

SOUTH DAKOTA BOARD OF REGENTS

Policy Manual

SUBJECT: Export Controls

NUMBER: 4:48

1. Preamble

The South Dakota Board of Regents and the institutions under its control and management encourage the exchange of research and technology consistent with United States national security and nonproliferation objectives. Export control laws and regulations are in place to protect not only the economic vitality of the United States, but also to thwart international criminal activity and to protect national security. United States (U.S.) export control regulations impact a wide range of university functions, including human resources, student affairs, international affairs, purchasing and procurement, international travel, information technologies, technology transfer, and research. While most of the activities occurring at the governed institutions are exempt from U.S. export control regulations, the Board recognizes the importance of these regulations and is committed to full compliance.

2. Definitions

- A. Controlled Activity:** An activity involving the export, reexport or deemed export of controlled technology, or an activity that due to its nature or the parties involved is otherwise subject to export controls, embargo or trade sanctions under the jurisdiction of the U.S. Departments of State, Commerce, Treasury, or any other U.S. government agency with export control responsibilities.
- B. Controlled Technology:** Any item, component, material, software, source code, object code, or other commodity subject to export controls. This term also includes enabling information to the extent required by the applicable export control regulations.
- C. Deemed Export:** The release or transfer of controlled technology to foreign nationals in the U.S.
- D. Employee:** For purposes of this policy, employees include full-time and part-time classified staff members, student employees, exempt staff members, faculty members, graduate assistants and associates, and persons with “no-salary” appointments. Visiting faculty members, postdoctoral appointees or other academic professionals who engage in controlled activity at a system institution

will also be deemed employees, unless there is an agreement providing otherwise. Undergraduate or graduate students who are not otherwise student employees, but who engage in a controlled activity that is sponsored or directed by the Board, one of its institutions or employees, shall be deemed gratuitous employees and encompassed within the definition of employee for purposes of this policy.

- E. Empowered Official:** A person that is not a foreign national who is directly employed by the Board or one of its institutions who is legally empowered to execute license applications or other requests for approval on behalf of the Board and each of its institutions and who has the delegated authority to: (i) inquire into any aspect of a proposed export, temporary import, or other export related activity by any institution; (ii) verify the legality of any transaction and the accuracy of the information to be submitted; and (iii) refuse to sign any license application or other request for approval without prejudice or other adverse recourse (See ITAR 120.25).

- F. Export:** Shipment or transmission of items, materials or information out of the United States. This includes the actual physical movement of items across the border. Technology and software may also be exported or reexported physically and electronically through personal conversations, meetings, engineering manuals, blueprints, plans, diagrams, formulae, email, telephone conversations, fax, posting on the internet, and a variety of other non-physical means.

- G. Export Controls:** Restrictions and other limitations imposed by the U.S. government on controlled technology and controlled activity.

- H. Export Control Analysis:** An analysis conducted by an institution's export control officer to determine if an activity or technology is subject to export controls. If the activity or technology is controlled, the assessment shall include a determination of the applicable export control restrictions, the restrictions on access by foreign nationals required, and any other relevant requirements to engage in a controlled activity in accordance with applicable export control regulations.

- I. Export Control Regulations:** These include the Export Administration Regulations, International Traffic in Arms Regulations, embargoes and trade sanctions administered by the Office of Foreign Assets Control, U.S. Department of the Treasury, and any other U.S. imposed regulations governing exports.

- J. Foreign National:** Individuals who are not U.S. citizens, permanent residents ("Green Card" holders) or political asylum holders. Hence, any individual who is present in the U.S. on a temporary immigrant visa status, including but not limited to H1B, J, F, B-visa persons, is a foreign national.

- K. Foreign Entity:** A foreign entity is any corporation, business or other entity that is not incorporated in the U.S. This includes foreign institutions, international organizations, foreign governments or any agency of a foreign government.
- L. Fundamental Research:** Basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.
- M. Institution Export Control Officer:** The officer, agent or employee who has authority on behalf of the institution to manage, administer and oversee export control matters at the institution.
- N. License:** The approval documentation issued by a proper U.S. government agency with export control responsibilities authorizing the recipient to proceed with an export, deemed export or other regulated activity as specified in a license application.
- O. System Export Control Officer:** The officer, agent or employee who has authority on behalf of the Board to manage, administer and oversee export control matters within the System.
- P. Technology Control Plan:** A document that sets forth the specific physical, electronic and procedural controls that will be taken to prevent unauthorized access to controlled technology.

