty to collaborate with their international colleagues in the conduct of fundamental research and to allow foreign researchers and graduate students to participate in University research projects. We believe that the pursuit of these goals necessitates a free and open academic environment, as emphasized in our Policy on Restricted Research (<http://www.cmu.edu/policies/documents/RestrictResearch.html>).

Compliance With Export Control Laws

The University understands that educational pursuits must be carried out in accordance with applicable laws and regulations, including those related to export controls. Although the vast majority of activities pursued by the University and its personnel are not subject to export control restrictions or licensing requirements, each member of the University community needs to be familiar with export control and embargo restrictions to ensure that the appropriate guidance is sought and actions taken should a situation arise in which such restrictions are applicable.

The following guidelines are intended to familiarize University personnel with export control and embargo issues. All members of the University community are responsible for understanding when export control issues may be applicable and for raising all concerns and providing all pertinent information to the **Office of Sponsored Programs** in accordance with these guidelines. If any member of the University community is ever uncertain whether export controls or embargoes apply in a particular situation, they should immediately contact the **Office of Sponsored Programs and/or the Office of the General Counsel**.

II. EXPORT AND EMBARGO CONTROLS: PURPOSE & IMPACT

What Export and Embargo Restrictions Mean to the University and You

Information and materials are subject to export control restrictions for a number of reasons, which range from national security and anti-terrorism purposes to trade sanctions. Regardless of the purpose behind a particular restriction, University personnel must comply with any applicable restrictions.

Export control regulations restrict the “export” of specially designated items from the United States without obtaining an appropriate export license. The reach of such regulations is quite broad and cover activities that one may not normally think of as an “export.” For example, a faculty member’s oral disclosure or demonstration of technology to a non-US citizen (or permanent resident alien) in a University laboratory may be deemed an export and could require an export license.

As mentioned earlier, while the majority of University activities are not subject to export control restrictions, it may not be the case that all research and information dissemination conducted within the University setting is exempt from all export control regulations. Both funded and unfunded research can be subject to export control regulations.

Current regulations do provide for certain exemptions that will cover the University’s activities in most cases and will permit the University to proceed in its normal course without the need for export control licensing (for example, the exemption covering “fundamental research”). However, engaging in certain activities (such as accepting publication restrictions or limitations, including agreeing to obtain a sponsor’s approval before publishing research results) may cause exemptions to be lost (thus resulting in restrictions on research that would otherwise have been exempt from licensing).

Both the Department of Commerce and the Department of State have released regulations and guidelines that should be consulted prior to any research initiative, particularly when the research involves non-US citizens (who are not permanent residents) or foreign corporations or entities, to determine whether any export controls will come into play as a result of the intended research.

In addition, OFAC administers embargo and other transaction and currency controls. OFAC embargoes generally block all trade with a particular country without a specific license. In addition, OFAC compiles a list of “Specially Designated Nationals” and blocked persons (“SDNs”), which includes both individuals as well as parties who are deemed to be agents of sanctioned governments. The University may not without a license or license exception export or reexport any item subject to the EAR to a country that is embargoed by the United States or otherwise made subject to controls, or to any SDNs. Whether a license must be sought from OFAC, the Commerce Department or (in rare instances) both varies depending upon the particular embargo.

Penalties for Non-Compliance

The consequences of violating export control regulations are serious. Penalties can range from loss of research contracts for the University to substantial monetary penalties and/or jail time for any individual violating these regulations. In addition, a violation could also lead to disciplinary sanctions under University policies.

III. IMPORTANT TERMS AND CONCEPTS

Export: The term export as used in the various export control regulations has an expansive meaning. In general an export includes any: (1) actual shipment out of the U.S., or between foreign countries, of any covered goods or items; (2) the electronic or digital transmission out of the U.S., or between foreign countries, of any covered goods, items or related goods or items; or (3) any release or disclosure, including verbal disclosures or visual inspections, of any technology, software or technical data to any Foreign National/Person, even if the release occurs in the United States. An export may also include the actual use or application abroad of personal knowledge or technical experience acquired in the United States. Complete definitions of the term “export” are contained within the regulations cited below. These regulations should be consulted when determining whether a particular course of action will constitute an export under those regulations. (Remember, discussion of the material with a Foreign National/Person, regardless of the country of which the individual is a citizen, constitutes an export to that individual’s home country.)

Person: Person means a natural person as well as a corporation, business association, society, trust, or any other entity, organization or group, including government entities.

U.S. Person: U.S. person means a natural person who is a lawful permanent resident of the U.S. Thus, a U.S. Person is any citizen of the United States, any citizen of a foreign country who has been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, or who is a “protected individual.” (A lawful permanent resident is a citizen of a foreign country who has been issued a “green card” by the U.S. government.)

Foreign National/Person: The term Foreign National/Person means a person (natural person as well as a corporation, business association, partnership, society, trust, or any other entity, organization, or group, including government entities) who is not a lawful permanent resident of the U.S., i.e. has not been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws or who is not a protected individual. (A Foreign National/Person is a person that has not been issued a “green card” by the U.S. government, or who possesses only a student visa.)

