

**Western Michigan University**  
**Policy and Procedures for Compliance**  
**with U.S. Export Control Laws**  
**Office of Vice President for Research**

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## I. INTRODUCTION

U.S. export control laws regulate certain transfers of technology to foreign nationals as well as the physical export of hardware and software. This policy establishes guidelines to ensure Western Michigan University's compliance with these laws.

U.S. Export Control laws, including the Export Administration Regulations (EAR) and the International Traffic in Armaments Regulations (ITAR), can apply to university research activities. The ITAR primarily regulates items and technology that are specifically designed or modified for military purposes, while the EAR regulates activities associated with other items and technology. With the exception of services controlled by the ITAR and certain encryption software, neither the EAR nor the ITAR apply to information that is in the public domain.

For purposes of these laws, "export" means **not only** the physical shipment of items from the United States to a foreign country, **but also** the release of controlled technology to foreign persons within the United States by way of visual inspection, oral transmission, or training ("deemed export"). In other words, a prohibited export can occur by the mere presence of a foreign researcher or student in a university laboratory, if the laboratory contains equipment or technology that is export controlled, and the foreign individual can learn information about the controlled technology or information that is not in the public domain. Likewise, dissemination of research results at international conferences may require specific prior approval of the awarding agency.

It is important to keep in mind that lawful permanent residents of the United States (i.e., persons who possess a "green card") and individuals in the process of obtaining asylum are treated the same as U.S. citizens under both the EAR and ITAR.

Under both laws, there are various exemptions, including exemptions that apply to information generated in the course of university research activities (sometimes referred to as the "fundamental research exemption"). Generally, under the ITAR, the fundamental research exemption applies to information that arises from university research which has already been published. The fundamental research exemption under the EAR is broader; generally, the fundamental research exemption applies to information that arises from university research so long as the university has not accepted any restrictions on how the research results can be published, whether or not the research results have in fact been published. A common problem is when a university researcher accepts third party technology under a non-disclosure agreement. The confidentiality obligation of the non-disclosure agreement can negate the fundamental research exemption with respect to the third-party technology, even if it is used in a research activity that otherwise qualifies for the exemption.

Contractual restrictions on the dissemination of research results, e.g., sponsor approval before publication is allowed, or the participation of foreign nationals in research projects, would generally eliminate the information resulting from such research projects from being considered publicly available and thus would eliminate the fundamental research exclusion. Since these exclusions and export control laws are complex it should not be assumed that a project is exempt.

It is important that WMU's research community comply with the letter and spirit of the regulations. A range of penalties and sanctions exist for individuals, and institutions, that do not comply with the regulations. The University subscribes to software which helps researchers determine if their research is subject to export control. The Office of the Vice President for Research can then assist researchers in complying with the export control regulations.

As with human subjects review, the principal investigator is responsible to alert the Office of the Vice President for Research to the potential export control vulnerability of their work.

## **II. POLICY STATEMENT**

It is the policy of Western Michigan University that all employees, faculty, students, research staff, contractors and collaborators will comply with U.S. export control laws. Primary compliance responsibility rests with the principal investigator. Violation of this policy is subject to provisions of WMU's policies regarding research misconduct, and/ or criminal or civil penalties.

Export control laws require that a license be obtained **prior** to providing controlled technologies to certain foreign national employees, faculty, students, research staff or other foreign national collaborators. Investigators must therefore alert OVPR to the potential for export control regulation of their research prior to the initiation of that research or contract. The Office of the Vice President for Research will assist the principal investigators in assessing the application of export control regulations and provide educational and compliance support.

Nothing in this policy shall contradict any existing/applicable state or federal laws. The president has the authority to amend this policy as needed to assure compliance with federal laws.

## **III. IMPLEMENTATION**

These procedures are applicable to all research or projects conducted under the auspices of Western Michigan University. These include projects, using facilities or university resources whether the research may be funded or unfunded. The research may be conducted on campus or off campus. It is the responsibility of faculty and administrators to be aware of and comply with the law relative to their work, students assisting them in their work or research, and agreements and collaborations with others to ensure no exports are made contrary to law and the University's policies, procedures, guidelines, and instructions regarding U.S. export controls.

To ensure compliance with applicable law, policy, and procedures, researchers must also obtain prior OVPR approval and any required licenses or technology control plan prior to export activities.

There are various aspects of export control including actual transport of technology out of the USA and "deemed" in which the technology is transmitted to foreign nationals (such as foreign graduate students) within the USA. University personnel need to contact OPVR prior to either of these potential export control projects.

