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# WESTERN MICHIGAN UNIVERSITY

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## Research Policies Council (RPC)

### Proposed Memorandum of Action: MOA 09-01

### Recommendation for Approval of Export Control Policy

**RPC Approved – December 4, 2008**

The Research Policies Council recommends approval of the proposed Export Control Policy, outlined in Sections II and III following. An introduction to U. S. regulations regarding export control is provided as background in Section I.

#### **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.

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.