
EXPORT COMPLIANCE PROGRAM MANUAL

University of Delaware

List of Abbreviations

AVPRRA	Associate Vice President for Research & Regulatory Affairs
BIS	Department of Commerce Bureau of Industry and Security
CCL	Commerce Control List
CJ	Commodity Jurisdiction
DDTC	Department of State Directorate of Defense Trade Controls
EAR	Export Administration Regulations
ECCN	Export Control Classification Number
EO	Empowered Official
DRRA	Director of Research Regulatory Affairs
ITAR	International Traffic in Arms Regulations
OFAC	Department of the Treasury Office of Foreign Assets Control
RO	Research Office
PI	Principal Investigator
SDN List	Specially Designated Nationals and Blocked Persons List
TCP	Technology Control Plan
USML	United States Munitions List
UD	University of Delaware

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OVERVIEW OF EXPORT CONTROLS

I. INTRODUCTION

The U.S. export control system generally requires export licensing for defense items, for items that have both commercial and military applications, and for exports to sanctioned persons and destinations. U.S. national security, economic interests and foreign policy shape the U.S. export control regime. The export laws and regulations aim at achieving various objectives, such as preventing the proliferation of weapons of mass destruction, advancing the U.S. economic interests at home and abroad, aiding regional stability, implementing anti-terrorism and crime controls, and protecting human rights.

These controls generally restrict the export of products and services based on the type of product and the destination of the export. In both the defense and high-technology sectors, the U.S. Government tightly regulates the export not only of equipment and components, but also of technology. Technology includes technical data, such as blueprints and manuals, as well as design services (including the transfer of “knowledge”) and training. U.S. laws assert jurisdiction over U.S.-origin equipment and technology even after it is exported (*i.e.*, restricting the re-export or re-transfer to third parties). In addition to general export licensing, the United States maintains economic embargoes against a number of countries whose governments consistently violate human rights or act in support of global terrorism. Such embargoes bar most transactions by U.S. persons with these countries. Finally, the U.S. Government maintains lists of Specially Designated Nationals or persons and entities that are barred from conducting export business because of previous activities.

Three principal agencies regulate exports from the United States: the U.S. Department of State Directorate of Defense Trade Controls (“DDTC”) administers export control of defense exports; the U.S. Department of Commerce Bureau of Industry and Security (“BIS”) administers export control of so-called “dual-use” technology exports; and the U.S. Department of the Treasury Office of Foreign Assets Control (“OFAC”) administers exports to embargoed countries and specially designated entities.

II. EXPORT CONTROLS AND UNIVERSITY RESEARCH

U.S. national security and economic interests are heavily dependent on technological innovation and advantage. Many of the nation's leading-edge technologies, including defense-related technologies, are being discovered by U.S. and foreign national students and scholars in U.S. university research and university-affiliated laboratories. U.S. policymakers recognize that foreign students and researchers have made substantial contributions to U.S. research efforts, but the potential transfer of controlled defense or dual-use technologies to their home countries could have significant consequences for U.S. national interests. The U.S. export control agencies place the onus on universities to understand and comply with the regulations.¹

Export controls present unique challenges to universities and colleges because they require balancing concerns about national security and U.S. economic vitality with traditional concepts of unrestricted academic freedom, and publication and dissemination of research findings and results.

¹ See GAO Report “Export Controls: Agencies Should Assess Vulnerabilities and Improve Guidance for Protecting Export-Controlled Information at Universities,” December 2006, available at <http://www.gao.gov/new.items/d0770.pdf>.

University researchers and administrators need to be aware that these laws may apply to research, whether sponsored or not. However, it also is important to understand the extent to which the regulations do not affect normal university activities.

