Export Controls 101

Global Operations and Security (GOS)

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What are "export controls"?

Export controls are U.S. laws and regulations that regulate and restrict the release of critical technologies, information, and services to foreign nationals, within and outside of the United States, and foreign countries.

U.S. export controls exist to protect the national security and foreign policy interests of the United States. Faculty, staff and students may intersect with federal regulations that impose access, dissemination or participation restrictions on the transfer of items and information regulated for reasons of national security, foreign policy, anti-terrorism or non-proliferation.

Why do I need to know about export controls?

U.S. export controls exist to protect the national security and foreign policy interests of the United States. The U.S. maintains comprehensive controls and sanctions on the export and re-export of U.S.-origin goods and technology to all destinations around the world.

GOS supports the University of Kansas commitment to comply with United States export control and sanctions laws. University and individual awareness of export control laws and requirements are critical in today's world. There are significant civil and criminal penalties for violations of these regulations both for individuals, and for entities.

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Who are the administering export agencies?

The U.S. Department of Commerce's [Bureau of Industry and Security](#) (BIS)
BIS administers the Export Administration Regulations (EAR) that govern the export of commercial and dual-use goods, software and technology, including hardware and software containing certain encryption algorithms. BIS also controls certain defense-related items, including certain parts and components for military aircraft and other military end-uses.

The U.S. Department of State's [Directorate of Defense Trade Controls](#) (DDTC)
DDTC administers the International Traffic and Arms Regulations (ITAR) that govern the export of defense articles, defense services and ITAR controlled technical data.

The U.S. Department of the Treasury's [Office of Foreign Assets Control](#) (OFAC)
OFAC administers country-specific economic and trade sanctions that often include restrictions on most or all transactions with and exports to targeted countries and persons. In addition, both the Treasury and Commerce Departments administer anti-boycott laws, which are designed principally to counter Arab country boycotts of Israel and Israeli goods.

Note: *Other agencies also have a role in limited circumstances, such as: the Census Bureau's [Foreign Trade Division](#), the U.S. [Customs and Border Protection (CBP)](#), Drug Enforcement Agency (DEA), Environmental Protection Agency (EPA), Department of Energy (DOE), Nuclear Regulatory Commission (NRC), Patent and Trademark Office (USPTO), Food and Drug Administration (FDA), and the Maritime Administration (MARAD)*

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Export Controls 101: Who? What? Where? Why?

WHO?

- Who are you shipping to?
- Are they the ultimate end-user?
- Have you screened the individuals and their organizations?

WHAT?

- What is being shipped?
- What is its Export Control Classification Number?
- What is the Harmonized Tariff (HS/HTS) Code or Schedule B number?
- What is the value of the item(s)?

WHERE?

- Where are you shipping to?
- Is the destination permissible for receipt of this item and the end use?
- Is a license required?
- Are there Import restrictions at the destination?

WHY?

- What is the end-use of the item?
- Is the end-use permissible without a license?

