

# DESERT RESEARCH INSTITUTE

## EXPORT CONTROL REGULATIONS

**Export control laws** are federal regulations that control the conditions under which certain information, technologies, and commodities can be transmitted overseas to anyone, including U.S. citizens, or to a foreign national in the U.S. These laws are implemented by both the Department of Commerce through its Export Administration Regulations (EAR) and the Department of State through its International Traffic in Arms Regulations (ITAR).

Export control laws have the potential to substantially impact Desert Research Institute researchers. If research involves specified technologies, the EAR and/or ITAR may require DRI to obtain prior federal approval before allowing foreign nationals to participate in the research, before partnering with a foreign company, or before sharing research results in any manner (including by publication or presentation at conferences) with persons who are not U.S. citizens or permanent resident aliens.

Export regulations apply whether or not the recipient is funded by a grant, contract, or other agreement, and apply whether or not the EAR or ITAR are cited in the award document. If a researcher accepts export-controlled technology or information from a government agency or from industry, the researcher is subject to ITAR or EAR regulations.

Most DRI activities are excluded from export controls because of a general exception for "**fundamental research**" under the export control regulations. By not accepting any restriction on publication or foreign nationals, DRI protects the fundamental research exemption.

It is important that faculty understand their obligations under the regulations and follow them. The consequences of violating the regulations can be severe including the loss of research funding, personal fines, and/or prison time. **DRI will assist investigators to comply with export control laws, but the primary responsibility for compliance rests with the principal investigator of the research.**

### **What is export control?**

The laws prohibit the unlicensed export of certain materials or information for reasons of national security or protection of trade. Most exports do not require government licenses. Only exports that the U. S. government considers "license controlled" under the EAR and/or ITAR require licenses. Export controls usually arise for one or more 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, and
- Government concerns about the declared or suspected end use or the end user of the export

Generally, an export includes any: (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, of 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 a foreign entity or person anywhere.

The term "export" can mean not only technology leaving the shores of the United States (including transfer to a U.S. citizen abroad whether or not it is pursuant to a research agreement with the U.S. government), but also transmitting the technology to an individual other than a U.S. citizen or permanent resident within the United States (a "**deemed export**"). Even a discussion with a foreign researcher or student in a DRI laboratory is considered a "deemed export." Export controls preclude the participation of all foreign nationals in research that involves covered technology without first obtaining a license from the appropriate government agency.

When an item is controlled, a license may be required before the technology can be exported. This requirement relates not only to tangible items (prototypes or software) but also to the research results themselves.

There are certain countries where it is the policy of the United States generally to deny licenses for the transfer of these items. These countries are currently Afghanistan, Armenia, Azerbaijan, Belarus, Cuba, Iran, Iraq, Libya, North Korea, Syria, Vietnam, and the Former Republic of Yugoslavia (Serbia and Montenegro).

### **What is the fundamental research exclusion for universities?**

Even if an item appears on one of the lists of controlled technologies, generally there is an exclusion for fundamental research (as long as there are no restrictions on publication of the research or other restrictions on dissemination of the information) or, in some cases, as long as the research or information is made public or is intended to be made public.

**Fundamental research**, as used in the export control regulations, includes basic or applied research in science and engineering where the resulting information either is ordinarily published and shared broadly in the scientific community or where the resulting information has been or is about to be published. Fundamental research is distinguished from proprietary research that results in information that is restricted for proprietary reasons or pursuant to specific U.S. government access and dissemination controls. Research will not qualify as fundamental research if (1) the institution 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 or to insure that publication will not compromise patent rights of the sponsor; or (2) the research is federally funded and specific access or dissemination controls regarding the resulting information have been accepted by the university or the researcher.

### **What is considered published information as used in the definition of fundamental research?**

The EAR and the ITAR approach the issue of publication differently. For the EAR, the requirement is that the information has been, is about to be, or is ordinarily published. The ITAR requirement is that the information has been published.

Information becomes "published" or considered as "ordinarily published" when it is generally accessible to the interested public through a variety of ways. Publication in periodicals, books, print, electronic or any other media available for general distribution to any member of the public or to those that would be interested in the material in a scientific or engineering discipline. Published or ordinarily published material also includes the following: readily available at libraries open to the public; issued patents; and releases at an open conference, meeting, seminar, trade show, or other open gathering. A conference is considered "open" if all technically qualified members of the public are eligible to attend and attendees are permitted to take notes or otherwise make a personal record (but not necessarily a recording) of the proceedings and presentations. In all cases, access to the information must be free or for a fee that does not exceed the cost to produce and distribute the material or hold the conference (including a reasonable profit).

### **What is public domain?**

Public domain is the term used for "information that is published and generally accessible or available to the public" through a variety of mechanisms. Publicly available software or technology is that which already is, or will be, published.

### **Regulations**

**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 regulates the export of goods and services identified on the Commodity Control List (CCL), Title 15 CFR section 774, Supp. 1. The EAR and CCL are available online at <http://www.access.gpo.gov/bis/>.

**International Traffic in Arms Regulations (ITAR)**, 22 CFR sections 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 § 121.1. The ITAR and MCL are available online at <http://pmdtc.org/reference.htm>.