International Traffic in Arms Regulations (ITAR): The ITAR is composed of published regulations and guidelines concerning the Department of State review of regulated exports. ITAR applies to defense articles and services, including any technical

data associated with such defense articles and services. The ITAR generally refers to items that have been designed or modified (however slightly) for military use. A list of regulated defense articles is contained in ITAR, and is known as the U.S. Munitions List (USML). ITAR and the USML are updated and re-published annually in the Code of Federal Regulations. The current ITAR is published in 22 CFR §§ 120-130 (Foreign Relations). The complete USML is published in 22 CFR § 121.1. Additional provisions in ITAR further define and categorize the items listed in the USML. The complete text of ITAR and the USML are available online at the U.S. Department of State website(<http://pmdtc.org/reference.htm>).

Export Administration Regulations (EAR): The EAR is composed of published regulations and guidelines concerning the Department of Commerce review of regulated exports. The EAR generally refers to items that have “dual use,” i.e. both military and commercial applications. Goods and services that are regulated by the EAR are listed in the Commerce Control List (CCL). The EAR and CCL are updated and re-published annually in the Code of Federal Regulations. The current EAR is published in 15 CFR §§ 730-774 (Commerce and Foreign Trade). The complete CCL is published in 15 CFR § 774, Supp. 1. The complete text of the EAR (including the CCL) is available online at the Government Publishing Office website (http://www.access.gpo.gov/bis/ear/ear_data.html).

Categories covered under the EAR include:

Category 0 - Nuclear Materials, Facilities & Equipment (and Miscellaneous Items);

Category 1 - Materials, Chemicals, Microorganisms, and Toxins;

Category 2 - Materials Processing;

Category 3 - Electronics Design, Development and Production;

Category 4 – Computers; Category 5 (Part 1) – Telecommunications;

Category 5 (Part 2) - Information Security;

Category 6 - Sensors and Lasers;

Category 7 - Navigation and Avionics;

Category 8 – Marine;

Category 9 - Propulsion Systems, Space Vehicles and Related Equipment

Commodity Jurisdiction Ruling: Where an article is arguably covered by both the EAR and ITAR, a request can be made to the State Department to determine which agency will have jurisdiction over the export of the article.

Fundamental Research: As used in the export control regulations, Fundamental Research includes basic or applied research in science and/or engineering at an accredited institution of higher learning in the United States where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental Research is distinguished from research that results in information that is restricted for proprietary reasons or pursuant to specific U.S. Government access and dissemination controls. University research will not be deemed to qualify as Fundamental Research if: (1) the University or researcher accepts any restrictions on the publication of the scientific and technical information resulting from the research, other than limited pre-

publication reviews by research sponsors to prevent inadvertent disclosure of proprietary information provided to the researcher by the sponsor or to ensure that publication will not compromise patent rights of the sponsor; or (2) the research is funded by the U.S. Government and specific access and dissemination controls regarding the resulting information have been accepted by University or the researcher. A complete definition of Fundamental Research is contained in the EAR (15 CFR §734.8) and ITAR (22 CFR § 120.11), (available online– see web sites listed in EAR and ITAR definitions above) and should be consulted when determining whether a particular course of action will constitute Fundamental Research under those regulations.

Specially Designated National (SDN): Persons subject to U.S. jurisdiction may not deal with specific entities or individuals known as “specially designated nationals” or “blocked persons” found in the Specially Designated Nationals List appended to the OFAC regulations and available at <http://www.ustreas.gov/offices/eotffc/ofac/sdn/index.html>. No one subject to U.S. jurisdiction may participate in *any* activity with *any* SDN.

IV. GUIDELINES:

The University recommends that University personnel follow these guidelines to determine whether arms control regulation issues are of concern prior to making any actual export or dissemination of potentially regulated materials, goods, information or technical data. In the event University personnel have questions or concerns involving the application of the various export control regulations in any of the following circumstances, the individual should contact the Office of Sponsored Programs for assistance and provide that office with all information concerning the prior attempts to determine the application of the export regulations pursuant to these guidelines.

EMBARGO CONTROLS AND SDN LISTS

Prior to engaging in any of the activities described below in these guidelines, personnel need to make sure that no exports or re-exports are planned to any embargoed country or SDN. The University will assist PIs in assessing whether the proposed project raises any embargo or SDN concerns, but **PRIMARY COMPLIANCE RESPONSIBILITY RESTS WITH THE PRINCIPAL INVESTIGATOR OF THE RESEARCH PROJECT**. Please contact the Office of Sponsored Programs and/or Office of the General Counsel for assistance, if necessary.