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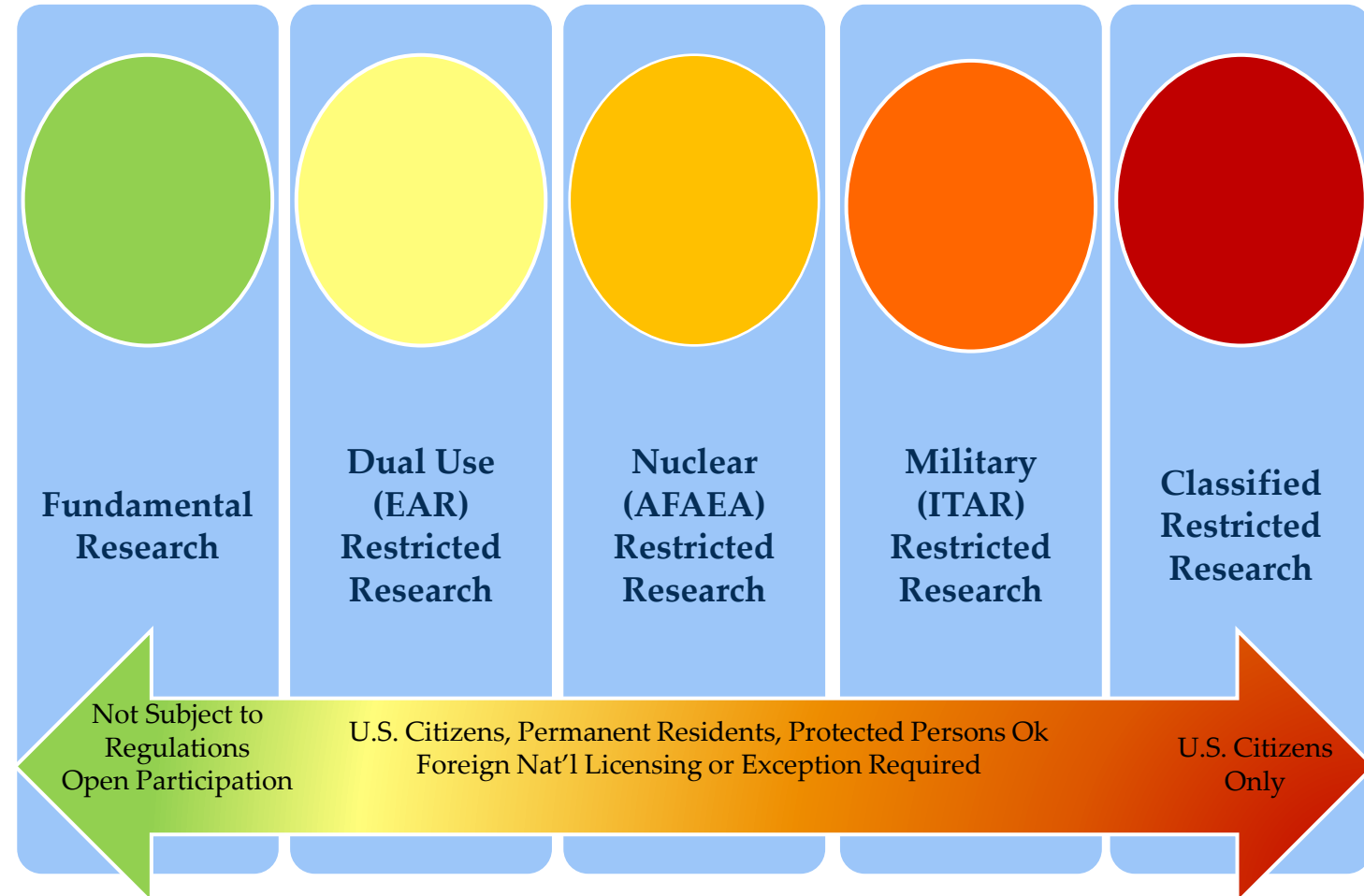
Export Controls 101: Who? Definitions

U.S. Citizen: Any natural person; Birth or Naturalization

U.S. Person: Includes U.S. Citizens, Lawful Permanent Resident (LPR) or protected individuals, or corporations/other entities

U.S. Person (OFAC): Above plus any person in the U.S.

Foreign Person (ITAR): Anyone *NOT* an U.S. person. Includes any corporation or entity not incorporated in the U.S., foreign governments

Foreign National (EAR): Same as Foreign Person

Fundamental Research

Dual Use (EAR) Restricted Research

Nuclear (AFAEA) Restricted Research

Military (ITAR) Restricted Research

Classified Restricted Research

Not Subject to Regulations Open Participation

U.S. Citizens, Permanent Residents, Protected Persons Ok
Foreign Nat'l Licensing or Exception Required

U.S. Citizens Only

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What is a "restricted party"?

Simply, a **restricted party** is an individual or entity (academic institutions, government, business, etc.) that the U.S. government prohibits or restricts transactions with. A prohibited transaction is broadly defined as "trade or financial transactions and other dealings in which U.S. persons may not engage." Because each program is based on different foreign policy and national security goals, prohibitions may vary between programs. A prohibited transaction may include the exchange of goods or services.

It is KU policy to ensure compliance with the regulations and laws, therefore KU will not engage in exports or transactions with such entities or their representatives, employees, or agents.

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What is a "restricted party screening"?

A Restricted Party Screening (RPS) is an essential component of the University of Kansas (KU) Export Compliance Program.