III. EXPORT OF DEFENSE ARTICLES AND SERVICES – INTERNATIONAL TRAFFIC IN ARMS REGULATIONS

Under the International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 120-130,² DDTC administers the export and re-export of defense articles, defense services and related technical data from the United States to any foreign destination, or to any foreign person, whether located in the United States or abroad. Section 121.1 of the ITAR contains the *United States Munitions List* (“USML”) and includes the commodities and related technical data and defense services controlled for export purposes. The ITAR controls not only end items, such as radar and communications systems, military encryption and associated equipment, but also the parts and components that are incorporated into the end items. Certain non-military items, such as commercial satellites, and certain chemical precursors, toxins, and biological agents, are also controlled.

A. ITEMS CONTROLLED UNDER THE ITAR

The ITAR uses three different terms to designate export controlled items – defense articles, technical data, and defense services. With rare exceptions, if an item contains any components that are controlled under the ITAR, the entire item is controlled under the ITAR. For example, a commercial radio that would normally not be controlled under the ITAR becomes a controlled defense article if it contains an ITAR-controlled microchip.

1. Defense Article means any item or technical data that is specifically designed, developed, configured, adapted, or modified for a military, missile, satellite, or other controlled use listed on the USML.³ Defense article also includes models, mock-ups, or other items that reveal technical data relating to items designated in the USML.

2. Technical Data means any information for the design, development, assembly, production, operation, repair, testing, maintenance, or modification of a defense article. Technical data may include drawings or assembly instructions, operations and maintenance manuals, and email or telephone exchanges where such information is discussed. However, technical data does not include general scientific, mathematical, or engineering principles commonly taught in schools, information present in the public domain, general system descriptions, or basic marketing information on function or purpose.⁴ It should be noted that if a U.S. government contractor makes the determination that an effort is controlled under the ITAR, all work and technical data generated for that project is subject to the ITAR, regardless of previous existence in the public domain.

Defense Service means providing assistance, including training, to a foreign person in the United States or abroad in the design, manufacture, repair, or operation of a defense article, as

² The ITAR are promulgated pursuant to Section 38 of the Arms Export Control Act, 22 U.S.C. §§ 2778 *et seq.*

³ 22 C.F.R. § 120.6.

⁴ 22 C.F.R. § 120.10. Note that the ITAR uses the term “blueprints” to cover drawings and assembly

well as providing technical data to foreign persons. Defense services also include informal collaboration, conversations, or interchanges concerning technical data.⁵

B. THE USML CATEGORIES

The USML designates particular categories and types of equipment as defense articles and associated technical data and defense services.⁶ The USML divides defense items into 21 categories, listed below. An electronic version of the USML is available on the Department of State website at:

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

- I Firearms and Related Articles
- II Guns and Armament
- III Ammunition and Ordnance
- IV Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines
- V Explosives and Energetic Materials, Propellants, Incendiary Agents, and their Constituents
- VI Surface Vessels of War and Special Naval Equipment
- VII Ground Vehicles
- VIII Aircraft and Related Articles
- IX Military Training Equipment and Training
- X Personal Protective Equipment
- XI Military Electronics
- XII Fire Control, Laser, Imaging, and Guidance Equipment
- XIII Materials and Miscellaneous Articles
- XIV Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment
- XV Spacecraft and Related Articles
- XVI Nuclear Weapons and Related Articles
- XVII Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated
- XVIII Directed Energy Weapons
- XIX Gas Turbine Engines and Associated Equipment
- XX Submersible Vessels and related Articles
- XXI Articles, Technical data, and Defense Services Not Otherwise Enumerated

C. CLASSIFICATION

While DDTC has jurisdiction over deciding whether an item is ITAR- or EAR-controlled, it encourages exporters to self-classify the item. If doubt exists as to whether an article or service is covered by the USML, upon written request in the form of a Commodity Jurisdiction (“CJ”) request, DDTC will provide advice as to whether a particular article is a defense article subject to

⁵ 22 C.F.R. § 120.9.

