

Office/Contact: Research and Sponsored Programs

Source: U.S. Department of State, International Traffic in Arms Regulations (ITAR); 22 C.F.R. parts 120 – 130, U.S. Department of Commerce, Export Administration Regulations (EAR); 15 C.F.R. parts 730 – 799; U.S. Department of the Treasury, Office of Foreign Assets Control (OFAC), 31 C.F.R. parts 500 – 599; SDBOR Policies 1.7.4 and 4.9.6

Link: <https://public.powerdms.com/SDRegents/documents/1729415>;  
<https://public.powerdms.com/SDRegents/documents/1726884>

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**SOUTH DAKOTA STATE UNIVERSITY**  
**Policy and Procedure Manual**

SUBJECT: Export Controls

NUMBER: 8:1

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1. Purpose

This policy supports compliance with federal laws and regulations concerning export controls and is governed by SDBOR Policy 4.9.6. The University's export controls policy and procedures are designed to assure compliance with regulations in those activities of the University to which the regulations may apply, which helps protect the University and its personnel from the consequences of non-compliance.

2. Definitions

- a. **Controlled Activity:** an activity involving the export, re-export, 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, employee includes University 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 the University 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 University, or its employees, shall be deemed gratuitous employees and encompassed within the definition of employee for purposes of this policy.
- e. **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 re-exported physically and electronically through personal conversations, meetings, engineering manuals, blueprints, plans, diagrams, formulae, emails, telephone conversations, faxes, Internet postings, and a variety of other non-physical means.

- f. Export Controls: restrictions and other limitations imposed by the U.S. government on controlled technology and controlled activity.
- g. Export Control Analysis: an analysis conducted by the University's or SDBOR's export control officer to determine if any 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.
- h. Export Control Regulations: these include the Export Administration Regulations (EAR), International Traffic in Arms Regulations (ITAR), embargoes and trade sanctions administered by the Office of Foreign Assets Control (OFAC), U.S. Department of the Treasury, and any other U.S. imposed regulations governing exports.
- i. Foreign Entity: 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.
- 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, or B-visa, is a foreign national.
- k. 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.
- l. 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.
- m. Technology Control Plan (TCP): a formal, written plan, approved by the University Program Director of Research Integrity and Compliance and the Vice President for Research and Economic Development, their successors, or their designees. Legal review will be provided by the University Office of General Counsel, SDBOR General Counsel, or their designees, describing what measures will be taken to secure export controlled equipment, data, or technology from access by unlicensed Foreign Nationals. The TCP will include:
  - i. an affirmation of compliance with export control regulations;

- ii. identification of the applicable export controls and items or technologies subject to the controls;
- iii. a description of the security measures that will be implemented to control the item/technology including as appropriate:
  - 1. Laboratory compartmentalization
  - 2. Time blocking
  - 3. Marking
  - 4. Locked storage
  - 5. Electronic security
  - 6. Confidential communications;
- iv. identification and nationality of each individual who will have access to the controlled item or technology;
- v. personnel training and screening measures in accordance with SDBOR Policy 1.7.4 for granting access to the controlled item/technology; and
- vi. appropriate security measures for disposal of the item/technology when use is complete.

### 3. Policy

- a. It is University policy that no University employee, as defined in this policy, or student may engage in any activity, or commit the University to engage in any activity, that is prohibited by export control regulations, or requires a license or other agency approval under these regulations, until such license or approval has been obtained.
- b. Employees and students who participate in projects that involve export controls must acquire a level of understanding of the requirements appropriate for their role through education, information, and support resources.
- c. Departments and employees who work with employees, visiting faculty, scholars, or students from foreign countries and foreign boycotted countries are required to be aware of the export control regulations that relate to those countries and related compliance requirements. Individuals may not share, not even in informal social interaction, export controlled information or items with foreign nationals without prior export control review and approval of the Program Director of Research Integrity and Compliance, or designee, and if appropriate, the Vice President for Research and Economic Development, University Office of General Counsel, SDBOR General Counsel, or their designees, and any other protocols required by law or herein, in accordance with this policy and its procedures.
- d. Employees who engage in international travel within the scope of employment are responsible for understanding export laws and regulations and how they apply to their respective situations, including the impact on any students, employees, collaborators, consultants, or other personnel who they ask to accompany them or travel on their behalf. If any controlled information, technology, software, or equipment will be transferred to a foreign party overseas, a license may be required prior to the transfer unless a valid licensing exception or exclusion applies. Individuals must seek export control review from the Program Director of Research Integrity and Compliance, or designee, prior to travel that has such impacts.

