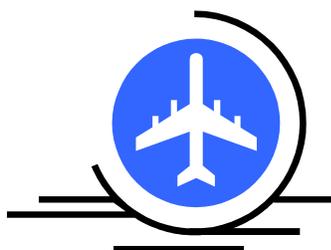




Guide to Export Control Regulations For Faculty & Staff



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About this Guide

This guide has been developed as a summary of the laws, regulations and issues to be considered with regards to exports and research at the University of California, Merced.

What are Export Controls?

U.S. export control laws and regulations are intended to serve various government objectives, such as to protect national security, advance U.S. foreign policy and economic goals, and to prevent the proliferation of weapons. Since September 11, 2001 export controls have been used as anti-terrorism tools. This has resulted in an increase in concern about enforcement and a greater focus on life sciences and biological materials.

Applicable Regulations

- **International Traffic in Arms Regulations (ITAR)** – regulates military or defense related articles, technologies and services.
http://www.pmdtc.org/itar_index.htm
- **Bureau of Industry and Security (BIS)/Export Administration Regulations (EAR)** - regulates commercial and “dual use” products and technologies.
<http://www.bis.doc.gov/licensing/exportingbasics.htm>
- **Office of Foreign Assets Control (OFAC)** – sanctions the transfer of assets (defined generally as “anything of value”). Applies to services, research and computers. Sanctions and embargoes are based on countries, entities, and individuals, not technology.
<http://www.treas.gov/offices/enforcement/ofac/regulations/>

FAILURE TO COMPLY WITH U.S. EXPORT CONTROL REGULATIONS CAN RESULT IN SEVERE PENALTIES, CRIMINAL AND CIVIL AS WELL AS INSTITUTIONAL AND INDIVIDUAL.

What is an Export?

Export - means to send or take controlled items out of the United States, to transfer ownership or control of a controlled item to a foreign person, or to disclose information about a regulated item to a foreign government or person. The item being sent or taken out of the U.S. is also referred to as an “export”. Although the export can take place with the item is carried out of the U.S. in luggage or is sent by mail/courier, an export can also occur when performing services for the benefit of a foreign person or entity, sending a wire transfer, email, fax, or in a conversation.

Deemed Export - the transfer, release, or disclosure of technical data about controlled commodities to foreign person inside the U. S.

Technical Data - is technical information that goes beyond general and basic marketing materials about a controlled item. The term does not refer to the controlled equipment or the item itself, or to the type of information contained in publicly available user manuals. It means specific information necessary for the development, production, or use of the item. This information usually takes the form of blueprints, drawings, photographs, plans diagrams, models, formulae, tables, engineering specifications, and documentation.

Under the above noted regulations, the export of certain items of equipment, software, and technologies that have military or defense applications (ITAR), or certain equipment, software, or technologies that may have dual commercial and military use (EAR) are considered “controlled articles” and may require a license.

Fundamental Research Exclusion

Export control regulations are designed to exclude publicly available, fundamental research results from regulation. The fundamental research exclusion is available to universities under ITAR and EAR for certain publicly available information resulting from fundamental research activities, with certain exemptions from control. All other transactions require a license. There are no exclusions for OFAC regulations and all contemplated transactions require a license.

The fundamental research exclusion under EAR and ITAR applies to information resulting from or arising during basic and applied research in science and engineering conducted at an accredited institution of higher education located in the U.S. **For this exclusion to apply, no restrictions on publication or access must be accepted. The information may not be subject to proprietary or U.S. government publication or access dissemination restrictions. This exclusion applies to information only, not items or materials.** Once created, the information may be transferred abroad without restriction. The fundamental research exclusion permits U.S. universities to allow foreign students, faculty and visitors to participate in research projects involving export-controlled technical information on campuses in the U. S. without a deemed export license.

However, under ITAR certain disclosures of unclassified technical data may be made to bona fide full time regular University employees only if: (1) The employee’s permanent abode throughout the period of employment is in the United States; (2) The employee is not a national of a country to which exports are prohibited; and (3) The institution informs the individual in writing that the technical data may not be transferred to other foreign persons without prior written approval.

