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**POLICY TITLE:** Export Control Policy

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**POLICY PURPOSE:** This policy provides guidance for compliance with Export Control Regulations

**BACKGROUND:**

**APPLIES TO:**

**DEFINITIONS:** **Deemed Export** – a deemed export is the transfer, release, or disclosure to foreign persons in the United States of technical data about controlled commodities. A transfer of “technology” (EAR) or “technical data” (ITAR) to the foreign person is “deemed” to be an export to the home country of the foreign person.

**Defense Article** - is any item or technical data on the U.S. Munitions List, which covers satellites and spacecraft as well as items specially designed, developed, configured, adapted or modified for a military application. Defense articles include: (a) technical data recorded or stored in any physical form, (b) models, (c) mockups or (d) other items that reveal technical data directly relating to items on the U.S. Munitions List. Defense articles do not include: (a) basic marketing information on function or purpose, or (b) general system descriptions of defense articles.

**Defense Service** - refers to:

- The furnishing of assistance (including training) to foreign persons in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of a defense article on the U.S. Munitions List; or
- The furnishing to foreign persons of any technical data on the U.S. Munitions List.

**Educational Information** – Whether in the U.S. or abroad, the educational exclusions in EAR and ITAR cover instruction in science, math, and engineering taught in courses listed in catalogues and associated teaching laboratories of academic institutions, even if the information concerns controlled commodities or items. Dissertation research must meet the standards for “fundamental research” to qualify as “publicly available.”

**Educational Information Exclusion** - covers information that might otherwise be controlled by the U.S. Munitions List is excluded from export controls if it concerns general scientific, mathematical or engineering principles commonly taught in universities, colleges or schools. This type of educational information is treated differently from information in the “public domain.”

**Export** – an export is an actual shipment or transmission of any commodity (equipment or hardware) out of the United States, or the release of technology

(technical data or information) about controlled commodities, or software (commercial or custom-made) to a foreign national in the United States.

**Export Administrative Regulations (EAR)** - govern the export of all items in the United States or of U.S. origin, unless an exclusion from export controls applies or the items are exclusively controlled for export or re-export under other federal regulations. The Export Administration Regulations (EAR), Title 15, sections 730-774 of the Code of Federal Regulations (CFR) are promulgated and implemented by the Department of Commerce. The EAR regulate the export of goods and services identified on the Commodity Control List (CCL), Title 15 CFR 774, Supp. 1.

**Export Controls** - apply to transactions involving certain types of information, items or services, namely, those classified on the Commerce Control List or the U.S. Munitions List, if they are in the United States or of U.S. origin.

**Export License** – an export license is a document stating that the relevant government agency has granted the licensee the right to export a specified commodity, technology, or software to a specific country.

**Foreign National** - is a foreign citizen, other than one who is:

- A U.S. citizen,
- A U.S. national,
- A lawful permanent resident alien of the United States (i.e., a foreign national with a Green Card, a.k.a., a Permanent Resident Card), Lawfully admitted to the United States as a refugee,
- Granted asylum by the United States or
- Lawfully admitted to the United States as a special temporary agricultural worker.

**Fundamental Research** – Fundamental research is defined as basic and applied research in science and engineering conducted at an accredited U.S. institution of higher education where the resulting information is ordinarily published and shared broadly within the scientific community. Such research can be distinguished from proprietary research the results of which ordinarily are restricted for proprietary reasons or specific national security reasons. Under the export control regulations, U.S. universities performing fundamental research may allow foreign members of their communities (e.g., students, faculty, and visitors) to participate in research projects involving export-controlled technical information on campus in the U.S. without a deemed export license, as long as the technical information used in the project is publicly available. Further, technical information resulting from fundamental research may be shared with foreign colleagues abroad and shipped out of the United States without securing a license.

**Fundamental Research Exclusion** - includes the conduct of and information resulting from fundamental research. This is generally EXCLUDED from U.S. export controls, including deemed export controls (i.e., disclosure of information to foreign nationals on U.S. soil) — in accordance with National Security Decision Directive 189 (AAU site). Because fundamental research is not generally subject to deemed export controls, no export license or other authorization is needed to involve foreign nationals in fundamental research activity. The general rule does not, however, apply to fundamental research on encryption software.

**International Traffic in Arms Regulations (ITAR)**, - 22 CFR §§ 120-130 are promulgated and implemented by the Department of State and regulate defense

articles and services and related technical data that are identified on the Munitions Control List (MCL), 22 CFR § 121.

