Introduction to Export Control Regulations

It is important that all University of Texas Medical Branch faculty members and senior staff engaged in research and research administration be aware of the potential applicability of federal laws and regulations on export controls, and recognizes the circumstances in which export licenses may be required. It is important to emphasize that only exports for which the U.S. government requires a license are those that are listed on the export controlled lists. The vast majority of exports at UTMB do not require the prior approval of the U.S. government.

The export rules are highly complex, but the federal penalties for noncompliance are very serious. Because the rules change frequently and are subject agency interpretation, this section provides only general guidance. We encourage faculty members to review the regulations at the pertinent sites and become familiar with Export Control Regulations.

What Are Export Control Regulations?

Federal export control laws restrict the export of goods, technology, related technical data, and services in the interest of protecting national security and the domestic economy. Export laws have been in existence for many years. However, due to the catastrophic events of 9/11, Congress has responded to the heightened concerns about security by applying stricter export control laws and regulations. Federal export controls are accomplished primarily through the Export Administration. There are three primary sets of federal regulations, under three different federal agencies, that govern export controls:

1. Export Administration Regulations (EAR) - implemented by the Department of Commerce for the export of dual use items and technologies that have both a commercial and military use, such as computers, software, and pathogens.

2. International Traffic in Arms Regulations (ITAR) - implemented by the Department of State for the export of military items and defense services.

3. Office of Foreign Asset Control (OFAC) – implemented by the U.S. Department of Treasury administers and enforces economic and trade sanctions to protect foreign policy and security goals.

Export Administration Regulations (EAR)

The Export Administration Regulations (EAR) located in Title 15, sections 730-774 of the Code of Federal Regulations (CFR) are promulgated and implemented by the Department of Commerce. (15 CFR §§730-774). These regulations are administered by the US Department of Commerce. They regulate the export of so-called “dual use” items, i.e., goods and related technology designed for commercial purposes but which could have military applications, such as computers, aircraft, and pathogens. The EAR regulate the export of goods and services identified on the Commerce Control List (CCL), Part 774 of the EAR. The complete text of the EAR and CCL are available online at http://www.access.gpo.gov/nara/cfr.
International Traffic in Arms Regulations (ITAR)

The International Traffic in Arms Regulations (ITAR), 22 CFR §§ 120-130, are promulgated and implemented by the Department of State. The purpose of ITAR is to regulate defense articles and services and related technical data that are identified on the United States Munitions List (USML), 22 CFR § 121. The USML contains a list of military items, the defense articles (including technical data which unlike the EAR, encompasses software) and services (furnishing technical services assistance, including design, engineering and use of defense articles) which are controlled. ITAR also includes a listing of space related technology. Licensing for ITAR is handled by the Directorate of the Office of Defense Trade Controls (DDTC). Complete, on-line versions of the ITAR and USML are available online at: http://www.access.gpo.gov/nara/cfr.

Differences between EAR and ITAR

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 most 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.

Office of Foreign Assets Control ("OFAC")

The U.S. Department of the Treasury, through the Office of Foreign Assets Control (“OFAC”), administers and enforces economic and trade sanctions against targeted foreign countries, terrorism-sponsoring organizations and international narcotics traffickers based on U.S. foreign policy and national security goals. OFAC acts under Presidential wartime and national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze foreign assets under US jurisdiction. They regulate economic trade with foreign countries and administer the statutory economic trade sanctions imposed against several foreign countries. The sanctions range from partial to full trade embargoes and are imposed in addition to other U. S. export control law penalties. Information regarding sanctions in effect can be found at the OFAC web site (http://www.ustreas.gov/offices/eotfcc/ofac/).

Definitions for Export Controls

The Export Control Regulations determine whether you, as a researcher, can send certain classified materials to another entity. In order to gain a better understanding of export control regulations and UTMB’s role in compliance thereof, it will be helpful to review the following definitions:

- **Dual Use Exports** - in general, the term dual use serves to distinguish EAR-controlled items that can be used both in military and other strategic uses (e.g. nuclear) and commercial applications. Technologies are those that have both a legitimate civilian and military use.