⁶ See 22 C.F.R. § 121.1.

the ITAR, or a dual-use item subject to Commerce Department licensing.⁷ Determinations are based on the origin of the technology (*i.e.*, as a civil or military article), and whether it is predominantly used in civil or military applications. University employees should contact the DRRA in the Research Office when classifying an item. If the University of Delaware (“UD”) needs to obtain a commodity jurisdiction (“CJ”) determination, the DRRA in conjunction with the AVPRRA will file the CJ request with DDTC.⁸

D. DEFINITION OF EXPORT UNDER THE ITAR

The ITAR defines the term “export” broadly. The term applies not only to exports of tangible items from the U.S., but also to transfers of intangibles, such as technology or information. The ITAR defines as an “export” the passing of information or technology to foreign nationals even in the United States.⁹ The following are examples of exports:

1. Exports of articles from the U.S. territory

- Shipping or taking a defense article or technical data out of the United States.
- Transferring title or ownership of a defense article to a foreign person, in or the United States.

2. Extra-territorial transfers

- The re-export or re-transfer of defense articles from one foreign person to another, not previously authorized (*i.e.*, transferring an article that has been exported to a foreign country from that country to a third country).
- Transferring the registration, control, or ownership to a foreign person of any aircraft, vessel, or satellite covered by the USML, whether the transfer occurs in the United States or abroad.

3. Export of intangibles

- Disclosing technical data to a foreign person, whether in the United States or abroad, through oral, visual, or other means.
- Performing a defense service for a foreign person, whether in the United States or abroad.

⁷ See 22 C.F.R. § 120.4. Note that DDTC has jurisdiction over determining whether an item is ITAR- or EAR-controlled. While BIS at Commerce provides assistance with determining the specific ECCN of a dual-use item listed on the CCL, if doubt exists as to whether an item is ITAR- or EAR-controlled, BIS will stay its classification proceeding and forward the issue to DDTC for jurisdiction determination.

⁸ Instructions on the content of a CJ and the filing procedure are available at http://www.pmdtc.state.gov/commodity_jurisdiction.htm.

⁹ 22 C.F.R. § 120.17.

E. AUTHORIZATION TO EXPORT

Generally, any U.S. person or entity that manufactures, brokers, or exports defense articles or services must be registered with DDTC.¹⁰ Registration is required prior to applying for a license or taking advantage of some license exemption.¹¹ Once the registration is complete, an exporter may apply for an export authorization by submitting a license application for the export of defense articles, technical data; or defense services. Most types of applications also contain additional certifications / transmittal letters, supporting documentation, and in some cases, non-transfer and use certification from the licensee and / or the foreign government of the licensee.

Researchers are usually engaged only in the creation of unclassified technical data, or engaged only in the fabrication of articles for experimental or scientific purpose, including research and development. Therefore, the university is not usually required to apply for licenses.¹² However, if the university desires to involve foreign nationals in ITAR-controlled research or take an ITAR-controlled item to a foreign destination, it must apply for a license or take advantage of certain license exemptions. License exemptions specific to universities, as well as licensing procedures, are described in detail in the *Key Issues in University Research* section, below.

F. EMBARGOED COUNTRIES UNDER DDTC REGULATIONS

ITAR Prohibitions. In general, no ITAR exports may be made either under license or license exemption to countries proscribed in 22 C.F.R. § 126.1, such as Cuba, Iran, North Korea, Sudan, and Syria. Additional restrictions apply to other countries; a complete list of U.S. arms embargoes is available online at:

http://www.pmdtc.state.gov/regulations_laws/documents/official_itar/ITAR_Part_126.pdf.

The list of proscribed countries changes from time to time, so the current DDTC list should be checked prior to initiating any export transaction.

IV. EXPORT OF COMMERCIAL DUAL-USE GOODS AND TECHNOLOGY—EXPORT ADMINISTRATION REGULATIONS

The Department of Commerce Bureau of Industry and Security (“BIS”) regulates the export of commercial products and technology under the Export Administration Regulations, 15 C.F.R. §§ 730-774 (“EAR”).¹³ While there are some parallels to the ITAR, there also are some major differences in how the regulations and the relevant agencies function.