**Public Domain (22 CFR § 120.11)** - means information that is published and that is generally accessible or available to the public:

1. through sales at newsstands and bookstores;
2. through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;
3. through second class mailing privileges granted by the U.S. Government;
4. at libraries open to the public or from which the public can obtain documents;
5. through patents available at any patent office;
6. through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States;
7. through public release (i.e., unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency; and (8) through fundamental research.

**Published Information** – Information is “published” (and therefore not subject to export controls) when it becomes generally accessible to the interested public in any form, including:

- publication in periodicals, books, print, electronic, or other media available for general distribution (including websites that provide free uncontrolled access) or to a community of persons interested in the subject matter, such as those in a scientific or engineering discipline;
- readily available at libraries open to the public or at university libraries;
- patents and published patent applications available at any patent office; and
- release at an open conference, meeting, seminar, trade show, or other open gathering held in the U.S. (ITAR) or anywhere (EAR).
- **Technology and Technical Data** – these terms refer to technical information beyond general and basic marketing materials about a controlled commodity. The terms do not refer to the controlled equipment or commodity itself, or to the type of information contained in publicly available user manuals. Rather the terms “technology” and “technical data” mean specific information necessary for the development, production, or use of a commodity. This information usually takes the form of blueprints, drawings, photographs, plans, diagrams, models, formulae, tables, engineering specifications, and documentation. The “deemed export” rules apply to transfer of such technical information to foreign nationals inside the United States.

**Technology or Source Code software** - is released for export through:

1. Visual inspection by foreign nationals of U.S.-origin equipment and facilities,
2. Oral exchanges of information, or
3. The application to situations abroad of personal knowledge or technical experience acquired in the United States. **CFR § 734.2(b)(3)**

**Technical Data (ITAR TERM)** - is a defense article covered by the U.S. Munitions List. Technical data means:

- Information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of a

defense article;

**U.S. Munitions List** - is a list of defense articles (including satellites and spacecraft), technical data and defense services controlled for export and re-export by the U.S. State Department. The U.S. Munitions List is located in the International Traffic in Arms Regulations at [22 CFR § 121.1 \(2004\)](#).

## CONTENTS:

### POLICY STATEMENT:

Federal laws restrict the export of certain goods, information, and technology in ways that affect FHSU. These laws primarily focus on technology that could have military, nuclear, or aerospace applications, but in some instances, can apply to such seeming innocuous items as laptop computers and cell phones. U.S. export control laws have existed for decades; their applicability to higher education has been of particular interest for at least the past twenty five years. Although the events of September 11, 2001 resulted in a significant increase in enforcement of export control laws, a trend toward greater enforcement had already been underway. As part of this enforcement trend, the various government agencies with responsibility for enforcing export control regulations have increasingly turned their attention to compliance in the higher education setting. Although the emphasis has largely been directed toward academic research institutions, all higher education institutions, including small liberal arts schools such as FHSU, are affected by and must comply with these export control laws.

#### Federal Penalties

Export control laws are serious matters that carry serious penalties for both the individual violator and the University, including:

1. Civil fines of up to five-hundred thousand dollars (\$500,000) per violation; seizure/forfeiture of the goods, technology or research product; and/or loss of export privileges.
2. Criminal fines of up to one million dollars (\$1,000,000) per violation; and/or up to ten (10) years in prison.
3. Risk of losing federal funding.

#### Guidelines

FHSU intends to fully comply with export control laws as they apply to the University's activities. Under no circumstances shall faculty members, employees, or other persons acting on behalf of the university engage in activities in contravention of U.S. export control regulation. Primary responsibility for compliance with export control laws lies with each individual faculty or staff member. Questions regarding the applicability of export control laws should be directed to the Office of General Counsel.

The vast majority of teaching, research, and travel conducted by FHSU faculty and employees will come within one or more of the various exceptions to the export control laws. However, the regulations have the

potential to limit certain research opportunities, affect publication rights, and prevent international collaboration in certain research areas. Export controls are most likely to affect FHSU faculty and staff in the following potentially overlapping situations:

1. Traveling abroad;
2. “Sharing” (broadly defined and includes emails) science or technology-based research with a non-US citizen, whether on U.S. or foreign soil; or
3. Entering into a contract (including a grant) related to science or technology.

Compliance with export controls must be considered and achieved before traveling, engaging in science or technology-based research, or engaging in any other activity that may be export controlled. In most cases, this will simply involve confirming that the travel/research falls within an exception to the export control laws. In the few cases where the activity does not fall within an exception, the Compliance Officer/General Counsel, as the University’s “empowered official” (see below) will determine whether the University will pursue an export license from the relevant governmental agency or whether it is not feasible to engage in the export. The license process can take up to six (6) months – therefore it is wise to plan ahead.