The RPS checks persons or entities against various U.S. government lists of individuals, companies, and organizations, both foreign and domestic, where export regulations or sanctions block or restrict any export or prohibited transaction. Individuals on this list are "restricted parties".

Regulators and enforcement authorities have made it clear that all organizations are obligated to conduct RPS on employees, contractors, vendors, business associates, and customers prior to any export or prohibited transaction.

How do I determine if some or something is a "restricted party"?

GOS is here to help you make this determination. GOS can perform a restricted party screening on your behalf or provide your department training in order to screen entities yourself.

The lists are constantly evolving with additions and removals. Below is the most notable, but not a fully exhaustive list, of lists the U.S. Government expects *every* transaction to be screened against:

-U.S. Treasury Department/OFAC: **Specially Designated Nationals And Blocked Persons List (SDN)**

-BIS List: **15 CFR 744**

-International Trade Administration: **Consolidated Screening List (CSL)**

Because the risks to the University are significant and the lists are constantly evolving, the University of Kansas utilizes Amber Road to help make perform restricted party screenings.

What is a "red flag"?

A red flag is an anomaly or other indicator of a potential issue concerning U.S. laws or regulatory requirements.

They include, but are not limited to:

- *The customer or its address matches, or is similar to one of the parties found on an "entity list";*
- *The customer or purchasing agent is reluctant to offer information about the end-use of the item;*
- *The product's capabilities do not fit the buyer's line of business, or the customer has little or no business background;*
- *the item ordered is incompatible with the technical level of the country to which it is being shipped;*
- *The customer is willing to pay cash for a very expensive item when the terms of sale would normally call for financing;*
- *The customer is unfamiliar with the product's performance characteristics but still wants the product;*
- *Routine installation, training, or maintenance services are declined by the customer;*
- *Delivery dates are vague, or deliveries are planned for out of the way destinations;*
- *A freight forwarding firm is listed as the product's final destination, or the shipping route is abnormal for the product and destination;*
- *Packaging is inconsistent with the stated method of shipment or destination;*
- *When questioned, the buyer is evasive and especially unclear about whether the purchased product is for domestic use, for export, or for reexport.*

KU an has obligation to observe any red flags or indicators and potentially restrict or prohibit interacting with entities entirely.
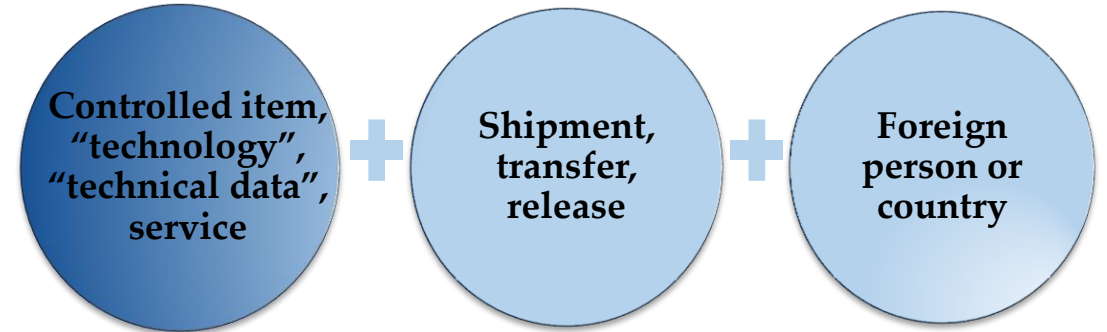
What is an "**export**"?

An export is any oral, written, electronic or visual disclosure, shipment, transfer or transmission of commodities, technology, information, technical data, assistance or software codes to:

- Anyone outside of the U.S.
- A "foreign national" wherever they are (deemed export)
- A foreign embassy or affiliate

Some examples of an export may include:
- *Shipping items internationally or hand carrying items internationally,*
- *Some foreign visits or visitors,*
- *phone/web calls or in person conversations,*
- *placing controlled information in the public domain,*
- *presenting at conferences, webinar or sharing screen with technical data or information,*
- *visual inspection of items, and/or emails of technical data.*

Controlled item, "technology", "technical data", service **+** Shipment, transfer, release **+** Foreign person or country

What is a "**deemed export**"?

A deemed export is the release of technology or information to a foreign national in the U.S., including students, post-docs, faculty, visiting scientists or training fellows.

