

Export Control Policy

Export controls are the United States laws and regulations that regulate and restrict the release of critical technologies, technical data, software code, equipment, chemical and biological materials, and other materials, and information and services to foreign nationals and foreign countries for reasons of foreign policy and national security.

These laws apply to virtually all fields of science and engineering and restrict the shipment, transmission or transfer of certain items, software, technology and services from the U.S. to foreign countries. Deemed exports, i.e. the release of controlled information to foreign nationals located in the U.S., also apply under the regulations. Export control laws apply to **all** activities – not just sponsored research projects.

An export is considered to be:

- a shipment of a controlled item or good,
- transmission (electronic or digital) of a controlled item or information related to a controlled item,
- transfer, release or disclosure (including verbal or visual) of any controlled item, technology, software or technical data, or service either in U.S. or abroad,
- use or application of controlled technology on behalf of, or for the benefit of, any foreign person or entity, either in U.S. or abroad.

There are several factors to consider in determining how export regulations may apply:

- 1) Is the activity considered fundamental research? (Will research results be published and publicly available?)
- 2) Is the activity limited to teaching activities?
- 3) Is there any physical or deemed export of a product, technology, or data?
- 4) Are foreign nationals involved in the activity?
- 5) Does an Export Control Classification Number (ECCN) apply?
- 6) Where is it going (country)?
- 7) Who is the end-user (person and entity)?
- 8) Are you screening for persons or entities identified on any lists of persons barred or restricted from conducting transactions with U.S. persons?
- 9) Is a license required? If so, is enough time allowed to secure one?
- 10) Will the activity involve an embargoed country?

These guidelines are intended to outline processes for members of the UMASS AMHERST community to follow to ensure that UMASS AMHERST is in compliance with all export control laws. All new employees shall receive and acknowledge receipt of the UMASS AMHERST Export Control Guidelines at the time of new employee orientation from the UMASS AMHERST Human Resources Department.

Institutional Policy

It is the policy of the University of Massachusetts Amherst (UMASS AMHERST) to comply fully with the U.S. export control laws and regulations. The UMASS AMHERST Office of the Vice Chancellor for Research and Engagement is charged with oversight of export control matters and any export control questions or issues should be brought to their attention.

It is also the mission and policy of the University of Massachusetts Amherst (UMASS AMHERST) to conduct instruction, research, and services openly and without prohibitions on the publication and dissemination of the results of academic and research activities. As a result, in many instances the requirements of the export control laws can be appropriately satisfied through reliance on available exclusions from export controls, such as exclusions for educational information, and exclusions for information that is publicly available or in the public domain.

Chief among these is the fundamental research exclusion (FRE) under the EAR and ITAR. Fundamental research means basic or applied research in science and engineering, the results of which are ordinarily published and shared broadly within the scientific community. Restrictions on publication of research results (other than prepublication reviews by research sponsors to prevent inadvertent disclosure of proprietary information provided to the researcher by the sponsor or to insure that publication will not compromise patent rights of the sponsor) and personnel access restrictions (such as to foreign nationals) invalidates the fundamental research exclusion. However, the FRE does not include an exclusion for the export, including deemed export, of goods that result from a research project.

For activities conducted by U.S. citizens or permanent residents that provide know how to or involve foreign nationals for a covered technology, export regulations apply and a license from one or more of the U.S. Government agencies may be required before any such activities are initiated. Appropriate time must be allowed to obtain such licenses. For the most current information on export control regulations, go to www.bis.doc.gov.

It is the responsibility of UMASS AMHERST faculty, administrators, and staff to be aware of and comply with these laws and with UMASS AMHERST's written instructions and procedures. Under no circumstances shall employees or other persons acting on behalf of UMASS AMHERST engage in activities that violate U.S. export control laws. UMASS AMHERST demands strict compliance with OFAC regulations governing transactions with embargoed countries and activities of concern.

The export control laws and regulations include those administered by the Department of Commerce through its Export Administration Regulations (EAR) and the Department of State through the International Traffic in Arms Regulations (ITAR) as well as those imposed by the Treasury Department through the Office of Foreign Assets Control (OFAC). Willful and knowing violation of these directives is a criminal offense.

FEDERAL LAWS, REGULATIONS, AND PENALTIES

Three U.S. Government agencies have primary export licensing responsibilities: the Departments of Commerce, Energy, State, and the Treasury. The primary U.S. regulations controlling export activities are the International Traffic in Arms Regulations (ITAR) administered by the Department of State; the Export Administration Regulations (EAR) administered by the Department of Commerce; and the foreign asset control regulations administered by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury. The Commerce Department administers the Commerce Control List and the State Department administers the U.S. Munitions List.