3. Application of Export Control Regulations

U.S. export control regulations govern what materials, data, technologies, software, instruments, and equipment can be accessed by foreign nationals studying, visiting, or working in the United States, as well as what items can be transferred abroad to restricted destinations. These regulations have significant ramifications for international travel; transfers of material, equipment or information; purchasing; and contracting. While other federal agencies have some export control oversight in limited instances, there are three primary federal agencies charged with regulating and enforcing export control laws and regulations: 1) the U.S. Department of Commerce through the Export Administration Regulations (EAR) (See: <http://www.bis.doc.gov/>), which govern the export of dual use items and other technologies; 2) the U.S. Department of State through the International Traffic in Arms Regulations (ITAR) (See: <http://www.pmddtc.state.gov/>), which apply to munitions, or defense articles and services; and 3) the U.S. Treasury Department through its Office of Foreign Assets Control (OFAC) (see <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>), which oversees trade sanctions, embargoes and travel restrictions.

The EAR and ITAR govern the shipment or transfer, physically, verbally or in writing, of controlled technologies outside of the United States, as well as deemed exports. In addition, OFAC regulations impose sanctions and embargoes on transactions or exchanges with designated countries, entities and individuals. In practice, these regulations have a direct impact on the utilization of controlled technologies, at our institutions and abroad. Additionally, these regulations have the potential to affect the institutional partners with which we collaborate, how and to whom we disseminate research findings, and the ability of our employees to engage in a controlled activity or travel abroad.

4. Export Controlled Activities

Before engaging in research activities, an institution's employees must identify and understand any potential export control implications. When export control implications are identified, the institution must conduct an export control analysis prior to engaging in the controlled activity. In some cases, an institution may decide not to engage in the controlled activity, including but not limited to when there is insufficient time to obtain a license or to implement the controls necessary to safeguard the controlled technology or the costs associated therewith outweigh the benefit obtained from engaging in the controlled activity.

If the controlled activity is not subject to an exemption or exclusion and it involves a foreign national or foreign entity, a license from one or more U.S. government agencies may be required to carry out the controlled activity. If a license is required, it must be obtained prior to the foreign national or foreign entity engaging in the controlled activity. Any negotiations or agreements entered into prior to receiving the required license must be contingent upon the ability to successfully obtain the same. Application for licensure must be coordinated and facilitated through the System Export Control Officer. Additionally, contracts to procure controlled technologies or to engage in controlled activities must be reviewed and approved for export controlled compliance purposes by the institution's export control officer prior to execution of the contract.

5. Exclusions and Exceptions

The exclusions and exceptions available under the export control regulations are fact specific and may be triggered or voided with the slightest of subtleties. As such, employees intending to rely on one of the exclusions or exceptions available under the EAR and ITAR regulatory provisions must confer with their institution's export control officer to confirm the applicability of the exclusion or exception prior to engaging in the controlled activity.

Common exclusions frequently used by institutions of higher education under the regulatory provisions of the EAR and ITAR relate to those engaged in fundamental research. Generally, the fundamental research exclusions (FRE) apply only to the results of research performed as fundamental research. No license is needed to share these results, even if they relate to a controlled technology. However, the FRE applies

only to the dissemination of research data and information, and not the transmission of controlled technology in general. Additionally, the FRE is lost if the institution accepts any contract clause that forbids the participation of foreign nationals or entities; gives the sponsor a right to approve publications resulting from the research; or otherwise operates to restrict participation in research or access to and disclosure of research results. Consequently, institutions should take care in negotiating agreements that are free of access and publication restrictions and export control requirements, when appropriate, as the inclusion of such terms will serve to void the fundamental research exclusion and subject the research to coverage under export control regulations. Additionally, for U.S. and state government-sponsored research, institutions are encouraged, when appropriate, to include contract terms specifically identifying the research as “fundamental research.”