¹⁰ 22 C.F.R. § 122.1.

¹¹ 22 C.F.R. §§ 120.1(c) and (d); 122.1(c).

¹² See 22 C.F.R. §§ 122.1(b)(3) and (b)(4).

¹³ The EAR are promulgated under the Export Administration Act of 1979, as amended (50 U.S.C. app. §§ 2401-2420). From August 21, 1994, through November 12, 2000, the Act was in lapse. During that period, the President, through Executive Order 12924, which had been extended by successive Presidential Notices, continued the EAR in effect under the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1706 (IEEPA)). On November 13, 2000, the Act was reauthorized by Pub. L. No. 106-508 (114 Stat. 2360 (2000)) and it remained in effect through August 20, 2001. Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001, which has been extended by successive Presidential Notices, has continued the EAR in effect under IEEPA.

They are similar in that both agencies focus on “technology transfer” and have been increasingly focused on enforcement. They differ in that the EAR covers a wider range of products and technology, the product classification process is highly technical, and most importantly, the need for a license depends not only on the type of product but on its final destination.

A. ITEMS CONTROLLED UNDER THE EAR

Generally, all items of U.S.-origin, or physically located in the United States, are subject to the EAR. Foreign manufactured goods are generally exempt from the EAR re-export requirements if they contain less than a *de minimis* level of U.S. content by value. Such *de minimis* levels are 10% content to embargoed countries, and 25% content for all others.

The EAR requires a license for the exportation of a wide range of items with potential “dual” commercial and military use, or otherwise of strategic value to the United States (but not made to military specifications). However, only items listed on the *Commerce Control List* (“CCL”) require a license prior to exportation. Items not listed on the CCL are designated as EAR99 items and generally can be exported without a license, unless the export is to an embargoed country, or to a prohibited person or end-use.¹⁴ The following summarizes the types of items controlled under the EAR:

- **Commodities.** Finished or unfinished goods ranging from high-end microprocessors to airplanes, to ball bearings.
- **Manufacturing Equipment.** This includes equipment specifically for manufacturing or testing controlled commodities, as well as certain generic machines, such as computer numerically controlled (“CNC”) manufacturing and test equipment.
- **Materials.** This includes certain alloys and chemical compounds.
- **Software.** This includes software specifically associated with particular commodities or manufacturing equipment, as well as any software containing encryption and the applicable source code.
- **Technology.** Technology, as defined in the EAR, includes both technical data, and services. Unlike the ITAR, there is generally no distinction between the two. However, the EAR may apply different standards to technology for “use” of a product than for the technology for the “design” or “manufacture” of the product.

B. THE COMMERCE CONTROL LIST CATEGORIES

The CCL provides a list of very specific items that are controlled. The CCL is similar to the “dual-use” list adopted by other countries under the Wassenaar Arrangement,¹⁵ although the CCL has additional items. The CCL is divided into the nine categories below. The CCL is available online at http://www.access.gpo.gov/bis/ear/ear_data.html.

¹⁴ 15 C.F.R. § 734.

¹⁵ Information on the Wassenaar Arrangement is available at: <http://www.bis.doc.gov/wassenaar/default.htm>.

CATEGORIES

0. Nuclear Materials, Facilities and Equipment and Miscellaneous
1. Materials, Chemicals, "Microorganisms," and Toxins
2. Materials Processing
3. Electronics
4. Computers
5. pt-1 Telecommunications
5. pt-2 Information Security
6. Lasers & Sensors
7. Navigation and Avionics
8. Marine
9. Aerospace and Propulsion

C. CLASSIFICATION

As discussed in *Overview*, Section III.C, DDTC has jurisdiction to decide whether an item is ITAR- or EAR-controlled. DDTC encourages exporters to self-classify the product. If doubt exists, a CJ request may be submitted to DDTC to determine whether an item is ITAR- or EAR-controlled.¹⁶

Once it is determined that an item is EAR-controlled, the exporter must determine its Export Control Classification Number ("ECCN"). BIS has two assistance procedures where the proper ECCN classification or licensing requirements are uncertain.¹⁷ To determine EAR's applicability and the appropriate ECCN for a particular item, a party can submit a "Classification Request" to BIS. To determine whether a license is required or would be granted for a particular transaction, a party can request BIS provide a non-binding "advisory opinion." While BIS provides assistance with determining the specific ECCN of a dual-use item listed on the CCL, if doubt exists as to whether an item is ITAR- or EAR-controlled, BIS will stay its classification proceeding and forward the issue to DDTC for jurisdiction determination.