- e. Exclusions and exceptions to this policy and its procedures may be 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 the Program Director of Research Integrity and Compliance, or designee, to confirm the applicability of the exclusion or exception prior to engaging in the controlled activity.
  - i. 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, as defined herein.
  - ii. Generally, the fundamental research exclusions 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, fundamental research exclusions apply only to the dissemination of research data and information, and not the transmission of controlled technology in general.
  - iii. Fundamental research exclusions are lost if the University 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.
  - iv. The University must 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.
- f. To implement this policy, University individuals who are involved in activities subject to export controls, are required to engage the export control review assistance of the Program Director of Research Integrity and Compliance, or designee, and, as appropriate, the University Office of General Counsel or SDBOR General Counsel, or their designees, to determine the applicability of export control regulations, the exemptions thereto, and compliance requirements.
- g. Violations of export control laws discovered at the University should be reported to the Program Director of Research Integrity and Compliance or to the University Office of General Counsel, or as appropriate, the SDBOR General Counsel. Such violations are subject to the penalties set forth in SDBOR Policy 4.9.6.
- h. Training and resources related to export controls will be coordinated by the Division of Research and Economic Development.

#### 4. Procedures

- a. The University must comply with all applicable U.S. government export regulations. When employees participating in projects that involve export controls plan to engage in activities, including but not limited to contracts, research projects, hire or visit of foreign nationals, foreign travel, or other proposed activities, they must disclose necessary information to the Program Director of Research Integrity and Compliance for review during the initial planning for the activities. This disclosure must be made before any commitments, however tentative, have been made.

- b. The information will be reviewed by the Program Director of Research Integrity and Compliance, or designee, and if needed, the University Office of General Counsel or SDBOR General Counsel, or their designees, prior to disclosure of any export-controlled information to a foreign national. Awareness of restrictions will not result in immediate disapproval, and the Program Director of Research Integrity and Compliance, or designee, will work with the Principal Investigator or other applicable individuals and the sponsoring entity to determine, as soon as possible, the nature and impact of such restrictions.
- c. In instances where it is anticipated that a foreign national may be hired and immigration petitions supported for the purposes of employment, an export control review will be performed by the Program Director of Research Integrity and Compliance, or designee, in consultation with the direct supervisor, and an export control determination will be provided to the SDBOR Shared Immigration Services. There may be instances where the SDBOR and University would be required to obtain a license before allowing the individual to work with export controlled items or when the SDBOR and University is unable to support an immigration petition based on this determination.
- d. The Program Director of Research Integrity and Compliance, or designee, will perform an initial review of the requested proposal, award, or change in scope of an existing project or activity.
- e. When export controlled equipment, data, or technology is identified for a project or activity, the Program Director of Research Integrity and Compliance, or designee, will work with the Principal Investigator or individual to develop and implement a TCP to appropriately secure the equipment, data, or technology from access by unlicensed non-U.S. persons. Before any individual may have access to export-controlled items or technology, they must be informed of the conditions of the TCP and agree to comply with the security measures outlined in the TCP.
- f. If a Department of State or Department of Commerce license is required in support of export controlled international University activities, a request will need to be approved in the following order: (1) the Program Director of Research Integrity and Compliance; (2) the Vice President for Research and Economic Development, or successor; (3) the University President; and (4) the SDBOR or their designees, upon the advice and support of University Office of General Counsel and SDBOR General Counsel, respectively. Activities that require a license will not occur without the appropriate license.
- g. The applicable University offices will maintain export-related records based on individual controlled items or activities. Unless otherwise provided for or instructed by the University Office of General Counsel or SDBOR General Counsel, all records shall be maintained consistent with the SDBOR record retention policy, as modified by federal law.
- h. In order to maintain the University's export compliance program and to ensure consistent adherence to U.S. export laws, the Program Director of Research Integrity and Compliance may conduct internal reviews of TCPs and export records. The purpose of the reviews is: (1) to identify possible violations; and (2) to identify deficiencies in training, procedures, etc. that can be rectified.

- i. If the results of such reviews indicate that an exemption from the export control regulations may not be available, the Program Director of Research Integrity and Compliance will forward the documentation to the University Office of General Counsel, who will then confirm the review of the Program Director of Research Integrity and Compliance and if the research contract or grant contains terms or conditions that affect the University's exemption from export control regulations, the matter will then be referred to the Vice President for Research and Economic Development.
5. Responsible Administrator

The Vice President for Research and Economic Development, successor, or designee is responsible for ad hoc review of this policy and its procedures. The University President is responsible for approval of this policy and its procedures.

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