#### Travel to Certain Countries

If you are traveling abroad, the first thing to know is whether you are visiting a country that has been sanctioned by the U.S. Office of Foreign Asset Control (“OFAC,”) see list here:

<http://www.treas.gov/offices/enforcement/ofac/programs/index.shtml>). Travel to these countries is heavily regulated, and in some instances prohibited. Anyone seeking to travel to one of these countries on University-related business or research should consult with the Office of General Counsel.

#### Travel with Laptops, GPS, Cell Phones, and other Common Items

Generally speaking, and provided that you are not traveling to an OFAC-sanctioned country, you may likely take laptops, GPS devices, cell phones, and other common, personal use technological items as long as:

- The device, including any software installed on it, does not contain encryption technology (be aware that encryption is becoming more and more common on certain devices and software programs);
- You own the device or are using a W&L-owned device;
- You will return to the U.S. with the device within one year;
- The device is for personal use or is a type of device that is usual and reasonably used within your profession;
- You will maintain control over the item at all times (e.g. by keeping in

your possession or locking in a hotel safe)

- The device, its software, and underlying technology will not be put to military use, used in outer space, or used to develop weapons of mass destruction.

If any of the above conditions do not apply to you, or if you have any questions, contact the Office of General Counsel for an individual assessment of your travel situation.

## Research

Most research conducted at FHSU will fall within an exception to the export control laws. Generally speaking, if the resulting research is published and generally accessible to the public (or shared broadly within the scientific community), the research is likely exempt from export control laws. However, be aware that these exceptions are lost if you accept certain contractual terms concerning:

- Foreign nationals;
- Publication restrictions or pre-publication review; or
- Access or dissemination controls.

Thus, it is imperative that you carefully review any contract – including a grant – you might sign in connection with your research. If you see terms addressing any of the above issues, you are advised to contact the Office of General Counsel.

In the context of research, the roles of each individual/office listed below are as follows.

### 1. Faculty Member

- a. Identify potential applicability of export control laws to the research/project; if it is determined that export control laws might be applicable:
  - i. Contact the Office of General Counsel;
  - ii. Understand that acquiring any necessary license from the government may take up to six (6) months, and, even with a license, exporting will not be feasible in some instances;
  - iii. Identify the names, country of origin, and country of citizenship of anyone who will be involved in the research/project;
  - iv. See that access to and distribution of technologies and information related to the project are restricted to those persons and destinations that are not export controlled; and
  - v. Report any suspected violations of export control laws to the

department chair, the Provost, and the Office of General Counsel.

2. Department Chair and Dean

- a. Read any contract – including a grant – carefully with an eye for references to:
  - i. Export control laws;
  - ii. Foreign nationals;
  - iii. Publication restrictions or pre-publication review; or
  - iv. Access or dissemination controls.
- b. Inform the PI that s/he must contact the Office of General Counsel; and
- c. Do not sign any contract until any applicable export control issues have been addressed by the Office of General Counsel, and , if necessary, approved by the Provost.

3. “Empowered Official” – General Counsel – Compliance Officer

- a. See that University faculty and staff are aware of and comply with export control laws;
- b. Make the ultimate determination as to whether to abandon a contract/grant that, despite attempts at negotiation, includes provisions that create problem for the University under export control laws;
- c. Make the ultimate determination as to whether to apply for a license or abandon the project due to the burden of export controls;
- d. Investigate reported violations of export control laws; and
- e. Report violations of export control laws to appropriate federal agencies.

4. Corporate and Foundation Relations

- a. Remind faculty – specifically those whose research involves science or technology – of the potential applicability of export control laws and encourage them to submit any grant applications, etc. with enough lead time for any necessary contract negotiations and/or license acquisition;
- b. Review each contract/grant for potential applicability of export control laws; and
- c. Contact the Office of General Counsel if it appears that export control laws might apply.

5. Office of General Counsel

- a. Provide legal interpretation of export control laws as they affect University activities;
- b. Negotiate with research sponsors or other third parties when contracts/grants include provisions that are problematic under export control laws;
- c. Apply for appropriate license as requested by the Provost; and
- d. Engage outside counsel with expertise in export control laws and/or international customs.

**RELATED DOCUMENTS:**

**Policies:**

**Forms:**

**Other:**

**KEYWORDS:**

Export Controls, Compliance Office, Foreign National

**RESPONSIBLE OFFICE:**

General Counsel

**RESPONSIBLE UNIVERSITY OFFICIAL:**

General Counsel

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**REVIEW CYCLE:** Every year

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7/2020

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