- **Deemed Export** - Providing, transferring or disclosing certain technology,
information, etc. to a foreign national within the United States. Such methods of disclosure include:

- FAX
- Telephone conversations
- E-mail communications
- Face-to-face discussions
- Tours of labs
- Training sessions
- Computer data

- **Defense service** (ITAR at 22 CFR §120.9) - The furnishing of assistance, including training, to foreign persons, whether in the US or abroad, in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing, or use of defense articles (those listed on the USML).

- **Export** – is the actual shipment or transmission of items subject to the EAR out of the United States. In short:

  An Export is the transfer to a foreign person in the U.S. or abroad of:

  - Controlled technology
  - Information
  - Equipment
  - Software
  - Services

  Transfer can be by:

  - Actual shipment outside the U.S.
  - Electronic or digital transmission
  - Visual inspection in or outside the U.S.
  - Written or oral disclosure
  - Actual use or application on behalf or for benefit of foreign person or entity

- **Export Administration Regulation (EAR)** - The Department of Commerce implements the EAR, which bars the export of items, technology, and technical information found on the Commerce Control List to foreign countries without
appropriate export license. EAR covers the transfer of dual-use commercial goods.

- **Foreign National** - means any natural person who is not a lawful permanent resident in the U.S and is not a “protected individual.” In general, a foreign national is:
  - Any person who is not a lawful permanent resident of the U.S.
  - Any foreign corporation or other entity or group that is not incorporated or organized to do business in the U.S.
  - Any foreign government

For the purpose of export controls, foreign nationals who have **exempted** status are the following:

1. foreign nationals granted U.S. Citizenship,
2. “green card” holders,
3. foreign nationals granted status as a “protected individual” under 8 U.S.C. §1342b(a)(3) which includes political refugees and political asylum holders.

- **Fundamental Research** - Basic or applied research in science and/or engineering at an accredited institution of higher learning in the United States where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is distinguished from research that results in information that is restricted for proprietary reasons or pursuant to specific U.S. Government access and dissemination controls.

- **International Traffic in Arms Regulation (ITAR)** - The Department of State implements the ITAR, which regulates the export of items on the Munitions Control List and technical information about them.

- **Office of Foreign Assets Control ("OFAC")** – The Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction.

- **Public Domain** - means information that is published and generally accessible or available to the public:
  - through sales at newsstands and bookstores;
through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;

through second class mailing privileges granted by the U.S. Government;

at libraries open to the public or from which the public can obtain documents;

through patents available at any patent office;

through unlimited distribution at a conference, meeting, seminar, trade show or exhibition;

through publication in any form or media after approval by the cognizant U.S. government department or agency;

through fundamental research.

Re-export- in general means the actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country. Technology or software: release of technology or software subject to the EAR to a foreign national outside the United States

Technical data- Information, other than software as defined in 22 CFR §120.10(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions and documentation.

Information covered by an invention secrecy order,

Software as defined in 22 CFR §121.8(f) directly related to defense articles.

What Agreements Involve Export Control Regulations?

1. Material Transfer Agreements- exchange of materials

2. Sponsored Research Agreements- exchange of materials and technology

3. Confidentiality Disclosure Agreements- exchange of technology

4. Non-Exclusive License Material Transfer Agreements-exchange of materials

5. Licensing Agreements-exchange of materials.

In all of these agreements, our goal is to protect the University and you as an UTMB employee from harmful language and clauses, which affects your right to publish or retain rights to any inventions you may discover in the process of conducting the research. Examples of harmful clauses are those requiring the Providers approval or consent before
you publish your results.