Unlike the ITAR, for classification purposes BIS generally looks at the classification of the complete product being exported rather than at the classification of each subcomponent of the item (*i.e.*, "black box" treatment), as opposed to the "see through" treatment under the ITAR.

D. DEFINITION OF EXPORT AND RE-EXPORT UNDER THE EAR

1. Export. Export is defined as the actual shipment or transmission of items subject to the EAR out of the United States. The EAR is similar to the ITAR in that it covers intangible exports of "technology," including source code, as well as physical exports of items.

2. Deemed Export. Under the EAR the release of technology to a foreign national in the United States is "deemed" to be an export, even though the release took place within the United

¹⁶ For a complete discussion, see *Overview of Export Controls*, Section III.C above.

¹⁷ See 15 C.F.R. § 748.3.

States. Deemed exports may occur through such means as a demonstration, oral briefing, or plant visit, as well as the electronic transmission of non-public data that will be received abroad.

3. Re-export. Similarly to the ITAR, the EAR attempts to impose restrictions on the re-export of U.S. goods, *i.e.*, the shipment or transfer to a third country of goods or technology originally exported from the United States.

4. Deemed Re-export. Finally, the EAR defines "deemed" re-exports as the release of technology by a foreign national who has been licensed to receive it to the national of another foreign country who has not been licensed to receive the technology. For example, ECCN 5E001 technology may be exported to a university in Ireland under the license exception for technology and software, but might require a deemed re-export license authorization before being released to a Russian foreign national student or employee of that university in Ireland.

E. AUTHORIZATION TO EXPORT

Once determined that a license is required, an exporter can apply for export authorization from BIS. Unlike the ITAR, there is no requirement for formal registration prior to applying for export authorization.

The EAR contains a number of exceptions. Determining whether a particular exception applies requires review of the specific application as detailed in 15 C.F.R. § 740, as well as review of the notes on applicable license exceptions following the ECCN entry on the CCL.¹⁸

Each category of the CCL contains ECCNs for specific items divided into five categories, A through E: "A" refers to specific systems or equipment (and components); "B" refers to test, inspection and production equipment; "C" refers to materials; "D" refers to software; and "E" refers to the technology related to that specific equipment. For example, most civil computers would be classified under ECCN 4A994. The "4" refers to Category 4, *Computers*, and the "A" refers to the subcategory, *i.e.*, equipment. Generally, if the last three digits begin with a 'zero' or 'one' (*e.g.*, 4A001), the product is subject to stringent controls, whereas if the last three digits are a "9XX" (*e.g.*, 4A994), then generally there are fewer restrictions on export.

Once an item has been classified under a particular ECCN, a person can determine whether a license is required for export to a particular country. The starting place is the information following the ECCN heading. The "List of Items Controlled" describes the specific items covered or not covered by the ECCN.

(1) *Determine Reason for Controls.* The "License Requirements" section provides notations as to the reasons for control. These reasons include:

AT	Anti-Terrorism	CB	Chemical & Biological Weapons
CC	Crime Control	CW	Chemical Weapons Convention
EI	Encryption Items	FC	Firearms Convention
MT	Missile Technology	NS	National Security
NP	Nuclear Nonproliferation	RS	Regional Stability
SS	Short Supply	UN	United Nations Embargo
SI	Significant Items		
SL	Surreptitious Listening		

¹⁸ 15 C.F.R. § 740.