Deemed exports are the <u>most common</u> exports for the university as a deemed export can happen when traveling abroad, or when hosting foreign nationals or persons.

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Does operating controlled lab equipment by foreign nationals constitute a deemed export?

It depends on the equipment. Operation of a defense article by foreign nationals is prohibited, unless a license is obtained prior to operating.

Operation of EAR/CCL items equipment by a foreign national in the U.S. is not controlled by the export regulations. In the U.S., any person (including foreign nationals) may purchase export-controlled commodities and the "deemed" export rule only applies to technical information about the controlled commodity. As such, while the operation of equipment inside the U.S. is not controlled, the transfer of technical information relating to the use (i.e., operation, installation, maintenance, repair, overhaul and refurbishing) of equipment may be controlled in certain circumstances.

The export regulations allow foreign students, researchers and visitors to operate (and receive information about how to operate) controlled equipment while conducting fundamental research on U.S. university campuses or while studying at the institution, as long as the technical information about the controlled equipment qualifies as "in the public domain" or "publicly available."

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What are exclusions and how do I know when they apply to research?

Research is not subject to export controls if it qualifies for at least one of three exclusions:

- Fundamental Research Exclusion,
- Public Domain Exclusion,
- Educational Information Exclusion.

While most KU research will qualify for one of these exclusions, some contracts will include language that will remove these exclusions.

Some requirements that may sever any exclusions include:

- The prohibition on foreign persons and/or foreign components.
- The sponsor requires approval of publications resulting from research.
- Language that expects research to rise to the export-controlled or Controlled Unclassified Information (CUI) level.

What is the **Fundamental Research Exclusion** (FRE)?

Fundamental Research Exclusion is a broad-based general legal exclusion that helps to protect technical information (but not tangible items) involved in research from export controls. It is defined as basic and applied research in science and engineering conducted at accredited U.S. institutions 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 and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary reasons or specific national security reasons. Research qualifying as "fundamental research" is not subject to export controls.

University research will not qualify as fundamental research if the university or researcher accepts any restrictions on the publication of the information resulting from the research, other than limited prepublication reviews by research sponsors to prevent inadvertent divulging of proprietary information provided to the researcher by sponsor or to ensure that publication will not compromise patent rights of the sponsor. There is no general fundamental research exclusion that applies to defense articles (as opposed to technical data) under the ITAR; however, there are exclusions that apply to specific articles under certain circumstances.

Fundamental research permits U.S. universities to allow foreign members of their communities (e.g., students, faculty, and visitors) to participate in research projects involving non-ITAR export-controlled technical information on campus in the U.S. without a deemed export license.

Further, technical information resulting from fundamental research may be shared with foreign colleagues.

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Basic and Applied Science, and