## Procedures

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**Procedures will be implemented by the Office of the Vice President for Research to enforce this policy. Current procedures are described below:**

### I. KEY PERSONNEL AND RESPONSIBILITIES

The Research Compliance Coordinator (RCC) in OVPR is responsible for ensuring institutional compliance with diverse governmental, state and university regulations, policies and procedures, particularly as associated with externally funded activities. This staff member will assist with the process of export control compliance and education.

- (1) The RCC will:
  - a) Ensure implementation of University export control policy and related guidelines and serve as the primary contact for the University on export control matters.
  - b) Conduct export control key word searches, prepare files, and monitor compliance with export regulations, as necessary.
  - c) Provide export control training to University staff, students, research staff and other collaborators, as necessary.
  - d) Assist research staff in completing the Export Control Review Form if needed.
  
- (2) Principal Investigator (PI) will **prior** to working on a potential export related project, seek advice from the RCC.
  - a) Assist the RCC, as necessary, in determining applicable export control requirements for hardware, equipment, software and/or technology subject to U.S. export control laws.
  - b) Execute the Export Control Review Form as applicable.
  - c) Implement export control guidelines suggested by the RCC.
  - d) Identify hardware, software and technology to be exported to a foreign destination and, in advance of export, report the same to the RCC for an export control determination.

Principal investigators are responsible to ensure education of their research group on export control issues and alert the RCC that their area of research might be subject to export control. If it is determined that their research is subject to export control, the investigator(s) must abide by the procedures put in place to protect the individual and University from violating export control regulations.

- (3) The Director of Intellectual Property Management and Commercialization and/or the OVPR Research Compliance Coordinator are responsible to review contracts of those projects that may be subject to export control regulations to assure that the “Fundamental Research” exemption is not violated.

## II. PROCEDURAL STEPS

There are six (6) steps to the Export Control Review process:

- (1) Prior to conducting the activity, researchers report to the RCC (OVPR) that the nature of their research, hardware, equipment or software may be subject to export controls.
- (2) The RCC works with the researcher to determine if the area of research, hardware, equipment or software is on one of the export control lists.
  - a) The RCC provides the Export Control Review Form to the principal investigator. PI completes the form. It is important that the PI include appropriate key words for the review search. Currently we are using software by the Visual Compliance Company.
  - b) In coordination with the principal investigator, the RCC determines applicable U.S. export control law requirements. The RCC documents applicable U.S. export controls on the Export Control Review Form.
- (3) If it is determined that the research area, hardware, equipment, software and/or technology is under export control, then the RCC will work with the investigator to determine if there is an exemption/exclusion possible for that research area, hardware, equipment, software or technology. Exemptions may include:

### **Public Domain Information**

Under both ITAR and EAR regulations, some information is automatically excluded from Export Controls. The exclusion is primarily for information (ITAR), including some forms of software (EAR) that is in the public domain and publicly accessible through books, periodicals (hardcopy or electronic) and generally distributed media, unrestricted subscriptions and websites that are free (or available for less than production/distribution costs), libraries, patents or open (published) patent applications, release at open conferences, seminars and trade shows.

### **Fundamental Research**

Research as defined below has exclusions applying to information (ITAR) and software (EAR) that result from basic and applied science and engineering research conducted at an accredited institution of higher education located in the U.S., must be ordinarily published and shared broadly within the scientific community, is not restricted for proprietary reasons or specific national security reasons (EAR) or subject to access and dissemination controls (ITAR).

### **Educational Information Exclusion**

Essentially both EAR and ITAR regulations exclude export controls for instructional content of curriculums for all students, including foreign nationals, that exist in general science, math and engineering principles commonly taught through courses and associated teaching laboratories. Further, the courses must be listed in course catalogs of colleges and universities (ITAR/EAR).

The most common exemption used at universities is the Fundamental Research exclusion. This exemption requires that there are no restrictions placed on the future publication of the ongoing

work. Various contracts have such restrictions that could negate the Fundamental Research exemption. The RCC must determine if the Fundamental Research exemption applies.

- (4) If the RCC determines the Fundamental Research exemption is inapplicable due to contract activity, the following actions may be taken by the RCC:
  - a) The RCC works with the investigator to assure that no export or deemed export of the research or equipment takes place this may be require an EXPORT CONTROL PLAN.
  - b) The RCC coordinates with the PI to perform export control screening for persons participating in the activity. To do so, the RCC, with the assistance of the investigator, circulates the Export Control Compliance Questionnaire to all University employees, professors, students, researchers or other collaborators participating in the research activity. (See Appendix III.)
- (5) When possible, the Director of Intellectual Property Management and Commercialization will review University contracts and subcontracts to determine whether the Fundamental Research exemption will apply to activity. With the assistance of the Office of the Vice President for Research, as necessary, the RCC will revise, modify or negotiate problematic contract provisions with the Sponsor with the goal of preserving the Fundamental Research exemption.
- (6) The RCC will document the end-results of this review using the Export Control Review Form and keep a file on the review process and reasons for determining the course of action. This document will become the Export Control Plan and will require the signature of the PI. Deviation from this plan may constitute violation of this policy.

