

Export Control Laws in the University Setting.

For more than twenty years, the federal government has regulated the export of certain technologies for reasons of national security or for the protection of trade. These restrictions are enforced by the Department of State through its International Traffic in Arms Regulations (ITAR) and by the Department of Commerce through its Export Administration Regulations (EAR). A common misconception concerning these regulations is that they do not apply to universities. In fact, universities **are not exempt** from these regulations, although in certain circumstances universities may fall within important exceptions to the regulations. The purpose of this article is to provide an introduction to the nature of the export control laws and to their applicability in the university setting, with particular emphasis on the exceptions that may be available as a safe harbor from the burdens of regulatory requirements.

Both ITAR and EAR apply to a broad range of technology in the fields of science and engineering, including many of the types of work conducted by faculty and research staff at UAH. Items that appear in those regulations may not be exported without a license issued by the cognizant agency. The licensing requirement arises because the exported item has actual or potential military applications or creates economic protection issues; the government has concerns about the destination country, organization, or individual; or the government has concerns about the declared or suspected use or user of the exported item. The exported item may take a tangible form, such as equipment or software, or it may include the results of research in the form of technical data.

In addition, the regulations define an “export” as including a broad range of activities. Obviously, the shipment of a listed item to a foreign country, either by regular mail or via the Internet, qualifies as an export. An export may also occur, however, through the release of technology to a foreign national in the United States. Such a release could take the form of a visual inspection by the foreign national or simply through verbal communications concerning a listed technology. Therefore, disclosure of research results to a foreign student in a UAH laboratory could be considered an export of those research results. The chilling effect on university research of requiring a license for any such disclosure is readily apparent.

Fortunately, at the time of the initial enactment of ITAR and EAR, the presidents of five major research universities recognized the potential problems arising from the application of these rules in the “decentralized and fluid nature of most campuses.” The presidents of Stanford, California Institute of Technology, Massachusetts Institute of Technology, Cornell, and the University of California authored a letter to the Secretaries of Commerce, State, and Defense arguing that “universities are neither structured nor staffed to police the flow of legitimate visitors to a given laboratory or the dissemination of information by their faculty at international conferences, or, indeed, even in a campus classroom where foreign students happen to be present.” Partially because of this lobbying effort, the official policy of the United States government, as reflected by President Reagan’s *National Policy on the Transfer of Scientific, Technical and Engineering Information*, recognized that sensitive information arising from fundamental research at colleges, universities, and laboratories should be protected by security classifications, not export control laws. This directive serves as the basis of what has come to be

known as the “fundamental research” exception to the export control regulations.

Fundamental research includes basic or applied research in science and engineering at an accredited institution of higher education in the United States where the resulting information is ordinarily published or shared broadly in the scientific community or where the information has been or is about to be published. University research is **not** considered fundamental research if (1) the university accepts any restrictions on publication of the research results, other than limited prepublication reviews by research sponsors to prevent inadvertent disclosure of the sponsor’s proprietary information or to insure that publication will not compromise patent rights of the sponsor; or (2) the research is federally funded and specific controls over the dissemination of the research results have been contractually accepted by the university.

Like most research universities, UAH generally insists that the results of funded research be freely available for publication. Faculty need to publish to receive consideration for promotion and tenure, and the mission of UAH as a public institution of higher education requires that research results be made available to promote the public interest. In addition, UAH typically does not accept restrictions in research contracts of grants on the dissemination of research results. Therefore, only in unusual cases would a UAH researcher need to be concerned about export control restrictions.

Nevertheless, it should be noted that the fundamental research exception applies only to technical data. The exception does not protect the export of equipment, such as prototypes, or certain types of software. Because of these limitations and to ensure that UAH does not inadvertently accept contractual restrictions that would abrogate the fundamental research exception, the Office of Research Administration and the Office of Counsel are in the process of implementing more formal procedures to review contract terms with these ends in mind.

The regulations also do not apply to publicly available technology and software. Such items are considered to be publicly available when they are generally accessible to the interested public in any form, including the following circumstances: (1) publication in periodicals, books, print, electronic, or any other media available for general distribution to any member of the public at no cost or at a price that does not exceed the cost of reproduction and distribution; (2) availability at public libraries; (3) publication in issued patents or patent applications available at any patent office; and (4) discussion or release at an open conference, meeting, trade show, or other open gathering. An “open” conference means one at which all technically qualified members of the public are eligible to attend and attendees are permitted to take notes or make a personal record of the proceedings and presentations. Finally, information released by instruction in catalog courses and associated teaching laboratories at institutions of higher education is also regarded as publicly available.

Although these exceptions apply to much of the research activity at a university, there still may be situations in which an export of certain technology requires a license. In such a case, a researcher can expect the licensing process to take no less than six months. Such a delay would usually result in a significant negative impact on research activity. Therefore, absent extraordinary circumstances, the better practice is to avoid situations in which an export license

must be obtained. The scope to the exceptions to the regulations noted above makes this a viable alternative in most cases.

Finally, it should be emphasized that the above summary of the export control regulations is only a “tip of the iceberg” look at a very complex and ever-changing area of the law. Both EAR and ITAR have their own peculiarities and compliance with one set of regulations does not necessarily ensure compliance with the other set of regulations. Therefore, before making a decision on the applicability of the regulations or any of the exceptions thereto, the Office of Counsel or the Office of Research Administration should be consulted.