At an accredited institution of higher learning in the US, and
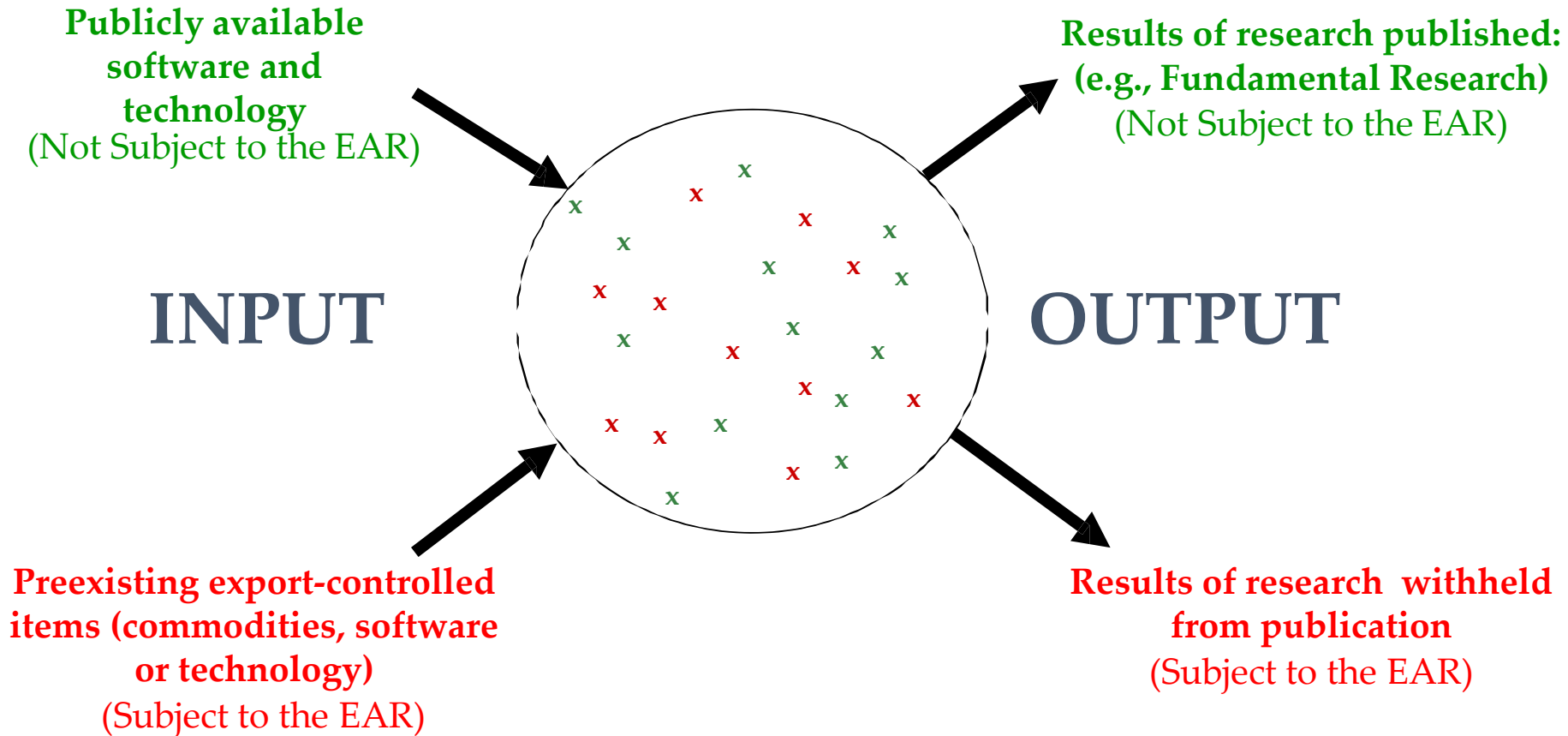
Research results are ordinarily published and shared broadly within the scientific community.

Does FRE apply to my research?

As long as **all conditions** are met, the results of the research are not subject to the ITAR or EAR.

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**Publicly available
software and
technology**
(Not Subject to the EAR)

**Results of research published:
(e.g., Fundamental Research)**
(Not Subject to the EAR)

INPUT

OUTPUT

**FRE only applies to
Software and
Technology
(not commodities)**

**Preexisting export-controlled
items (commodities, software
or technology)**
(Subject to the EAR)

**Results of research withheld
from publication**
(Subject to the EAR)

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What is the **Public Domain Exclusion**?

Public Domain Exclusion applies to 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 in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community.

ITAR/USML technical information already in the public domain qualifies for the Public Domain exclusion as long as it meets the requirements stipulated above

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What is the Educational Information Exclusion?

Educational Information Exclusion covers general science, math or engineering commonly taught in courses listed in catalogues and associated teaching laboratories of academic institutions in the U.S. even if the information concerns EAR/CCL controlled commodities or items. ITAR/USML items do not qualify for the Educational Exclusion, as instruction is a "defense service."

Please reach out to GOS if there is any concern about whether or not any of the exclusions apply to your research. Do not simply presume to be excluded without confirmation.

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Public Domain, Information, and Informational Material

Public domain (ITAR 120.11) or Published (EAR 734.7): Information which is published and is generally accessible or available to the public

Information released in a catalog course from an academic institution is not subject to the EAR (734.3.b).

Informational Material (OFAC): includes publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMS, artworks, and news wire feeds

Does this apply to KU?

- **Information released in a catalog course (734.3.b).**

- **Restrictions on further dissemination (734.7)?**

- **OFAC Guidance: Course delivery is a service.**

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What countries have **restrictions**?