The most commonly used controls are Anti-Terrorism and National Security, while other controls only apply to limited types of articles. For example, ECCN 4A994 lists “License Requirements: Reason for Control: AT” (*i.e.*, anti-terrorism) and the following:

<u>Control(s)</u>	Country Chart
AT applies to entire entry	AT Column 1

(2) *Apply Country Chart.* Once an item is identified as meeting the criteria for a particular ECCN, the user can refer to the chart found at 15 C.F.R. § 738, Supp. 1. If the particular control applies to that country, a license is required. For example, Syria has an “X” under AT Column 1, therefore a license would be required unless an exception applied.

(3) *Exceptions.* The EAR contains a number of exceptions. Determining whether a particular exception applies requires review of the specific application as detailed in 15 C.F.R. § 740, as well as review of the notes on applicable license exceptions following the ECCN entry. These exceptions include:

LVS	Items of limited value (value is set under each ECCN).
GBS	Items controlled for national security reasons to Group B countries.
CIV	Items controlled for national security reasons to particular countries where end-user is civilian.
TSR	Certain technology and software to certain countries.
APP	Computer exports to certain countries.
TMP	Certain temporary exports, re-exports, or imports, including items moving through the U.S. in transit.
RPL	Certain repair and replacement parts for items already exported.
GFT	Certain gifts and humanitarian donations.
GOV	Exports to certain government entities.
TSU	Certain mass-market technology and software.
BAG	Baggage exception.
AVS	Aircraft and vessels stopping in the U.S. and most exports of spare parts associated with aircraft and vessels.

APR	Allows re-export from certain countries.
ENC	Certain encryption devices and software.
AGR	Agricultural commodities.
CCD	Authorization of certain consumer communication devices to Cuba.

License exceptions specific to universities, as well as licensing procedures, are described in detail in *Key Issues in University Research* below. UD researchers wishing to use a license exception should consult with the DRRRA and receive a written determination of the exception prior to the export.

V. **OFAC SANCTIONS PROGRAM AND BARRED ENTITIES LISTS**

A. **SANCTIONED COUNTRIES**

U.S. economic sanctions broadly prohibit most transactions between a U.S. person and persons or entities in an embargoed country, including Cuba, Iran, North Korea, Syria, and Sudan.¹⁹ This prohibition includes importation and exportation of goods and services, whether direct or indirect, as well as "facilitation" by a U.S. person of transactions between foreign parties and a sanctioned country. For example, sending a check to an individual in Iran could require an OFAC license or be prohibited. More limited sanctions may block particular transactions or require licenses under certain circumstances for exports to a number of countries, including but not limited to Burma, Libya, and Zimbabwe.²⁰ Because this list is not complete and subject to change, please visit <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>.

While most sanctions are administered by OFAC, BIS has jurisdiction over certain exports prohibitions (via "embargo" regulations), as is the case with exports to Syria.²¹ In other words, a license from BIS would be required to ship most items to Syria and other OFAC sanctioned countries or could be prohibited. Economic sanctions and embargo programs are country-specific and very detailed in the specific prohibitions.

B. **TERRORIST AND OTHER BARRED ENTITY LISTS**

Various U.S. Government agencies maintain a number of lists of individuals or entities barred or otherwise restricted from entering into certain types of transactions with U.S. persons. Particularly since 9/11, U.S. companies are beginning to become more assertive in attempting to place contractual terms with foreign companies related to these lists. Such lists must be screened to ensure that the university does not engage in a transaction with a barred entity. The University of Delaware uses Visual Compliance™ to expedite screening of these and other lists.

¹⁹ With the exception of the sanctions on Cuba and North Korea, OFAC sanctions are promulgated under the International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1701-1706 (IEEPA). The embargoes on Cuba and North Korea are promulgated under the Trading with the Enemy Act of 1917, 12 U.S.C. § 95a (TWEA).

²⁰ See <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> for a full list of U.S. sanction programs.

²¹ See 15 C.F.R. § 746.