Other Exclusions

Under EAR, publicly available information is excluded from control, and under ITAR, public domain information is excluded from control. These exclusions involve information that is already published through specified means and found in libraries open to the public, unrestricted subscriptions available for a cost not exceeding reproduction and distribution costs. They also apply to published patent information and to information available on websites accessible to the public for free. Information distributed at conferences held in the U.S. (ITAR) or anywhere (EAR) which are generally accessible to the public for a reasonable fee and where attendees may take notes, is also excluded from control. There is also an exclusion for educational information which covers general science, math and engineering commonly taught at schools and universities (ITAR) and information conveyed in courses listed in course catalogs and in their associated teaching labs of any academic institution (EAR). There is also a license exemption for unclassified technical data provided to bona fide fulltime regular employees of U.S. institutions of higher learning with permanent abodes in the U.S. throughout the their employment. Please note that students are not considered employees.

If Universities accept restrictions on publication and/or access to, or dissemination of research results, the fundamental research/publicly available/public domain exclusions do not apply. Close attention must be paid to contract language that may take investigators out of these exclusions. Investigators must refrain from making side agreements with sponsors, as these will destroy exclusions. A short (30-90 days) pre publication review period for patent protection or to permit a sponsor to remove inadvertently included sponsor-proprietary information does not destroy the exclusions.

For more information on exclusions see:

<http://www.access.gpo.gov/bis/ear/pdf/734.pdf>

http://www.access.gpo.gov/nara/cfr/waisidx_06/15cfr734_06.html

The University strives to maintain an open research environment where the right to publish and disseminate results of research are key. This is critical since information resulting basic and applied research conducted in an open environment with no publication restrictions is excluded from Export Control Regulations under the Fundamental Research Exclusion. Staying within the boundaries of this exclusion allows the University to avoid issues associated with “deemed exports” of technical data.

However, equipment, software, or other technologies acquired or developed under any research may still fall under Export Control Regulations if any of these items are to be exported from the U.S. to another country and may require a license prior to export.

The University will also need to acquire licenses to conduct research or transfer assets to any countries, organizations or individuals on the OFAC list.

The University of California does not normally accept Export Controlled information from outside organizations under a duty not to disclose it. Exceptions may be made on a case-by-case basis. Please contact your Contracts and Grants Officer for further information. Faculty, staff and researchers are reminded not to enter into any personal or private agreements to accept Export Controlled information outside of the agreements negotiated by the Regents of the University of California.

Foreign Collaborations

Information created under the Fundamental Research Exclusion may be freely transferred outside the U.S. provided that the entity or individual to which the information is being transferred is not sanctioned and on the OFAC list. Licenses are required for all transactions under OFAC. Collaboration with foreign universities is allowed. However, if any materials are to be shipped abroad, or if the research involves proprietary information, the exchange of researchers or faculty, or work in or transfer of funds to sanctioned nations, licenses may be required.

Material Transfers

Shipments of tangible items out of the U.S. may require a license. Even an item resulting from fundamental research may require a license if it is to be shipped outside of the U.S. Shipments of controlled items under ITAR out of the U.S. will always require a license.

In all cases, if the shipment is to a sanctioned nation, entity, or individual, an OFAC license is required. Please allow up to a minimum of 45 days to obtain any required licenses.

Shipping items controlled under EAR may also require a license. It is critical to secure license approval or verify a license exception before shipping any controlled items. Contact the Office of Research for guidance on verifying license exceptions and submission of license applications.

For more information please see:

<http://www.cdc.gov/od/sap/docs/salist.pdf>

<http://ehs.ucmerced.edu/>

For further assistance with shipping decisions please see:

<http://www.ucop.edu/research/policies/shipping.htm>

For material transfer agreements please see:

<http://research.ucmerced.edu/>

Select Agents

On June 12th, 2002, President Bush signed the “Public Health Security and Bioterrorism Preparedness and Responsibility Act of 2002”. The purpose of this law is to prevent, prepare and respond to bioterrorism and other public health emergencies. The law requires that all persons possessing select biological agents and toxins deemed a threat to public health, animal or plant health register with the appropriate federal agency. Although this program is distinct from the export control program, it is important for campuses to be aware of the regulations when conducting research or transferring materials. The select agent list contains organisms, viruses, and toxins that could be used as biological weapons. The agents themselves, nucleic acid or genetic elements from any of the agents, and agent vaccines approved by USDA or FDA are restricted. There are criminal and civil penalties for failure to disclose possession or transfer of agents without registration. Please consult the select agent list which contains organisms, viruses, and toxins that could be used as a biological weapon at <http://www.cdc.gov/od/sap/docs/salist.pdf>