**Who must abide**

Any person in the University of Texas Medical Branch System who desires to transfer materials or technical know-how, technology to persons who are not employees, faculty, staff or students of UTMB must abide and comply with Export Control Regulations.

In brief, you must ask the 5 following questions in conducting an export control search:

1. **What is it?**
   What an item is, for export control purposes, depends on its classification, which is its place on the Commerce Control List (see part 774 of the EAR)

2. **Where is going?**
   The country of ultimate destination for an export or reexport also determines licensing requirements (see parts 738 and 774 of the EAR concerning the Country Chart and the Commerce Control List).

3. **Who will receive it?**
   The ultimate end-user of your item cannot be a bad end-user. See General Prohibition Four (Denial Orders) in § 736.2(b)(4) and parts 744 and 764 of the EAR for a reference to the list of persons you may not deal with.

4. **What will they do with it?**
   The ultimate end-use of your item cannot be a bad end-use. See General Prohibition Five (End-Use End User) in § 736.2(b)(5) and part 744 of the EAR for general end-use and end-user restrictions.

5. **What else do they do?**
   Conduct such as contracting, financing, and freight forwarding in support of a proliferation project (as described in § 744.6 of the EAR) may prevent you from dealing with someone.

In answering these questions, we will conduct the following searches:

- EAR Search
- EAR 99 Search
- OFAC and BIS Lists To Check Search
- Commerce Country Chart Search
- ITAR/Embargoed Country Search
- License Exemption Search
- General Prohibitions Checklist Search

We first begin our process with conducting an EAR search.
Conducting an EAR search

Once we receive the complete name of the material requested, we will consult the Commerce Control List (CCL) in order to complete an EAR search. The Commerce Control List (CCL) on the EAR website categorizes covered items into the following ten categories (which each have subdivisions):

0) Nuclear materials, Facilities and Equipment, and Miscellaneous
1) Materials, Chemicals, Microorganisms, and Toxins
2) Materials Processing
3) Electronics
4) Computers
5) Telecommunications and Information Security
6) Lasers and Sensors
7) Navigation and Avionics
8) Marine
9) Propulsion Systems, Space Vehicles, and Related Equipment

Most of the items requested from UTMB fall under category 1 on the CCL—Materials, Chemicals, Microorganisms, and Toxins. This category includes various forms of DNA, common cell-lines and viruses.

If the items requested are located on the CCL, then these items will be assigned an Export Control Commerce Number (ECCN). At this point, the items are considered to be “controlled items”. If an ECCN has been assigned to the items, we next look to the reasons for control of that particular item. There are several reasons for control. Such as examples are the following:

- AT = Anti-Terrorism,
- MT = Missile Technology
- CB = Chemical/Biological weapons
- CC = Crime Control
- RS = Regional stability
- SS = short supply
- UN = United Nations Embargo
- NS = National Security
- EI = Encryption Items
- XP = Computers
- SI = Significant Items
If the item is controlled, then we must check what General Prohibitions of the EAR apply to this transaction. If the item is not assigned an ECCN, we will next decide if it falls into the category of EAR99.

**Checking the 10 General Prohibitions List**

The purpose of the General Prohibitions list located in Part 736 of the EAR, is to prohibit certain exports, re-exports, and other conduct without a license, license exception or determination when no license is required. We must read and apply the general prohibitions 1-10 to this transaction. The answers to the inquiries will determine if a license is needed. The General Prohibitions are as follows:

When shipping materials, you are **not** to:

1. Export and re-export of controlled items to listed countries,
2. Re-export and export from abroad of foreign-made items incorporating more than a de minimis amount of controlled U.S. content
3. Re-export and export from abroad of the foreign produced direct product of U.S. technology and software
4. Engaging in actions prohibited by a denial order (check denied persons list)
5. Export or re-export to prohibited end-users or end-users (e.g. chemical and biological warfare)
6. Export or re-export to embargoed or special destinations
7. Support of proliferation activities
8. In transit shipments and items to be unladen from vessels or aircraft
9. Violation of any order, terms, and conditions
10. Proceeding with transactions with knowledge that a violation has occurred or is about to occur

General Prohibitions 1-10 apply to items having a specific ECCN.