Sanctions are changing constantly, and new additions and subtractions are added with regularity. Additionally, not all sanctions are the same – some sanctions target individuals or organizations (aka, restricted parties) while others target countries with comprehensive sanctions, industry sanctions, or targeted sanctions.
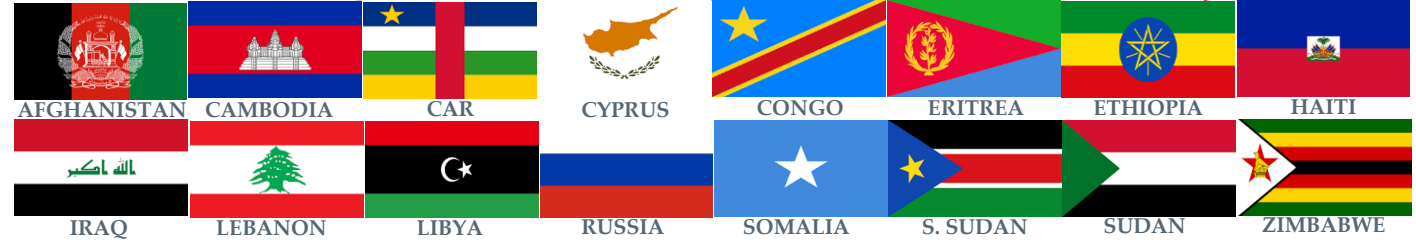
On the next page, are the most restrictive country sanctions currently imposed by the U.S. Government.

Export Controls 101: Where? Countries with Sanctions

For defense articles/defense services (ITAR), the following countries have a policy of denial:

BELARUS BURMA CHINA CUBA

IRAN N. KOREA SYRIA VENEZUELA

For defense articles/services (ITAR), the following countries have a policy of denial *with exception*:

AFGHANISTAN CAMBODIA CAR CYPRUS CONGO ERITREA ETHIOPIA HAITI

IRAQ LEBANON LIBYA RUSSIA SOMALIA S. SUDAN SUDAN ZIMBABWE

OFAC Comprehensive Sanctions:

CHINA (Military) CUBA IRAN

N. KOREA RUSSIA SYRIA

OFAC Selective Sanctions:

AFGHANISTAN BELARUS BURMA CAR CONGO ETHIOPIA HONG KONG

IRAQ LEBANON LIBYA MALI NICARAGUA SOMALIA

S. SUDAN SUDAN UKRAINE (Crimea region) VENEZUELA YEMEN ZIMBABWE

EAR Group E Countries:

CUBA IRAN N. KOREA SYRIA

Alphabetically: Balkans, Belarus, Burma, Central African Republic (CAR), China (+ **Chinese Military Complex**), Congo, **Cuba**, Eritrea, Ethiopia, Haiti, Hong Kong, Iraq, **Iran**, Lebanon, Liberia, Libya, Mali, Nicaragua, **North Korea**, **Russia** (+ **Russian Industry Sector**), South Sudan, Sri Lanka, Sudan, **Syria**, Ukraine (**Crimea**),Venezuela, Vietnam, Yemen, Zimbabwe.

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Do U.S. export controls apply if I am no longer in the U.S.?

Yes. International travel by employees or students is still subject to export control regulations. When traveling, be aware that taking information, technology, equipment or laptops out of the country because they may require an export license.

If you are traveling to a sanctioned or embargoed country to conduct university activities, or you are taking any of the following: **encrypted software**, **export-controlled items/information**, **unpublished research data or data not in the public domain** – you must ensure you discuss your activities in advance of travel with the KU Export Compliance Officer or another GOS employee.

Depending on the type of activity, it may be prohibited, or require licenses be obtained before being allowable.

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Export Controls 101: Why?

I am exporting to a non-restricted party from a country with no prohibitive sanctions.
Are there any concerns?

Perhaps the most difficult question to answer for shippers and researchers is "why"? To answer the "why" requires a review of the entity you are dealing with beyond restrictions.

