



# TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER EL PASO

## Operating Policy and Procedure

**HSCEP OP:** 73.16 **Export Controls**

**PURPOSE:** The purpose of this Texas Tech Health Sciences Center El Paso (TTUHSCEP) Operating Policy and Procedure (HSCEP OP) is to provide a framework for compliance with federal export control laws and regulations as these apply to TTUHSCEP activities.

**REVIEW:** This HSCEP OP will be reviewed on June 1 of each odd-numbered year (ONY) by the Director of Office of Research Resources (ORR), the Director of Safety Services, the Director of the Office of Sponsored Programs (OSP), the Executive Director for Human Resources, the Export Control Officer or designee, the Research Compliance Officer (RCO), and the Institutional Compliance Officer or designees.

### **POLICY/PROCEDURE:**

#### **1. Background and Introduction.**

It is critical to the mission of TTUHSC EP that all TTUHSC EP activities comply with federal export control laws and regulations. Currently there are 3 primary export control laws that impact TTUHSCEP:

- a. **The U.S. Department of Commerce Export Administration Regulations (EAR)** controls the export of technologies that have primarily civil applications, but may also have military applications ("dual use") as identified in the Commodity Control List (CCL), 15 CFR Part 774, which can be found at: <http://www.bis.doc.gov/policiesandregulations/ear/index.htm>.
- b. **The U.S. International Traffic in Arms Regulations (ITAR)**, implemented by the State Department, controls the export of inherently military technologies, which are listed in the United States Munitions List (USML), 22 CFR Part 121 located at: <http://www.fas.org/spp/starwars/offdocs/itar/p121.htm>.
- c. **The U.S. Treasury Department's Office of Foreign Asset Control (OFAC)** prohibits exports, financial transactions, provision of services, and other dealings with sanctioned, boycotted or embargoed countries (<http://www.ustreas.gov/offices/enforcement/ofac/programs/>) and individuals listed on the Specifically Designated Nationals (SDN) list: (<http://www.ustreas.gov/offices/enforcement/ofac/sdn>).

These export control laws prohibit the export (or re-export) of controlled technology and information to a foreign person or entity without an export license or agency approval, unless an exception applies. Export control laws impact not only TTUHSCEP's research activities, but also employment of foreign nationals, travel outside the borders of the United States, and shipment of materials subject to export control laws.

#### **2. Definitions.** For purposes of this policy, these terms have the following meanings:

**Controlled Technology and/or Information.** This includes goods, services and related technology identified on the CCL)and governed under EAR, 15 CFR Parts 730-774, and defense articles or services and related technical data listed in the United States Munitions List (USML) and governed under ITAR, 22 CFR §§120-130.

**Deemed Export.** A deemed export occurs when Controlled Technology or Information is disclosed (written, oral or visual inspection) to foreign persons **within** the United States. Examples of a deemed export include tours of laboratories that have Export Controlled Technology or Information,

or laboratories in which foreign nationals (i.e., students or visiting scientist) are working on an research project involving Export Controlled Technology or Information.

**Export.** An export is the transfer by any means of technology, information (written, visual or oral), equipment (including visual inspection), software or codes, or services to anyone, including a U.S. citizen, **outside** the United States. This includes actual shipment outside the U.S., visual inspection, or making the information or software available over the Internet.

**Foreign Person or Entity.** (i) Persons who are not U.S. citizens, "Lawful Permanent Residents" (Green Card), or "Protected Individuals" under the Immigration and Naturalization Act designated an aslyee, refugee, or a temporary resident under amnesty provisions; (ii) any foreign corporation, business association, partnership or any other entity or group incorporated under the laws of a foreign state if either its principal place of business is outside the U.S. or its equity securities are primarily traded on foreign exchange(s); or (iii) any foreign government.

**Principal Investigator.** The Principal Investigator is the individual(s) primarily responsible for the conduct of the research.

**Researcher.** A researcher includes the principal investigator and any other person working or participating in the research.

**Export Control Officer.** Designated person by the ORR Director in consultation with Vice President for Research (VPR) for purposes of compliance, education, and information regarding U.S. export controls regulations.

### 3. Research

- a. Export Law Prohibitions. The federal export control laws (EAR, ITAR and OFAC) prohibit the export (including deemed export) of controlled technology and information to a foreign national or entity within or outside the U.S. without an export license, unless an exception applies. Under ITAR, an export also includes the performance of a defense service on behalf of or for the benefit of a foreign person within or outside the United States.

The following research and research related activities **MAY BE** subject to export controls, unless an exception applies:

- Research that contains restrictions on publications or access by foreign nationals;
  - Research where controlled technology or information is provided to and used by researchers in a laboratory that would require a license for foreign nationals to participate;
  - Shipment of controlled technology or information outside the United States;
  - Technical assistance agreements where U.S. citizens or permanent residents are providing training to foreign nationals where a controlled technology or information is involved;
  - Taking laptop computers, GPS systems or their associated software to another country;
  - Travel to embargoed, sanctioned or boycotted countries, or shipment, transport or other provision of equipment, goods, services or anything of value to embargoed, sanctioned or embargoed countries or individuals therein.
- b. Export Law Exceptions. There are two (2) exceptions from the export license requirements that may be applicable to TTUHSCEP researchers. These exceptions only apply to deemed exports, not to shipments of controlled technology or information outside the U.S.

- 1) **Fundamental Research.** Fundamental Research is defined by the National Security Decision Directive (NSDD) 189 (September 21, 1985; <http://www.fas.org/irp/offdocs/nsdd/nsdd-189.htm>) as:

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.

This definition was adopted in the regulations at 15 CFR 734.8(a). Prepublication review by a sponsor to protect its proprietary information or patent rights does not invalidate fundamental research. Research that restricts information for proprietary reasons or pursuant to specific U.S. government access and/or dissemination controls is not fundamental research and therefore may be subject to export controls.

Research at TTUHSCEP will not qualify as fundamental research if:

- TTUHSCEP<sup>1</sup> accepts any restrictions on the publication of the information resulting from the research other than limited prepublication reviews to protect proprietary information or patent rights of the sponsor;
- Specific access and dissemination controls regarding the resulting information have been accepted by TTUHSCEP<sup>1</sup>;
- TTUHSCEP<sup>1</sup> accepts any restriction on the participation of foreign nationals in the research.

- 2) **Public Domain/Publicly Available.** Information in the public domain or that is publicly available includes information that is generally accessible to the public in any form, including periodicals, newspapers, books, subscription journals, print, electronic or other media available for general distribution to the public. It also includes information that is readily available at public libraries, patents and patent applications, or information used at open conferences, meetings or seminars as well as information obtained through fundamental research.

- c. **Open Research Policy.** TTUHSCEP supports free and open research activity. Unless otherwise approved in writing by the VPR or designee, TTUHSCEP will not accept or agree to conduct any research activity that contains restrictions on publication/dissemination of research results and/or participation of foreign nationals that would take TTUHSCEP research outside the fundamental research and/or public domain exceptions under EAR and/or ITAR.
- d. **Accepting Research with Export Controls.** The VPR or designee is TTUHSCEP's administrative "official" for all export control issues. His/her office provides support to address export control and license issues and he/she is the authorized official to sign export license applications on behalf of TTUHSCEP. The Export Control Officer or designee is the main contact for export control issues or questions.
- e. **Prohibition of "Side Deals".** TTUHSCEP employees are not authorized and shall not accept or enter into informal agreements ("side deals") with a sponsor (e.g., not to submit research articles for publication until approved by the sponsor) that could invalidate the fundamental research exception. Failure to comply may result in violation of export control laws and civil/criminal penalties for an individual TTUHSCEP employee. TTUHSCEP will not honor, recognize or be bound by any arrangements, contracts, terms or clauses that have not been

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<sup>1</sup> The TTUS Regents' Rules authorize TTUHSC administrators to execute agreements for use of TTUHSC resources. Individual employees, including faculty, are not authorized to sign agreements for this purpose.

signed in accordance with [HSC OP 54.01, Contracting Authority and Policy](#).

f. Review of Research Projects for Export Controls. All externally sponsored research projects shall be reviewed as set forth below before initiation of the research project to determine whether or not export control regulations apply.

- 1) **Initial Review**. OSP (with the assistance of the Export Control Officer) shall designate one or more individuals (“Designee”) who will be responsible for reviewing the terms of any contract, agreement or grant identified as possibly containing terms or conditions that restrict access to or publication of research and technical data, that limit the participation of foreign nationals in the research effort, or otherwise render the exceptions from export control regulations inapplicable.
- 2) **Review by VPR**. If the review in 3.f(1) above indicates that the research does not meet the fundamental research or public domain/publically available exceptions, the VPR or designee will meet with the Principal Investigator or his/her Designee(s) to determine if the research involves any of the technology or items designated by the Department of State (USML) or the Department of Commerce (CCL) as export controlled, or if the restrictions imposed by the Office of Foreign Assets Control apply. The results of that review shall be documented by the VPR or designee and Principal Investigator. If the review indicates that the research is not excluded from the export control laws, the Office of General Counsel (OGC) may be consulted for further action pursuant to open policy on 3.c below. If the review indicates that the research does not involve items on either the USML or CCL, then no further action is necessary and the research can continue through the normal TTUHSCEP approval process.
- 3) **Renegotiation of Contract Terms**. If the research project involves Export Controlled Technology and/or Information, the PI Designee(s), with assistance from the OGC, will contact the research sponsor to negotiate the removal or modification of the contract provisions that jeopardize exemptions under the export control laws as may be requested. If the negotiation is unsuccessful in removing those provisions, the matter will be referred to the VPR or designee to make one of the following determinations:
  - Accept the research and apply for the appropriate export control licenses before initiating the research. Principal Investigators conducting any research subject to export controls must develop a written Export Control Plan (Attachment A) that outlines the procedures for handling and safeguarding Export Controlled Technology and/or Information which shall be submitted to the OSP, as applicable (**no work under the research will begin and no fund will be set up until** any required export control license(s) have been issued) and an Export Control Plan have been approved
  - Decline to pursue the research due to the burdens or restrictions associated with compliance under the export control laws and regulations.

#### 4. **Travel and Shipment**

If a TTUHSCEP employee will be temporarily traveling (less than one year) outside of the United States, the employee may take for activities related to travel laptop computers, other portable computing devices, data storage devices and other equipment that people in that discipline would generally recognize as tools of trade as long as the employee maintains effective control of those items while outside of this country and the employee is not traveling to an embargoed country (Cuba, Iran, North Korea, Syria or Sudan). To maintain effective control over an item, the employee either retains physical possession of the item or secures the item in such an environment as a hotel safe, a bonded warehouse, or a locked or guarded meeting or conference facility.

- a. Embargoed/Sanctioned/Boycotted Countries and their Nationals. Unless an export license has been obtained, no items (including those otherwise subject to research exclusions) shall be shipped or taken by a TTUHSCEP employee to an embargoed/sanctioned/boycotted country, as listed by OFAC at: <http://www.ustreas.gov/offices/enforcement/ofac/programs/index.shtml> This includes research information (including research excluded under fundamental exception or public domain/publically available), and laptops, GPS and associated software containing encryption technology that is subject to export controls regardless of whether the temporary travel exemption may otherwise apply.
- b. Export of Controlled Technologies and/or Information. The export of controlled technology and/or information, including “deemed exports” are subject to export regulations if they are shipped or taken outside the U.S. Unless the export involves the temporary travel exemption for travel with laptops, a TTUHSCEP faculty or staff member shall contact the RCO, Eco, or Institutional Compliance Officer before shipping or traveling outside the U.S. with such items or information to confirm whether an export license is required and if so, that an export license is obtained before the export controlled technology or information leaves the U.S.

A TTUHSCEP employee should not take any of the following without first contacting the ECO or Institutional Compliance Officer:

- Data or information received under an obligation of confidentiality.
  - Data or analyses that result from a project for which there are contractual constraints on the dissemination of the research results.
  - Computer software received with restrictions on export to or on access by foreign nationals.
  - Devices or equipment received with restrictions on export to or on access by foreign nationals.
  - Private information about research subjects
  - Devices, systems or software that was specifically designed or modified for military or space applications.
  - Classified information
- c. Prior to travel, the employee must complete a “Request for certification to travel with TTUHSCEP issued laptop” form (Attachment B) and provide a copy to the ECO. The form must be kept in Departmental records.

## **5. Employment of Foreign Nationals (Sponsored or Non-Sponsored Programs).**

A “foreign national” is anyone who is not a U.S. citizen or lawful permanent resident (i.e., aliens possessing a valid Form I-551 or “green card”), or persons granted asylee or refugee status. At TTUHSCEP, anyone holding a temporary visa (B, E, F, H-1B, H-3, J-1, L-1, O-1, etc.) is treated as a foreign national for these purposes. Employee requiring the deemed export certification could include faculty, visiting scholars, observers, interns, researchers, staff, post-doctoral candidates, technicians, foreign students seeding advanced degrees from U.S. universities, and/or any foreign person conducting research at U.S. universities or their affiliates.

It is TTUHSCEP’s policy that all foreign nationals including employees, faculty, visiting scholars, observers, interns, researchers, staff, post-doctoral candidates, technicians, foreign students, and/or other persons retained at or for TTUHSCEP conduct their affairs in accordance with U.S.

Export Control laws and regulations.

The United States Citizenship and Immigration Services (USCIS) requires petitioning employers for H-1B, H-1B1 (Chile & Singapore), L-1 or O-1 visa applicants to attest on Form I-129, Petition for a Nonimmigrant Worker, that any technology or technical data released to a prospective H-1B, H-1B1, L-1 and O-1 applicant during the period of his/her employment will or will not require a license from the U.S. Department of Commerce or the U.S. Department of State. The responsible party who will be supervising a Foreign National within the TTUHSCEP Department shall provide documentation to the Office of International Employer Services (IES) for USCIS filings attesting to whether the employee during the period of his/her employment will or will not require an export license. Deemed export checklists for USCIS filings are available from IES. The sponsoring Department is responsible for ensuring and maintaining records documenting that foreign national employees and non-employees do or do not require an export license. These records shall be made available for review by TTUHSCEP Compliance personnel.

**6. Glossary of Terms:**

**BIS** Bureau of Industry and Security, U.S. Department of Commerce.

**CCL** Commodity Control List, U.S. Department of Commerce.

**EAR** Export Administration Regulations, U.S. Department of Commerce.

**ECCN** **Export Control Classification Number; an alpha-numeric classification used in the Commerce Control List to identify items for export control purposes.**

**ENC** "Encryption" License Exception, Encryption Request Coordinator, Bureau of Industry and Security, U.S. Department of Commerce.

**ITAR** Internal Traffic in Arms Regulations, U.S. Department of State.

**OFAC** Office of Foreign Asset Control, U.S. Treasury Department. **USML** United States Munitions List, U.S. Department of State.

7. **Contact local FBI office:** It is recommended to contact the El Paso local FBI office whenever questions arise or further guidance is needed.