General Prohibitions 4-10 apply to items that are EAR99 (not found on CCL).

Generally, conducting an OFAC search will answer 4-10 as will be discussed below.

Even though the items requested are controlled, we may still be able to ship the items without a license depending on where we are shipping it to. This is where we must check the
Checking the Commerce Country Chart

The Commerce Country Chart is located on the EAR database under Part 738. The reasons for control of controlled items and the Commerce Country Chart are taken together to determine whether a license is needed.

With every country there is a direct relation between the Recipient country and the reasons for control. If there is an X in the box in the country that you wish to send the items that aligns with the reasons for control of that particular material, then a license application must be submitted based on the particular reason for control and destination unless a License Exception, located in Part 740, applies. If there is no X in the designate column for your transaction, then a license is not required based on the particular Reason for Control and destination (provided that certain General Prohibitions do not apply to your proposed transactions.)

Conducting an OFAC and BIS Lists To Check Search

In addition to conducting a search on the items, we must also conduct search on the individuals requesting the items. The OFAC and Bureau of Industry and Security (BIS) websites provide us with a list of individuals and agencies of whom are denied from receiving controlled items from the United States. This site has five lists we check, including:

- Denied Persons Lists,
- Entity Lists,
- Debarred Lists,
- Unverified Names and Countries and
- Specially Designated Names-(OFAC site).

We use this website for shipments abroad. When we have a domestic shipment, we only need to inquire as to whether the requestor has U.S. citizenship or a foreign national. If the requestor is a foreign national, we must inquire as to requestor's nationality and country residence.

Conducting an ITAR/Embargoed Country Search

ITAR is similar yet more restrictive in nature than EAR. ITAR focuses primarily on restricting the export of defense materials such as missiles and weapons used in warfare. We look at the chemical or biological materials and search in the ITAR handbook as to the controls on the items. If no controls, then a license will not be required. If it is controlled, a license will be required.

Moreover, if a foreign national is a resident of an embargoed country, then we can not ship the items to the requestor. ITAR regulations at 22 C.F.R. § 126.1 specifies countries to
which exports and sales are prohibited. Currently, it is the policy of the United States to deny licenses, other approvals, exports and imports of defense articles and defense services certain countries. This policy applies to Belarus, Cuba, Iran, Libya, North Korea, Syria and Vietnam. This policy also applies to countries with respect to which the United States maintains an arms embargo (e.g., Burma, China, Haiti, Liberia, Somalia, and Sudan) or whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States. Please use the ITAR Embargo Reference Chart for specific reference to Defense Trade Controls. See commerce chart on EAR website for designated countries.

**Requesting a License for Shipment**

Conduct the Export Control Officer to assist you in processing the license from the pertinent agency.

**No Controlled Item: Conduct EAR 99 Search**

If your item is not on the CCL, then your item is classified as an EAR99. This additional “catch-all” category in the regulations, the “EAR 99,” covers any good or technology that is “subject to the EAR” as defined in 15 CFR §734.3(a) but is not on the CCL.

Items in the EAR 99 category may or may not require a license, depending on the country involved and individual(s) to whom the export will be made. Therefore we must go through the General Prohibitions and inquiry as to if any of the Prohibitions apply. If so, then we will still need a license in order to export the material. However, if the check produces that we can ship to this country and it is a good end user, the item would be classified as an EAR99 and can be shipped as “No License Required (NLR).” On the shipping label, you, the shipper, would mark “NLR” in the ECCN field on the shipping label.