The U.S. Government controls exports on a case-by-case basis, examining four factors: the destination, end-user, product, and its end-use.

Mechanism	Governing Department	Covers
EAR	Commerce	Dual-use goods, technology, chemicals and software
ITAR	State	Military items; space-related technology and research
OFAC	Treasury	Trade prohibitions with sanctioned countries/entities

EAR and ITAR apply to the transfer of specific physical items and information and the provision of specific services to persons and entities *outside* the U.S. (exports) and to the disclosure of specific information and the provision of specific types of services to foreign nationals *inside* the U.S. (deemed exports).

OFAC regulations restrict transactions with embargoed countries and activities such as terrorism, drug trafficking and proliferation of weapons of mass destruction. Even when exclusions to EAR or ITAR apply, OFAC may prohibit payment, travel and the transfer of items, assets, and services of value to sanctioned nations (check the OFAC website www.treas.gov/ofac for the latest information about embargoed countries).

The majority of exports do not require government licenses. Only exports that the U.S. Government considers “license controlled” under the EAR and ITAR require licenses. Export controlled transfers usually are required for one of the following reasons:

- The nature of the export has actual or potential military applications or economic protection issues
- Government concerns about the destination country, organization, or individual
- Government concerns about the declared or suspected end use or the end user of the export

Even if an item appears on a list for controlled technology, there is generally an exclusion for “fundamental research”. For research to be considered “fundamental research” there cannot be restrictions on publication of the research or restrictions on personnel.

The University will assist any member of the University community in complying with export control laws, including pursuing licenses from U.S. Government agencies, where appropriate. However, the primary responsibility rests with the faculty/staff member and/or researcher, as the individual most informed about the contemplated project.

A helpful tool for analyzing exclusions under the EAR for publicly available information is the Questions and Answers – Technology and Software Subject to the EAR which is found in Supplement 1 to part 774 of the EAR.

Penalties

There are potentially severe civil and criminal penalties, including fines and imprisonment, for violating the export control laws and both the organization and the individuals involved are subject to these penalties. The University and the individual(s) involved may also lose their ability to export in the future. The criminal and civil penalties for unlawful export and disclosure of information in violation of U.S. export control laws include the following, depending on the items involved and the jurisdiction that applies:

EAR: Criminal violations by the university can incur penalties up to \$1 million for each willful violation. For individuals, these penalties can reach up to \$1 million or 20 years imprisonment, or both, per violation. Civil penalties for both the university and individuals can reach up to \$250,000 per violation, or five times the value of the export, whichever is greater. These violations can also result in a denial of export privileges as well as other potential collateral penalties.

ITAR: Criminal penalties can reach up to \$1 million per violation and 10 years imprisonment for individual willful violations. Civil penalties imposed upon departments, agencies, and officials can reach up to \$500,000 per violation. A university found to be in violation of ITAR regulations can be debarred from contracting with the government and could lose its export privilege.

OFAC: Penalties will range depending upon the sanction regime in question. Criminal violations by the university can reach up to \$1 million, and criminal penalties for individuals can reach \$1 million or 20 years in prison, or both. Civil penalties can be imposed up to \$250,000 per violation, or two times the transaction in question, or both.

TERMS AND DEFINITIONS

Code of Federal Regulations (CFR) - Codification of the general and permanent rules and regulations published in the Federal Register by the executive departments and agencies of the Federal Government.

Commerce Control List (CCL) - List of items under the export control jurisdiction of the Bureau of Industry and Security, U.S. Department of Commerce. The CCL is found in Supplement 1 to part 774 of the EAR.

CCL Category - The CCL is divided into ten categories: (0) Nuclear Materials, Facilities and Equipment, and Miscellaneous; (1) Materials, Chemicals, "Microorganisms," and Toxins; (2) Materials Processing; (3) Electronics Design, Development and Production; (4) Computers; (5) Telecommunications; (6) Sensors; (7) Navigation and Avionics; (8) Marine; (9) Propulsion Systems, Space Vehicles, and Related Equipment.

CCL Group - The CCL is divided into 10 categories. Each category is subdivided into five groups, designated by the letters A through E: (A) Equipment, assemblies, and components; (B) Test, inspection and production equipment; (C) Materials; (D) Software; and (E) Technology.

Controlled country - A country designated controlled for national security purposes found in Country Group D:1. The Entity List should be checked at <http://www.bis.doc.gov/complianceand enforcement/liststocheck.htm> (EAR Supp No. 4 to Part 744) for the latest information about restricted countries and license requirements. (EAR Part 740, Supp. No. 1 provides a list of the country groups.)