Are you shipping aeronautical equipment or data to a company that is in an unrelated field?
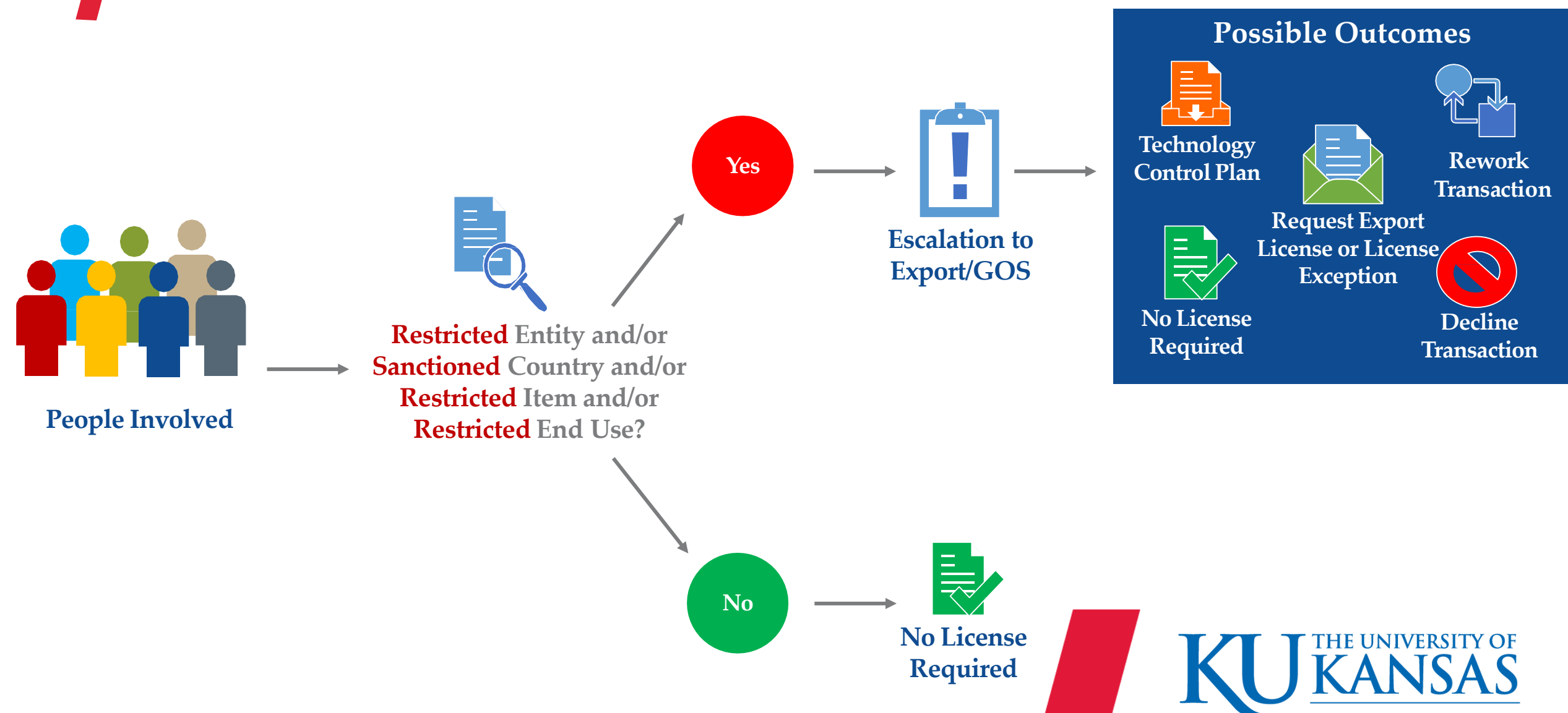
Is the company operated by a foreign government, or is subject to it?

Does the company want you to ship somewhere other than one of their facilities?

Is a researcher wanting to join a lab in a field outside of their scope of expertise?

These are just a few potential questions that must reviewed. Red flags may not be explicitly forbidden, but knowingly disregarding red flags is one of the highest risks facing the University and researchers. The U.S. Government does not accept ignorance as a viable excuse when dealing with export controls. Fortunately, Global Operations and Security are here to help you make these determinations in order to ensure compliance and to mitigate this substantial risk.

Export Controls 101: Export Review Flow

People Involved

Restricted Entity and/or
Sanctioned Country and/or
Restricted Item and/or
Restricted End Use?