This would conclude our export control check.
Faculty Member's Responsibility

If you are desiring to send materials or exchange information to another entity, then you will have certain amount of responsibility to conduct an inquiry about the requestor and the materials requested. By answering most of these questions, you will understand the steps of conducting an EAR search. When communicating with individuals who wish to trade information or materials, ask these questions:

1. **What is it?** - what is the complete name of material requested, without abbreviations.
2. **Where is going?** - what is the country of ultimate destination for the material requested?
3. **Who will receive it?** - The ultimate end-user of your item cannot be a bad end-user.
4. **What will they do with it?** - The ultimate end-use of your item cannot be a bad end-use. An in-depth scope of research will generally answer this question.
5. **What else do they do?** Conduct such as contracting, financing, and freight forwarding in support of a proliferation project may prevent you from dealing with someone.

All persons requesting for materials or technology to be export at UTMB shall have the responsibility to at least inquire into these questions since they are the first to deal with requestors then complete form and turn in with request to the Office of Technology Transfer. Upon receipt, we will begin processing the MTA and conducting our export control analysis.

Once an export analysis has been cleared, and there is no license required for shipment, you would mark “NLR”- (means no license required) in the ECCN field of the shipping label.

**DO's and DON'Ts**

**Activities to Avoid:**

If you have been asked to export material or technology:

**Don’t:**

1. Discuss non-public domain technology with foreign companies and foreign nationals without having an export review done.
2. Take controlled technology overseas without having an export review done.
3. Send materials (chemical or biological) overseas or in the country without having an export review done.
Do:

1. When receiving a request, ask the requestor the following questions. Know who you are sending materials to.
2. Inquire about the use
3. Inquire about the possible access of the materials
4. Go to OTT website, complete our form, submit
5. If a license is required to ship, keep a copy in your files for 5 years, pursuant to the Record Retention Act.

Are Research Results Protected From Export Analysis?
Exclusion/Exemption status from Export Laws

There are several common exclusions and an exemption that may remove University research results from the application of export control restrictions. The safe harbor of the Fundamental Research exclusion will protect most of all the results of research.

Fundamental Research Exclusion

Fundamental research (basic or applied research in science and/or engineering at an accredited institution of higher learning in the US that results in information that is ordinarily published and shared broadly within the scientific community) is excluded from export control regulations. This means that where University research meets this definition, information (but not materials or technology) resulting from that research may be disclosed to foreign nationals and that disclosure is not subject to export control restrictions. The Fundamental research exemption applies to “deemed export” and applies to the institution itself.

University research results will not qualify for this exclusion if:

1. the University or researcher accepts any restrictions on the publication of the information resulting from the research, other than limited prepublication review by research sponsors to ensure that proprietary information is not inadvertently disclosed in publication or to ensure that publication will not compromise the patent rights of the sponsor; or
2. The research is federally funded and specific access and dissemination controls regarding the resulting information have been accepted by the University or researcher.

It is important to remember two things about the fundamental research exclusion: 1) it applies only to information and 2) it does not apply to a sponsor’s existing proprietary information when some or all of that information is required to be held confidential.

As a university, we cannot transfer our “safe harbor” of fundamental research to another entity. Therefore, even though in our MTAs we often refer that the research is for educational or internal research purposes only, it does not apply to the actual transfer of
materials. These materials will require the export analysis in order to ship.

Public Domain/Publicly Available Exclusion

Information that is *published and generally available to the public*, as well as publicly available technology and software, is outside the scope of the export control regulations. This exclusion does not apply to encrypted software, to information if there is reason to believe it may be used for weapons of mass destruction, or where the US government has imposed access or dissemination controls as a condition of funding.

Educational Instruction Exclusion

Export control regulations do not apply to information released in academic catalog-listed courses or in teaching labs associated with those courses. This means that a faculty member teaching a University course may discuss what might otherwise be export-controlled technology in the classroom or lab without an export control license even if foreign national students are enrolled in the course. This exclusion is based on the recognition in ITAR that “information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain” should not be subject to export control restrictions. 22 CFR §120.10.