6. Security and Technology Control Plans

Institutions governed by the Board that possess controlled technologies are responsible for providing and maintaining the appropriate security of the controlled technologies. Institutions should create technology control plans (TCP) to ensure secure access of controlled technologies. A TCP should include: the person(s) responsible for maintaining the controlled technology and monitoring compliance with the TCP; the appropriate location, security, access and disposition of the controlled technology; a description of the controlled technology; security measures to be taken with regard to the controlled technology, to include the appropriate location to house the controlled technology, access restrictions required and disposition of the controlled technology; and the level of training required and provided to each individual with access to the controlled technology. The System Export Control Officer shall be notified by the institution’s export control officer in the event of the implementation or expiration of a TCP.

7. International Travel

Institutions shall screen all employees participating in university sponsored international travel to ensure compliance with export control regulations. If applicable, the screening shall identify any license or special documentation required to engage in the controlled activity or to transport the controlled technology abroad.

8. Foreign Employees, Students, Collaborating Scholars and Visitors

Foreign Employees

All foreign nationals must be screened by their hiring institution prior to their employment start date to ensure compliance with export control regulations. Any offer made in advance of the required screening must be contingent upon the individual providing the information necessary to screen against the appropriate restricted party lists and satisfactory screening results. Additionally, if an export license is needed to hire an employee, such offer shall be contingent upon the ability of the institution to obtain such license.

Foreign Students

All foreign national students must be screened by their enrolling institution prior to engaging in a controlled activity or obtaining access to a controlled technology. In the event that a student appears on a restricted party list but is not prohibited from enrolling at the institution, the institution's export control officer shall contact the System Export Control Officer to assist in creating a plan to ensure the student does not engage in a controlled activity or gain access to the university's controlled technology, and if necessary, to obtain a license.

Foreign Institutions, Scholars and Visitors

All foreign nationals and foreign entities visiting our institutions shall be screened against the restricted party lists prior to engaging in a controlled activity or obtaining access to a controlled technology. If a visiting foreign national or foreign entity appears on any of the restricted party lists but is not prohibited from engaging in the desired activity, the institution's export control officer shall contact the System Export Control Officer to assist in creating a plan to ensure the visiting foreign national or foreign entity does not gain access to controlled technologies, and if necessary, to obtain a license.

9. Education and Awareness

Training on export control regulations shall be provided by each institution to its employees, as necessitated by their level of exposure to export controlled activities. Each institution must maintain records of the training provided and the individuals who have received such training. Formal communication to employees about export control regulations and related policies and procedures shall be provided annually.

10. Recordkeeping Requirements

Export control regulations include specific recordkeeping requirements. Each institution must retain copies of all export related documentation, including classification determinations, prohibited party screenings, financial records, shipping documents, electronic communication, research logs, and appropriate certifications in their research project files for a minimum of five (5) years after the date of the export or from the date of the termination of a TCP or license, whichever is later.

11. System Export Control Officer

The Board shall employ or designate a System Export Control Officer who shall be authorized as the Empowered Official for the System. The System Export Control Officer will be responsible for the coordination and submission of export license requests, formal commodity jurisdiction requests, and other direct contact with federal licensing agencies on behalf of the system. The System Export Control Officer may exercise any power reserved or delegated herein to an institution's export control officer and may execute on its behalf such filings, instruments or papers as may be necessary to properly and faithfully exercise such powers.

12. Institutional Responsibility

Each institution shall develop, implement and administer specific policies and procedures as necessary to comply with this policy and the requirements of federal law. Such policies and procedures shall be maintained on the institution's website and available to all employees and students of the institution. Additionally, each institution shall designate an institution export control officer. The institution's export control officer shall notify the System Export Control Officer immediately in the event of an incident involving a violation or threatened violation of export control regulations.

13. Individual Responsibility

Employees are individually responsible for compliance with export control regulations. All employees must be aware of and are responsible for the export control implications of their work. While each institution will provide assistance to its employees in assessing the applicability of export control regulations; primary responsibility for export control compliance rests with the individuals involved in the export.

14. Penalties for Non-Compliance

Failure to comply with export control regulations subjects the employee to disciplinary action in accordance with BOR Policy 4:14. Additionally, non-compliance with export control regulations exposes both the individual and the institution to severe criminal and civil penalties (fines and prison sentences) as well as administrative sanctions (loss of research funding and export privileges). Civil and criminal sanctions can apply to both the individual and the institution, with fines ranging from \$50,000 to \$1,000,000 per violation, and prison sentences of up to 20 years.

SOURCE: BOR, December 2015.