INITIATING NEW RESEARCH, OR EXPORTING, RELEASING, TRANSMITTING OR ALLOWING ACCESS TO CURRENT RESEARCH RESULTS

- Prior to initiating new research (regardless of **whether unfunded or funded under a contract/grant**) or exporting, releasing, transmitting, or allowing access to current research results, personnel must meet and review their proposal and/or contract with the Office of Sponsored

Programs (OSP) to determine whether their research or proposed dissemination is impacted by the rules or regulations of the EAR and/or ITAR or other controls (such as those involving embargoed countries/nationals, EAR denied persons, etc.).

- Periodically the Principal Investigators (“PIs”) must re-evaluate the original determination - particularly if there is a change of scope or new staff are proposed to be added to the project. If the original determination is altered, they must cooperate with OSP to follow up with the appropriate paperwork.
- The PIs are responsible for allowing for timely review in the event an export determination is made for either a proposal or a proposed contract.

The University will assist PIs in assessing the research project under the rules and regulations but **PRIMARY COMPLIANCE RESPONSIBILITY RESTS WITH THE PRINCIPAL INVESTIGATOR OF THE RESEARCH PROJECT.**

The designated Contracts Officer for the project will review the research contract for terms or provisions that restrict access to or publication of research and technical data, limit the participation of foreign nationals, or otherwise render inapplicable the exclusion for fundamental research conducted in the public domain. If the project qualifies as fundamental research and research information will publishable and generally accessible or available to the public, no export license will be required.

If it appears that the fundamental research and public domain exceptions are not applicable, the Contracts Officer will work with the PI and the Office of the General Counsel to determine whether the research falls within the EAR (Commodity Control List) or the ITAR (Munitions List). OSP will provide a form for the PI to review and complete. The PI will be asked to sign this form, signifying his or her representation with regards to this assessment and return the completed form to the Contracts Officer.

The Associate Provost for Research, the Contracts Officer and the Office of the General Counsel will make a final determination as to the application of export control regulations and provide written notice of that decision and recommend appropriate actions to the PIs, Contracts Officer, and the appropriate dean or department head.

The Contracts Officer will work with the PIs and other appropriate parties to implement the determination.

FOREIGN NATIONAL/PERSON (INCLUDING, BUT NOT LIMITED TO, FACULTY, STAFF, POST-DOCTORATE SCHOLARS, VISITING FACULTY, GRADUATE STUDENTS, RESEARCH OR TEACHING ASSISTANTS) PARTICIPATION IN REGULATED RESEARCH INITIATIVES

Allowing Foreign Nationals/Persons **who are not bona fide full-time employees of the University** to participate in a research initiative that is regulated by one of the various export control regulations (ITAR or EAR) may require a license before such participation begins under the terms of the applicable export control regulations.

- Before allowing any Foreign Nationals/Persons to participate in any research initiative, University personnel should first use the guidelines above and coordinate with the Office of Sponsored Programs to determine whether the research involved is regulated under the ITAR or EAR.

If it is determined by the researcher and/or the University that the research involved is regulated by the ITAR or EAR, University personnel shall notify the Associate Provost for Research or the Office of Sponsored Programs of the desire to allow a Foreign National/Person to participate in an export-regulated research initiative. Those offices will determine whether an export license is required and if so, will work with the researcher to obtain such a license.

ACCESS TO ITAR-CONTROLLED MATERIALS BY FOREIGN NATIONALS/PERSONS INCLUDING, BUT NOT LIMITED TO FACULTY, STAFF, POST-DOCTORATE SCHOLARS, VISITING FACULTY, GRADUATE STUDENTS, RESEARCH OR TEACHING ASSISTANTS:

Foreign Nationals/Persons who are:

- Hired to be, or are, bona fide, full-time employees of the University, and
- Who are not citizens of a country to which exports are prohibited, and
- Whose duties include the performance of sponsored research

may have access to technical data (as defined in the ITAR) without a license.

Any such Foreign National/Persons must execute a statement that they will maintain a permanent abode in the U.S. during their period of employment. In addition, they must also agree that they will not disclose, export, or transfer technical data to any other Foreign National/Person without written approval of the Office of Defense Trade Controls, U.S. Department of State.

RESEARCH PARTICIPATION ABROAD:

Participation or use of specialized knowledge abroad may be deemed an export under the various export control regulations. Prior to actively participating in any research initiative being conducted abroad, University personnel shall contact the Associate Provost for Research or the Office of Sponsored Programs to discuss possible export control implications.

TAKING RECEIPT OF CONTROLLED MATERIALS FROM A THIRD PARTY:

In the event any member of the University community desires to have access to export controlled materials of a third party (such as government or industry sponsors or research partners), they should contact the Office of Sponsored Programs. Even to the extent the University determines that there is a need for such materials, such materials generally will not be permitted on campus and arrangements will need to be made to receive and review such materials in a controlled environment off-campus. Because such materials are not subject to the fundamental research exception, having such materials accessible by certain University foreign nationals would likely be prohibited without a license.

In the event anyone believes they have been sent controlled materials for which no special arrangements were previously made (for example, a University researcher unexpectedly receives an email containing information believed to be export controlled), they must immediately attempt to safeguard the information and contact the Office of Sponsored Programs or the Office of the General Counsel.