### **Transport of Controlled Technology or Equipment**

All University personnel (including faculty, staff, visiting scholars and students) who plan to ship or even to hand-carry out of the country any research equipment, materials, or data; biological material; or non-biological scientific samples are required to contact OVPR several weeks before the date of transport to obtain assistance. Transporting any amount of regulated material in an aircraft, either on your person, in carry-on luggage, or checked luggage, is covered by export control regulations.





**Appendix I**  
**Western Michigan University**  
**EXPORT CONTROL COMPLIANCE QUESTIONNAIRE**

U.S. export control laws, including the Export Administration Regulations (“EAR”), International Traffic in Arms Regulations (“ITAR”) and Office of Foreign Assets Control (“OFAC”) regulations, require that WMU obtain an export license prior to providing controlled technologies to certain foreign national employees, professors, students, researchers or other foreign national collaborators. The decision whether or not to file and/or pursue an export license application is at WMU’s sole election.

The following questions are being asked to assess your country of chargeability for export control screening purposes only. This information will not be used for any improper purpose.

1. Are you one of the following:
- Citizen or National of the United States.
  - Lawful Permanent Resident.
  - Refugee.
  - Person granted Asylum.
  - Temporary Resident (granted under Amnesty or Special Agricultural Worker provisions. The term “Temporary Resident” does not include persons in nonimmigrant status such as H-1B, L-1, F-1, etc)?

Yes

No

**Important Note: If your answer to Question 1 above is “Yes,” please do not answer any of the following questions. Rather, go directly to the Signature Section at the end of this form.**

**If your answer to Question 1 is “No”, please proceed to Question 2.**

2. Have you ever acquired citizenship, nationality, or permanent resident status in a country other than your place of birth?

Yes

No

If “Yes”, please provide details (country(s), type of status, date of acquisition).

If “No”, then please provide details (country(s), type of status, date of acquisition).

3. Have you ever relinquished, abandoned, or lost citizenship, nationality or permanent residence in any country, including your country of birth?

Yes

No

If “Yes”, please provide details (country(s), status relinquished/abandoned/lost, date of relinquishment/abandonment/loss):

**SIGNATURE SECTION**

I understand WMU reserves the right to inquire further on any matter related to matters bearing on the university’s export compliance obligations.

I certify that the foregoing answers are true and correct to the best of my knowledge and belief.

Print Name:

Date:

Signature: \_\_\_\_\_

**EXPORT CONTROL REVIEW FORM (WMU Appendix II)**

<b>RESEARCH TITLE:</b>
<b>AGENCY NAME:</b>

<b>CONTRACT NUMBER:</b>
<b>PRINCIPAL INVESTIGATOR:</b>

<b>I. CONTRACT REVIEW (COMPLETED BY RESEARCH COMPLIANCE COORDINATOR)</b>			
<b>A. DOES THE CONTRACT, STATEMENT OF WORK, OR RELATED ATTACHMENTS CONTAIN OR CONTEMPLATE ANY OF THE FOLLOWING PROVISIONS, RESTRICTIONS OR CONDITIONS:</b>	<b>YES</b>	<b>NO</b>	<b>IF YES, LIST APPLICABLE DOCUMENT &amp; SECTION #</b>
1. The contract activity is subject to U.S. export control laws.	<input type="checkbox"/>	<input type="checkbox"/>	
2. Any restriction on the publication or dissemination of information, including: - Prepublication review by the Sponsor. - Sponsor's right to withhold information from publication. - Other restriction on publication or dissemination.	<input type="checkbox"/>	<input type="checkbox"/>	
3. Research will be performed at a foreign location.	<input type="checkbox"/>	<input type="checkbox"/>	
4. Any restriction on non-U.S. persons or citizens participating in contract activities.	<input type="checkbox"/>	<input type="checkbox"/>	
<b>(Note: "Non-U.S. persons" are those, regardless of location in or outside the U.S., who are <i>not</i> U.S. citizens or nationals, lawful permanent residents, persons granted asylum or refugee status, or Temporary Residents. Non-U.S persons include individuals in nonimmigrant status such as H-1B, L-1, F-1, etc. and those in the U.S. without lawful status.)</b>			
5. Items will or may be exported to a foreign destination.	<input type="checkbox"/>	<input type="checkbox"/>	
<b>SECTION I COMPLETED BY:</b> _____ <b>DATE:</b> _____ Research Compliance Coordinator			

**II. EXPORT CONTROL DETERMINATION, AND IF SUBJECT TO U.S. EXPORT CONTROL LAWS, ACKNOWLEDGED BY PRINCIPAL INVESTIGATOR AND RESEARCH COMPLIANCE COORDINATOR)**

Contract activity is considered "Fundamental Research" as defined by U.S. export control laws. End review.