Yes

Escalation to Export/GOS

No

No License Required

Possible Outcomes

Technology Control Plan

Request Export License or License Exception

Rework Transaction

No License Required

Decline Transaction

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Export Controls 101: Do's and Do Not's

- **Do contact** the Office of Global Operations & Security (GOS) for assistance in classifying items involved in an export. All documents relating to export determinations, risk assessments, use of exceptions and shipping must be retained 5 years for federal audits/investigations.

- **Do ensure** your staff is aware of controlled-commodities, software and technology on site. When purchasing equipment, always request the export control classification number (ECCN) which provides control requirements.

- **Do identify** projects that involve restricted research and international transactions early in project development so an export analysis can be conducted to determine and plan for impact.

- **Do conduct** restricted party screening for all exports using Amber Road. If sanctions or alerts are identified during these screenings, have GOS review.

- **Do NOT ship** any item outside the U.S. without first conducting an export analysis. Export controlled equipment, materials, software, or technology may require a license before transferring to a foreign entity (organization, person, business, etc.).

- **Do NOT carry**, without an export review, export-controlled technology when travelling abroad to include digital data that may be stored in your cell phone, laptop, USB drives or other digital media etc.

  If you are not sure, do not carry these items with you.

- **Do make** sure that technical data about export-controlled commodities qualifies as "public domain" or "publicly available" by any of the following criteria:

  - Published information: in journals, books, open websites, or other media available to a community of persons interested in the subject; readily available at university libraries.
  - Published through release at open conferences and meetings.
  - Educational information released by instruction in catalog courses and associated teaching laboratories of the University.
  - Fundamental research where the resulting information is ordinarily published and shared broadly within the scientific community and where no contractual restrictions have been accepted.

- **Do review** any Confidentiality/Non-Disclosure Agreements to ensure that KU is not assuming the burden of restricting dissemination based on citizenship status or securing export licenses.

- **Do implement** a KU technology control plan (TCP) for your work areas if there is a risk that a foreign national (employee or visitor) may inadvertently access export-controlled technology.

- **Do NOT enter** into proprietary data agreements containing export control requirements or restricts dissemination to others on the basis of nationality or citizenship without a Legal/Export review.

- **Do NOT accept** data from a commercial contractor that is marked "export controlled" without an export review.

Export Controls 101: Do's and Do Not's – Software

- **Do** *[when possible]* **make** KU created software "publicly available" or ensure an export classification is completed on the software before export.

- **Do** "**publish**" software and technical data, making it available in the public domain or obtain a legal/ export review prior to distribution.

  Note: If using source code of a software program that is publicly available, then the machine-readable code compiled from the source code is software that is publicly available and therefore not subject to export controls.

- **Do ask** software providers to identify the ECCN number of their software and understand the controls involved before exporting (includes deemed export).

- **Do consult** with Export Control for software transfers involving export of encryption software with symmetric key length exceeding 64-bits

- **Do NOT agree** to software license restrictions on access to, or use of, the software by nationals of certain countries or restrictions on dissemination of the "direct product" of the software.

- **Do NOT accept** Third Party's Controlled Items or Data without conducting an export analysis to determine impact to your project.

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Real life scenario 1:

Hiring a Foreign Person Researcher

- Proper authorization obtained (H1B, J1)
- Hired to work on a non-EC project
    - Other lab RA's provide export controlled data
- Is this allowable?
- Yes, this a license/license exception
- No, if fail to have license/license exception
- Microwave Engineering Corporation $100k fine (2016)
- UT Roth sentenced to 4 years in prison (2009)

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Real life scenario 2:

International

Collaboration

- Collaborating with a foreign entity on aerospace research
  - Purchase an EAR99 (NLR) weather balloon
  - Mail Wx balloon to entity
- Is this allowable?
- Yes, usually. But, failed to screen entity properly
- No, if on entity list (still possible to seek a license)
- UMass-Lowell $100k fine, loss of export privileges; suspended for two years (2013)

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Real life scenario 3:

International Collaboration

- Collaborating with medical researchers in Country of citizenship:
  - Seek to purchase EAR99 (NLR) MRI coil
  - Ship coil to Country
- Is this allowable?
- Yes, usually. But, failed to properly screen destination
- No, if comprehensively embargoed country (still possible to seek a license/license exception)
- U-Michigan H1B researcher; Arrested in 2012, released on bond; case dismissed in 2016

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