Deemed export – Whenever a foreign national on U.S. soil may be exposed to or is able to access in any manner an export-controlled item or information. It is “deemed” to be an export to the home country of the foreign entity or individual.

Defense Article - Any item designated in the U.S. Munitions List. Examples include specified chemical agents, cameras designated for military purposes, specified lasers, and some GPS equipment and any directly related technical data. (ITAR 120.6)

Defense Service - Providing of assistance (including training) anywhere (inside the United States or abroad) to foreign nationals in connection with the design, development, engineering, manufacture, production, etc. of a defense article, and the furnishing of any related technical data. (ITAR 120.9) The *Bona Fide* Employee Exemption does not apply to where the employee will be provided a Defense Service.

Debarred Parties List - List of individuals denied export privileges under ITAR and maintained by the State Department. Information can be accessed from <http://www.bis.doc.gov/complianceand enforcement/liststocheck.htm>.

Denied Persons List - A list of persons who have been issued a denial order from the Commerce Department’s Bureau of Export Administration (BXA). U.S. exporters and third parties in general are prohibited from dealing with these persons in transactions involving U.S. items. The list can be accessed from <http://www.bis.doc.gov/complianceand enforcement/liststocheck.htm>.

Dual-use - Items that have both commercial and military or proliferation applications. While this term is used informally to describe items that are subject to the EAR, purely commercial items are also subject to the EAR (see §734.2(a) of the EAR).

Empowered Official - U.S. person who:

- (1) Is directly employed by the applicant or a subsidiary in a position having authority for policy or management within the applicant organization; and
- (2) Is legally empowered in writing by the applicant to sign license applications or other requests for approval on behalf of the applicant; and
- (3) Understands the provisions and requirements of the various export control statutes and regulations, and the criminal liability, civil liability and administrative penalties for violating the Arms Export Control Act and the International Traffic in Arms Regulations; and
- (4) Has the independent authority to:
 - (i) Inquire into any aspect of a proposed export or temporary import by the applicant, and
 - (ii) Verify the legality of the transaction and the accuracy of the information to be submitted; and
 - (iii) Refuse to sign any license application or other request for approval without prejudice or other adverse recourse. (22 C.F.R. § 120.25)

End-use - A detailed description of how the ultimate consignee intends to use the commodities being exported.

End-user - Person abroad that receives and ultimately uses the exported or reexported items. The end-user is not a forwarding agent or intermediary, but may be the purchaser or ultimate consignee.

Entities List – Exports to foreign end-users engaged in proliferation activities are usually prohibited without a license. These are administered on a case-by-case basis. The list can be accessed at <http://www.bis.doc.gov/entities/default.htm>

Exemption - An authorization to export without a license.

Export - Includes any of the following: 1) actual shipment of any covered goods or items; 2) the electronic or digital transmission of any covered goods, items or related goods or items; 3) any release or disclosure, including verbal disclosures or visual inspections, or any technology, software or technical data to any foreign national; or 4) actual use or application of covered technology on behalf of or for the benefit of any foreign entity or person anywhere.

Export Administration Regulations - Regulations promulgated and implemented by the Department of Commerce that regulate the export of goods and related technology identified on the Commodity Control List (CCL), Title 15 CFR 774, Supplement 1.

Export control - Set of laws, policies, and regulations that govern the export of sensitive items for a country or company.

Export Control Classification Number (ECCN) - Identifies items on the Commerce Control List that are subject to the export licensing authority of the Bureau of Industry and Security.

Exporter - Person who has authority of a principal party in interest to determine and control the sending of items out of the country.

Export license - Approval documentation issued by an export agency authority authorizing the recipient to proceed with the export, reexport, or other regulated activity as specified on the application.

Foreign National - Any person who is not a citizen or Permanent Resident Alien of the United States. Under the EAR, the term applies to “persons lawfully admitted for permanent residence in the United States and does not apply to persons who are protected individuals (i.e. has been admitted as a refugee or granted asylum).

The ITAR does define the term “foreign person” as any natural person who is not a lawful permanent resident or who is not a “protected individual”, and may also include any corporation, business association, partnership society, trust or any other entity, organization or group that is incorporated to do business in the United States. This also includes any governmental entity.

Forwarding agent - Person in the country of origin who is authorized by a principle party in interest to perform the services required to facilitate the export of the items from the country of origin. This may include air couriers or carriers. In routed export transactions, the forwarding agent and the exporter may be the same for compliance purposes under the EAR.