Contract activity is subject to U.S. export control laws. The applicable U.S. export controls are as follows:

EAR: ECCN(s) \_\_\_\_\_

ITAR: USML Category(ies) \_\_\_\_\_

The Principal Investigator has been briefed on U.S. export control restriction and will implement export control compliance guidelines as provided by the Director of Intellectual Property Management and Commercialization during the course of the contract activity.

Acknowledgements: \_\_\_\_\_  
Principal Investigator Signature

Date: \_\_\_\_\_

\_\_\_\_\_  
Export Compliance Officer

Date: \_\_\_\_\_

**SECTION II COMPLETED BY:** \_\_\_\_\_  
Director of IP Management and Commercialization

Date: \_\_\_\_\_

## COMPLETING THE EXPORT CONTROL REVIEW FORM

U.S. export control laws, including the Export Administration Regulations (“EAR”) and International Traffic in Arms Regulations (“ITAR”), require that WMU obtain an export license prior to providing controlled technologies to certain foreign national employees, professors, students, researchers or other foreign national collaborators. However, information generated during the course of “Fundamental Research,” as defined by these laws, is exempt from export licensing requirements.

As a public academic institution, it is important that WMU instruction and research be conducted openly and without restriction on access, publication or dissemination and that, unless unavoidable, information generated during the performance of any research, including contract activities, qualifies for the Fundamental Research provisions of the EAR or ITAR (see EAR §734.8 and ITAR §120.11(8) for Fundamental Research provisions).

### I. CONTRACT REVIEW

The Export Control Review Form, Section I, lists problematic provisions, restrictions and conditions that may trigger export licensing requirements. The Director of Intellectual Property Management and Commercialization shall coordinate with the Office of General Counsel, as necessary, to alleviate such problematic provisions, restrictions or conditions through negotiation with the Sponsor.

#### **The following examples are provided for reference only.**

#### SECTION A

##### 1. The contract activity is subject to U.S. export control laws.

**Comment:** Fundamental Research exempts such activities from U.S. export control laws. Contract language that suggests the activity is subject to U.S. export control laws, and thus not exempt, may defeat the Fundamental Research exemption.

*Example:* AFMC 5352.227-9000 Export Controlled Data Restrictions

##### 2. Any restriction on the publication or dissemination of information, including: - Prepublication review by the Sponsor.

**Comment:** Under the Fundamental Research rules only limited prepublication review by the Sponsor is permissible, including review to ensure publication would not compromise patent rights or inadvertently divulge the Sponsor’s proprietary information.

##### 3. Sponsor’s right to withhold information from publication.

**Comment:** The Fundamental Research exemption is not available if the University accepts restrictions on publication of scientific or technical information resulting from the research, including the right to withhold information from publication.

*Example:* DFAR 252.204-7000 Disclosure of Information

##### - Other restrictions on publication or dissemination.

**Comment:** Restrictions on publication or dissemination may appear in a variety of forms. The Director of Intellectual Property Management and Commercialization should consult with the Office of General Counsel to further analyze potentially restrictive provisions.

*Example:* H-6 Dissemination of Information (Prime contracts), ARL 525.005-4401 Release of Information (Army Regulations), FAA Civil Aviation Security Publications

## COMPLETING THE EXPORT CONTROL REVIEW FORM

### 4. Research will be performed at a foreign location.

**Comment:** With minor exceptions, the Fundamental Research exemption is limited to research conducted at U.S. accredited institutions of higher learning. Accordingly, contract activity performed at a foreign location may invalidate the Fundamental Research exemption.

### 5. Any restriction on non-U.S. citizens or persons participating in contract activities.

**Comment:** Access or participation restrictions may invalidate the Fundamental Research exemption.

***Example:*** ARL 52.004-4400 Foreign Nationals Performing Work Under Contract, 52.0000-4017 Foreign Nationals (Army Corps of Engineers), H.2 Foreign Nationals (FORNAT), AFMC 5352.227-9000 Export Controlled Data Restrictions, NSA Section K Representations.

### 6. Items will or may be exported to a foreign destination.

**Comment:** The Fundamental Research exemption does not cover the export of hardware and certain software and technology to a foreign destination.