Why Must I Comply With Export Control Laws?

Penalties for Non-compliance

It is the obligation of all University faculty, staff and students to comply with applicable laws, including U.S. export control laws. When you do not comply with the export control laws, you subject yourself to audits by the University. Worse than that, violation of these laws can potentially lead to severe criminal and/or civil sanctions for the individual who violates these laws.

Criminal and Civil Sanctions

The criminal penalty for unlawful export and disclosure of Export-Controlled Information under the ITAR entails fines of up to $1,000,000 and up to 10 years imprisonment. Civil penalties include fines of up to $500,000.

The corporate criminal penalty for unlawful export and disclosure of information controlled under the EAR is the greater of $50,000 to $1,000,000 or five times the value of the export and imprisonment of up to ten years. Individual criminal penalties for willful violations of export control laws range from fines up to $250,000 and 10 years imprisonment. Civil penalties range from fines of $12,000-$55,000.

The penalty for unlawful export and disclosure of information controlled under the OFAC is a fine of up to one million dollars ($1,000,000) and imprisonment of up to 10 years.
It is very important to keep in mind that individuals, such as faculty member, may be held personally liable for export control violations.

**Administrative Sanctions**

For each violation of Export Administration Regulations, any or all of the following may be imposed:

- Revocation of export licenses. General denial of export privileges.
- Imposition of fines of up to $10,000 per violation (for a violation of national security export controls, up to $100,000).

**Conclusion**

It is for these reasons that we require compliance with export laws. Cooperation from the faculty and staff will make all of our jobs easier and the U.S. safer. We encourage all faculty, researchers, and staff to become familiar with these laws for not just your protection but for the integrity of the University.

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**Where to turn for questions and help at University of Texas Medical Branch**

- Frances R. Streeter, J.D.-Legal Officer and Export Control Officer  Extension 20376.

The Export Control Officer will obtain all export licenses and commodity classifications from the pertinent government agencies. Licenses can take up to 3 months. It is important to contact the Export Control Officer as soon as you know that you wish to ship an item overseas.
GENERAL INFORMATION ON THIS SITE IS A COMPILATION OF INFORMATION FROM THE FOLLOWING SOURCES:

Resources for more information on Export Controls: links to websites.


3. CCL are available online at [http://www.access.gpo.gov/nara/cfr](http://www.access.gpo.gov/nara/cfr).

4. An alphabetical list of CCL items is available at ([http://www.access.gpo.gov/bis/ear/pdf/indexccl.pdf](http://www.access.gpo.gov/bis/ear/pdf/indexccl.pdf)).

5. The Export Administration Regulations (EAR), 15 CFR §§730-774 ([http://www.access.gpo.gov/bis/ear/ear_data.html](http://www.access.gpo.gov/bis/ear/ear_data.html)).


7. Society for International Affairs provides a forum for the exchange of information related to export and import licensing.


There also are a number of useful university websites. These include:

1. The University of Oklahoma ([http://research.ou.edu](http://research.ou.edu)).
2. MIT ([http://web.mit.edu/osp](http://web.mit.edu/osp)).
4. The University of Texas at Austin ([http://www.utexas.edu/research/osp/](http://www.utexas.edu/research/osp/)).
5. The University of Iowa: ([http://research.uiowa.edu/dsp/main/?get=export-controls-who](http://research.uiowa.edu/dsp/main/?get=export-controls-who)).
7. Michigan Tech University: ([http://www.admin.mtu.edu/research/sprot/policies/U_S_Export_Control_Laws-MTU_Research_Activities.htm](http://www.admin.mtu.edu/research/sprot/policies/U_S_Export_Control_Laws-MTU_Research_Activities.htm)).
8. Yale University: ([http://www.yale.edu/grants/policies_reg/exportcontrols.html](http://www.yale.edu/grants/policies_reg/exportcontrols.html)).