Inventions

If you make an invention, please contact the Office of Research and file an invention report. The Technology Transfer Office will help determine if the invention described is of the type which may be subject to export control regulations. If the technology is export controlled, it should be published or patented as soon as possible to stay within the Fundamental Research Exclusion. This means that publication must take place in a timely manner as dictated by the standards of each individual discipline. Secrecy agreements with potential licensees must also be carefully structured to preserve the Fundamental Research Exclusion.

Travel Abroad for Research

Travel to conduct research or educational activities to embargoed/sanctioned countries is not allowed without a license from the Department of Treasury (OFAC). Please contact the Office of Research before traveling.

You may bring the usual and reasonable kinds and quantities of tools of the trade that will be used by you and your employees in a lawful enterprise. These are known as “tools of the trade”. These items must remain under your effective control at all times. Encrypted commodities and software may be pre-loaded on laptops, handheld devices or other computer equipment. Tools of the trade may accompany an individual departing the U.S. or may be shipped unaccompanied within one month before departure date, or at any time after departure. These items, if not consumed or destroyed, must be returned to the U.S. as soon as practicable, but in no event later than one year after the date of export. No tools of trade can be taken into Cuba or Sudan. Please see 15 CFR Part 740 section 9 for the “Tools of the Trade” license exception.

List of currently embargoed countries:

<http://www.ustreas.gov/offices/enforcement/ofac/sdn/index.shtml>

Monetary Transfers

OFAC monitors the transmission of cash through wire transfers made from U.S. banks. Payments to sanctioned nations or individuals of these nations is prohibited without a license. Bringing cash into sanctioned nations and paying individuals there for services is also prohibited. For information on restricted nations, entities and individuals, as well as procedures for obtaining licenses to transact business with embargoed nations, please see

<http://www.ustreas.gov/offices/enforcement/ofac/index.shtml>

General Guidelines

Do not ship any item outside the U.S. without first determining if the item is controlled under ITAR or EAR. This applies to outgoing materials under MTA's, software, and other deliverables.

Publish early and often to ensure all technical data about export controlled commodities qualifies as "publicly available".

Do not accept publication restrictions or access/dissemination restrictions.

Do not enter into secrecy agreements or otherwise agree to withhold results in research projects conducted at the University of California, Merced or that involve University facilities, students, or staff.

Do not accept proprietary information from another that is marked "export controlled". Return to the manufacturer any materials they provide to you about export controlled equipment that is marked "confidential". Review any confidentiality/non-disclosure agreements to insure that the University of California and you are not assuming burden of restricting dissemination based on citizenship status or securing licenses.

Do not provide citizenship, nationality, or visa status information for project staff to parties outside the University or include such information in proposals. It is a violation of INS regulations, the Federal Privacy Act, and the California Information Practices to provide such information. It is contrary to University of California policy to discriminate based on citizenship or nationality or to select research project staff on any basis other than merit.

Do not agree to background checks or other arrangements where the external sponsor screens, clears, or otherwise approves project staff. University of California policy allows for background screening when conducted by the University and when appropriate to the position.

Do not attend meetings where foreign nationals are prohibited from attending. Do not sign DD2345, Militarily Critical Technical Data Agreement, as a condition of attending a conference or receiving materials from the government.

Potential Penalties

ITAR: (Individual and Entity)

Criminal Fines of up to \$1 million and up to 10 years in prison. Civil Fines of up to \$500,000.

EAR:

(Entities –criminal)

The greater of fines of up to \$1 million or 5X the value of the export.

(Individual – criminal)

Fines of up to \$250,000 and/or up to 10 years in prison.

(Civil)

Fines \$10,000-\$100,000.

OFAC:

(Individual and Entity)

Criminal Fines of up to \$1 million and up to 10 years in prison. Civil Fines of \$12,000-\$55,000. Violators may also face loss of reputation and export privileges

Please contact of the Office of Research, Office of Responsible Research Practices for any questions regarding Export Control policies and regulations.

Contact

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