

BAYLOR UNIVERSITY EXPORT CONTROL

Interim Guidance

The following is interim guidance on export control compliance. It is intended to provide a helpful overview for faculty, staff, and students to understand the potential export issues that arise in a university setting. This document is not intended to be a comprehensive export compliance program, nor is it intended to provide process or implementation guidance.

Commitment to Compliance

Baylor University conducts focused research to advance knowledge, enhance student learning experiences, and build its reputation in the scientific and technical communities while providing positive returns on sponsoring partners' investments. While Baylor University endorses the principles of freedom of inquiry and open exchange of knowledge, it is the university's goal to comply with the export control regulations. The export control laws are intended to control the transfer of sensitive information, services or goods to individuals, entities or countries of concern and, under certain conditions, to foreign persons.

The controls are imposed for reasons of national security, foreign policy, prevention of the spread of weapons of mass destruction and for competitive trade reasons. Baylor University and all its employees are required to comply with the laws and implementing regulations issued by the Department of State, through its International Traffic in Arms Regulations ("ITAR"), the Department of Commerce, through its Export Administration Regulations ("EAR") and the Department of the Treasury through its Office of Foreign Asset Controls ("OFAC"). The subject matters regulated by ITAR and EAR are mutually exclusively so that either (i) neither applies or (ii) only ITAR or EAR applies. By definition both cannot apply to the same subject matter.

Brief Summary of ITAR, EAR and OFAC

In general terms, ITAR controls military use items and information, identified as Defense Articles or Defense Services (with Technical Data being one type of Defense Services). The categories are identified in the U.S. Munitions List (USML). An electronic version of the USML is available on the Department of State website at:

http://www.pmddtc.state.gov/regulations_laws/documents/official_itar/ITAR_Part_121.pdf.

EAR controls "dual use" items and information. Dual use means commercial use with potential military use. The categories are identified in the Commerce Control List (CCL). Items on the CCL typically require a license to export. Items that are not on the CCL can typically be exported without a license unless the item is being sent to a country subject to economic sanctions or embargo or to a prohibited person or for a prohibited end use under OFAC (discussed below). The CCL is available online at:

http://www.access.gpo.gov/bis/ear/ear_data.html.

OFAC imposes economic sanctions of differing degrees on certain countries which sanctions may limit transactions of any kind with the subject countries. The following countries

Iran, Cuba, Syria, North Korea, Sudan, and Iraq have current sanctions which prohibit almost all transactions with these countries, even if not regulated by ITAR or EAR. Fewer restrictions may be placed on other countries.¹

The Office of Sponsored Programs and the Office of General Counsel are available to assist in these compliance matters. Transactions, financial and otherwise, with foreign entities or nationals (even in the United States) and foreign countries require additional due diligence by Principal Investigators, departments, program directors and other managers to ensure compliance with federal restrictions or reporting requirements. This paper will focus on EAR and ITAR because of application to activities on campus without transfers or travel across the U.S. border into foreign countries.

Recurring Issues under EAR and ITAR

In Baylor's academic environment, there are recurring questions that affect whether the activity is regulated or not. The boundaries are typically very factually specific and may require additional review, including legal advice. Some of these boundaries expand the apparent scope of the regulations and some of these boundaries provide opportunities to avoid regulation. These frequently encountered boundaries are discussed below as either Not Regulated or Regulated.

Not Regulated:

- *Transfers to U.S. Persons:* Under EAR and ITAR, otherwise regulated transfers to "U.S. Persons" are typically not regulated, although there can be other restrictions, such as classified information, that further limit any transfer. A U.S. Person is defined as a U.S. entity or a U.S. citizen, a person lawfully admitted for permanent residence in the United States (*i.e.*, green card holder), or a person who is a protected individual under the Immigration and Naturalization Act. EAR considers the person's most recent citizenship or permanent residence. ITAR considers the person's country of origin (*i.e.*, country of birth) and all current citizenships.
- *Publicly Available Information:* ITAR and EAR do not control information that is published and generally accessible or available to the public. Even though the two regimes have similar scope regarding what is not regulated as public information, the ITAR and the EAR vary in the specific information that qualifies as publicly available.² The EAR requires that the publication is available for

¹ The Office of General Counsel website at <http://www.baylor.edu/content/services/document.php/187099.pdf> provides an overview of international transactions generally, including ITAR, EAR and OFAC, as well as other compliance matters for international transactions. Additionally, travel to any foreign country must be coordinated through the Center for International Educations.

² **ITAR provision:** The ITAR describes such information as information in the *public domain*. The information in the public domain may be obtained through: sales at newsstands and bookstores; subscription or purchase without restriction to any individual; second class mailing privileges granted by the U.S. Government; at libraries open to the public; patents available at any patent office; unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States; public release in any form after approval of the cognizant U.S. Government agency; or *fundamental research* in the U.S. **EAR provision:** The EAR does not control publicly available technology if it is already published or will be published. Information is published when it becomes generally accessible to the interested public in any form, including: publication in periodicals, books, print, *etc.*, available for general distribution free or at cost; readily available at libraries open to the public or

distribution free or at price not to exceed the cost of reproduction and distribution; however, the ITAR does not have such a requirement.

EAR does not specify where an open conference, meeting, seminar or trade show must take place, and thus allows, for example, participation at a foreign conference so long as the conference is open to all technically qualified members of the public, and attendees are permitted to take notes. Unlike the EAR, the ITAR limits participation in conferences and similar events to those that are taking place in the United States.