Fundamental Research - Basic or applied research in science and engineering performed or conducted 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 (EAR and ITAR). Fundamental research is distinguished from research that results in information that is restricted for proprietary reasons or national security reasons (EAR) or pursuant to specific U.S. government access and dissemination controls (ITAR).

Note: Even if no publication restriction exists, the fundamental research exclusion does not apply to the export of goods.

Fundamental Research Exclusions - EAR provides that university research normally will be considered as fundamental research unless the university or its researchers accept sponsor restrictions on publication of scientific and technical information resulting from the project or activity. The EAR specifically permits limited prepublication reviews by research sponsors to prevent inadvertent divulging of proprietary information provided to the researcher by the sponsor or to insure that publication will not compromise patent rights of the sponsor. The citation for the official definition of fundamental research under the EAR is 15 CFR § 734.8.

The ITAR states that university research will not be deemed to qualify as fundamental research if: (1) the university or its researchers accept any restrictions on publication of scientific and technical information resulting from the project or activity; or (2) the research is federally funded and specific access and dissemination controls protecting information resulting from the research

have been accepted by the university or the researcher. The ITAR citation is 22 CFR § 120.11(8).

Good - Any article, natural or man-made substance, material, supply, or manufactured product, including inspection and test equipment, and excluding technology.

International Trafficking in Arms Regulations (ITAR) - ITAR, 22 CFR Sections 120-130, are the regulations promulgated and implemented by the Department of State Which regulate defense articles and services and related technical data listed on the U.S. Munitions Control List (USML), 22 CFR § 121.1. The USML is available on the Department of State at:

<http://www.fas.org/spp/starwars/offdocs/itar/p121.htm>

Lists to Check – all transactions with potential export restrictions should be checked against the published lists before proceeding. All of the lists can be accessed from

<http://www.bis.doc.gov/complianceand enforcement/liststocheck.htm>

Principal Investigator (PI) - The researcher with primary responsibility for achieving the technical success of the project, while also complying with the financial and administrative policies and regulations associated with a sponsored activity.

Public Domain - Information that is published and that is generally accessible or available to the public through: (a) sales at newsstands and bookstores; (b) subscriptions that are available without restriction to any individual who desires to obtain or purchase the published information; (c) second class mailing privileges granted by the U.S. government; (d) libraries open to the public or from which the public can obtain documents; (e) patents available at any patent office; (f) unlimited distribution at a conference, meeting, seminar, trade show, or exhibition, generally accessible to the public, in the United States; (g) 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 (h) 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; 22 CFR § 120.11)

Purchaser - Person abroad who has entered into a transaction to purchase an item for delivery to the ultimate consignee. In most cases, the purchaser is not a bank, forwarding agent, or intermediary. The purchaser and ultimate consignee may be the same entity.

Reexport - An actual shipment or transmission of items subject to export regulations from one foreign country to another foreign country. For the purposes of the U.S. EAR, the export or reexport of items subject to the EAR that will transit through a country or countries to a new country, or are intended for reexport to the new country, are deemed to be exports to the new country.

Sanctioned country – Even when exclusions to EAR or ITAR apply, U.S. Treasury Department, Office of Foreign Assets Control may prohibit payment, travel and the transfer of items, assets, and services of value to sanctioned nations (check the OFAC website www.treas.gov/ofac for the latest information about embargoed countries).

Specially Designated National (SDN) - Any person who is determined by the U.S. Secretary of the Treasury to be a specially designated national for any reason under regulations issued by the Office of Foreign Assets Control.

Technical assistance - Technical assistance may take forms such as instruction, skills training, working knowledge, consulting services, and may also involve the transfer of technical data.

Technical data - Information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of controlled articles. This includes information in the form of blueprints, drawings, plans, instructions, diagrams, photographs, etc. May take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, or read-only memories. The ITAR definition does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain (ITAR 120.10(5)).

Technology - Any specific information and know-how (whether in tangible form, such as models, prototypes, drawings, sketches, diagrams, blueprints, manuals, software, or in intangible form, such as training or technical services) that is required for the development, production, or use of a good, but not the good itself.

Ultimate consignee - The principal party in interest located abroad who receives the exported or reexported items. The ultimate consignee is not a forwarding agent or other intermediary, but may be the end-user.

U.S. person - Individual who is a citizen of the United States or a foreign national with a visa status of Legal Permanent Resident (LPR). An LPR is also known as a Permanent Resident Alien (PRA).

Use - Technology for operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing.