OP 74.10: Export Control

DATE: April 25, 2012

PURPOSE: The purpose of this Operating Policy/Procedure (OP) is to establish policies for federal laws and regulations governing the export of information, products, and technology.

REVIEW: This OP will be reviewed in January of even-numbered years by the senior associate vice president for research with recommended changes forwarded to the vice president for research.

POLICY/PROCEDURE

1. Policy Statement

   Regulations promulgated and enforced by the Department of Commerce, Export Administration Regulations (EAR), and the Department of State, International Trafficking in Arms Regulations (ITAR) prohibit the unlicensed export of specific technologies for reasons of national security or protection of trade. If TTU research involves such specified technologies, the EAR and/or ITAR may require the university to obtain prior approval from the Departments of State or Commerce before allowing foreign nationals to participate in the research, partnering with a foreign company, and sharing research, verbally or in writing, with persons who are not United States citizens or permanent resident aliens.

   Current export law controls both hardware and information concerning a wide range of commercial items and specially designated “defense articles” in a way that may have a substantial impact on university research. Export control regulations have the potential to harm the quality of university research, undermine publication rights, and prohibit international collaboration if the dissemination of institutional research is not placed in the public domain and does not qualify for the fundamental research exclusion (see below). The consequences of violating these regulations can be quite severe, ranging from loss of research awards to monetary penalties to jail time.

   Therefore, it is the policy of Texas Tech University that principal investigators must conduct a thorough review of research projects and contract provisions and determine whether, and, if so, how, a particular project is affected by those regulations.

2. Federal Regulations Definitions

   Export control decisions depend on a correct understanding of the following terms. The official regulatory definition should be consulted in specific applications.

   a. The term export, as used in export control regulations, has an expansive meaning. Generally, an export includes: (1) any 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, of any technology, software,
or technical data to any foreign national, wherever located; or (4) actual use or application of covered technology on behalf of or for the benefit of any foreign entity or person anywhere. The official definition of export under the EAR and ITAR should be consulted when determining whether a specific act constitutes an export. As is evident in many instances, export is defined so as to preclude the participation of foreign graduate students in research that involves covered technology without first obtaining license from the appropriate government agency.

b. Deemed export—Transport of goods, items, or intellectual property is not prerequisite to export. Technology can be transferred to foreign persons in the United States. As a general proposition, a “deemed export” (one requiring a license and imposing access restrictions) exists whenever a foreign national from a country subject to export controls for a given item or technology, who is currently on U.S. soil, has access in any manner to an export-controlled item or information.

c. The Export Administration Regulations (EAR), Title 15, sections 730-774 of the Code of Federal Regulations (CFR) are promulgated and implemented by the Department of Commerce. The EAR regulate the export of goods and services identified on the Commodity Control List (CCL), Title 15 CFR 774, Supp. 1. The complete text of the EAR and CCL are available online at http://w3.access.gpo.gov/bis/index.html The complete text of ITAR and MCL are available at http://www.siaed.org/. The MCL in larger print is at http://www.access.gpo.gov/nara/cfr/waisidx_01/22cfr121_01.html  

d. The International Traffic in Arms Regulations (ITAR), 22 CFR §§ 120-130 are promulgated and implemented by the Department of State and regulate defense articles and services and related technical data that are identified on the Munitions Control List (MCL), 22 CFR § 121. Complete, on-line versions of ITAR and MCL are available online at http://www.siaed.org/ 

e. Commodity jurisdiction ruling—Where an article is arguably covered by both the EAR and ITAR, a request can be made to the State Department to determine which agency will have jurisdiction over the export of the article.

f. Fundamental research, as used in the export control regulations, includes 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, which results in information that is restricted for proprietary reasons or pursuant to specific U.S. Government access and dissemination controls. University research will not be deemed to qualify as fundamental research if: (1) the university accepts any restrictions on the publication of the information resulting from the research, other than limited prepublication reviews by research sponsors to prevent inadvertent divulging of proprietary information provided to the researcher by sponsor or to insure that publication will not compromise 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 the researcher. The citation for the official definition of fundamental research under the EAR is 15 CFR § 734.8. The ITAR citation is 22 CFR § 120.11.

g. Public domain, (22 CFR § 120.11), means information that is published and that is generally accessible or available to the public: (1) through sales at newsstands and bookstores; (2) through subscriptions that are available without restriction to any individual who desires to obtain or purchase the published information; (3) through second class mailing privileges granted by the U.S. Government; (4) at libraries open to the public or from which the public
can obtain documents; (5) through patents available at any patent office; (6) through unlimited distribution at a conference, meeting, seminar, trade show, or exhibition generally accessible to the public in the United States; (7) through 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 (8) through fundamental research.

3. Responsibilities and Procedures

Principal investigators shall have responsibility:

- Prior to commencing any research, to review and to determine whether their research is affected by the controls or requirements contained within the export regulations; and

- To re-evaluate that determination before changing the scope of or adding new staff to the project to determine if such changes alter the initial determination; and

- To make export determinations far enough in advance to obtain an authorization, should one be required.

The Office of Research Services (ORS) will assist PIs in assessing the application of such regulations, but primary compliance responsibility rests with the PI of the research.

ORS will review all award documents to determine whether there are references to U.S. export regulations or restrictions that would prevent the project from being classified as fundamental research under EAR and ITAR. For projects that include these references or restrictions, ORS will notify the PI, and the PI will determine whether the research falls within a category of technology covered by EAR or ITAR. For those projects that are covered by EAR or ITAR, the PI will sign a certification on the handling of export-controlled information. Forms to document export control review and to certify procedures for handling export-controlled information are available on the ORS website.