Under ITAR, Fundamental Research is defined as a type of information that may be publicly available. Fundamental Research is defined 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 exemption does not apply to Defense Articles or Defense Services (other than Technical Data).

In order to take advantage of the Fundamental Research exemption: such information must be produced as part of basic and applied research in science and engineering and must be broadly shared within the scientific community (*i.e.*, no restrictions on publication / dissemination of the research results). The exclusion could be jeopardized if ITAR controlled or third party export controlled information is released to a foreign person.

Additionally, ITAR requires that, to qualify as fundamental research, research must be performed at accredited institutions of higher learning in the United States. Under EAR, fundamental research may occur at facilities *other than* accredited institutions of higher learning in the United States.

EAR provides that prepublication review by a sponsor of university research solely to ensure that the publication would not inadvertently divulge proprietary information that the sponsor has initially furnished, or compromise patent rights, does not constitute restriction on publication for proprietary reasons. However, EAR also has provided examples of "specific national security controls" which will trigger export controls. These include requirements for prepublication review and approval by the Government, with right to withhold permission for publication; restriction on prepublication dissemination of information to non-U.S. citizens or other categories of persons; or restrictions on participation of non-U.S. citizens or other categories of persons in the research. While the ITAR does not contain such descriptive provisions, the EAR is instructive as to interpreting the limitations on fundamental research.

university libraries; patents and open patents applications available at any patent office; or released at an open conference, meeting, seminar, trade show, or other gathering open to the public.

- *Educational Information:* Under EAR and ITAR, educational information, as defined,³ is excluded from the regulations. Again, the definitions have significant limitations. Under ITAR, the exclusion relates to Technical Data, not Defense Articles or other Defense Services, and the information must be commonly taught in the listed subject areas. Under EAR, the transfer must be by instruction in a catalog course and related laboratories.
- *Technical Data Transfers to Bona Fide Full-Time Regular Employees:* ITAR allows a university to disclose unclassified Technical Data (not Defense Articles or Defense Services) in the U.S. to a foreign person who is the university's *bona fide* and full-time regular employee. The exemption is available only if: the employee's permanent abode throughout the period of employment is in the United States; the employee is not a national of a country to which exports are prohibited pursuant to ITAR § 126.1; the university informs the individual in writing that the technical data may not be transferred to other foreign persons without the prior written approval of DDTC; and the university documents the disclosure of technical data under the exemption providing: (1) a description of the technical data; (2) the name of the recipient / end-user; (3) the date and time of export; (4) the method of transmission (*e.g.*, e-mail, fax, FedEx); (5) the ITAR reference, *i.e.*, ITAR § 125.4(b)(10), *Full-Time University Employee*.

The "full-time *bona fide* employee" requirement will preclude foreign students and postdoctoral researchers from qualifying for access to technical data under this exemption. Generally, a H1B work visa would be required.

Regulated:

- *Deemed Exports:* While exports are commonly associated with the shipment of a tangible item across the U.S. border, export controls have a much broader application through the deemed export concept. One of the most difficult issues with respect to export controls is the fact that an export is defined to include the transfer of controlled *information or services* to foreign persons even when the transfer takes place within the territory of the United States. Though taking place inside the U.S., the transfer is "deemed" to be an export (as if exporting to the country of the foreign person).

Both the ITAR and the EAR provide for deemed exports, even though in the case of defense exports the regulations generally speak of exports. While the ITAR distinguishes between the transfer of *technical data* and *defense services*, the EAR

³ **ITAR provision:** The ITAR specifically provides that the definition of "technical data" does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities. **EAR provision:** The EAR provides that publicly available "educational information" is not subject to the EAR, if it is released by instruction in catalogue courses and associated teaching laboratories of academic institutions.

generally provides for the release of *technology*. Such transfer or releases may be made orally, visually, or other means.⁴

The issue of deemed exports is particularly relevant to university research because of the activities that normally take place at a university. While a university may be involved in the shipment abroad of equipment or machinery to participate in a conference, a joint project, or equipment loan programs, most often faculty and students are engaged in teaching and research. Whenever teaching or research is related to controlled equipment or technology, foreign students' or researchers' involvement may trigger export control compliance issues.

- *Regulated Inputs to Fundamental Research:* If inputs to research are regulated under EAR or ITAR, the Fundamental Research exemption would not apply because the research is on information that is already controlled.
- *Restricted Publication:* Under both the ITAR and the EAR (with slight variation)⁵, research performed at universities will not qualify as fundamental research if the university (or the primary investigator) has accepted or imposed publication or other dissemination restrictions.

⁴ An export may occur through the following, for example: a demonstration; oral briefing; telephone call or message; laboratory or plant visit; presenting at conferences and meetings; faxes or letters; hand-carried documents, hardware or drawings; design reviews; the exchange of electronic communication; posting non-public data on the Internet or the Intranet; carrying a laptop with controlled technical information or software to an overseas destination; or collaborating with other universities / research centers through research efforts. For example, Baylor has had to take steps to ensure proper handling and receipt of equipment that is controlled, and further to limit physical access to certain equipment by certain foreign nationals.

⁵**ITAR provision:** the fundamental research exception does not apply to research the results of which are restricted for proprietary reasons, or specific U.S. Government access and dissemination controls. **EAR provision:** the fundamental research is distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary reasons or specific national security reasons. Under the EAR, university-based research is not considered fundamental research if the university or its researchers accept restrictions (other than review to ensure no release of sponsor-provided proprietary or patent information) on publication of scientific and technical information resulting from the project.