- **Specially Designated Nationals and Blocked Persons List (“SDN List”).** Maintained by OFAC, this is a list of barred terrorists, narcotics traffickers, and persons and entities associated with embargoed regimes. Generally, all transactions with such persons are barred. The *SDN List* is available at: <http://www.treas.gov/offices/enforcement/ofac/sdn/index.shtml>.
- **Persons Named in General Orders (15 C.F.R. § 736, Supp. No. 1).** General Order No. 2 contains the provisions of the U.S. embargo on Syria; General Order No. 3 prohibits the re-exports to Mayrow General Trading and related parties. A link to the General Orders is available at: <http://www.bis.doc.gov/policiesandregulations/ear/736.pdf>.
- **List of Debarred Parties.** The Department of State bars certain persons and entities from engaging in the export or re-export of items subject to the USML (available at: <http://www.pmdtc.state.gov/compliance/debar.html>). Note that the number of countries subject to a U.S. arms embargo is much broader than those subject to OFAC embargoes. *See* http://www.pmdtc.state.gov/embargoed_countries/index.html.
- **Denied Persons List.** These are individuals and entities that have had their export privileges revoked or suspended by BIS. The *Denied Persons List* is available at: <http://www.bis.doc.gov/dpl/Default.shtm>.
- **Entity List.** These are entities identified as being involved in proliferation of missile technology, weapons of mass destruction, and related technologies. The *Entity List* is available at: http://www.bis.doc.gov/policiesandregulations/ear/744_sup4.pdf.
- **Unverified List.** These are foreign persons and entities for which BIS has been unable to verify the nature of their operations. While transactions with these entities are not barred, special due diligence is required. The *Unverified List* is available at: http://www.bis.doc.gov/Enforcement/UnverifiedList/unverified_parties.html.
- **Excluded Parties List.** These are entities that have been barred from contracting with U.S. Government agencies. In general, companies cannot contract with such parties in fulfilling a U.S. Government contract, either as prime or sub-contractor. The *EPLS* is available at: <https://www.sam.gov/portal/public/SAM/>.
- **Nonproliferation Sanctions** maintained by the Department of State. These lists are available at: <http://www.state.gov/t/isn/c15231.htm>.

VI. ANTI-BOYCOTT RESTRICTIONS

The anti-boycott rules were implemented to prevent U.S. business from participating directly or indirectly in the Arab League’s boycott of Israel. The laws prevent U.S. persons from doing business under terms that would restrict that person’s ability to do business with other countries under a boycott not recognized by the U.S. The Arab League’s boycott has lessened over the years, but still remains in effect in some countries. These restrictions are enforced by BIS. The applicable regulations are at 15 C.F.R. § 760.

Anti-boycott restrictions are most likely to appear in dealings with entities in certain Arab League countries. As of August, 2012, Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, the United Arab Emirates, and Yemen continue to impose boycott restrictions on Israel and companies that do business with Israel. Future lists remain under review by the U.S. Department of Treasury.²²

Note that there are strict reporting requirements even where the U.S. person refuses to participate in a requested boycott action.

A. JURISDICTION

These laws generally apply to any person or entity in the U.S., and to U.S. persons or entities abroad. As examples, the laws apply to:

- A foreign company's affiliate or permanent office in the U.S.
- A U.S. company's foreign affiliate's transaction with a third-party if that affiliate is controlled by the U.S. company and involves shipment of goods to or from the U.S.

B. RED FLAGS

The U.S. Commerce Department has set forth the following red-flags to look for as signs of anti-boycott restrictions:

- Agreements to refuse or actual refusals to do business with Israel or with blacklisted companies.
- Agreements to discriminate or actual discrimination against other persons based on race, religion, sex, national origin, or nationality.
- Furnishing information about business relationships with Israel or with blacklisted companies.
- Furnishing information about the race, religion, sex, or national origin of another person.
- Paying or otherwise implementing letters of credit that include requirements to take boycott-related actions prohibited by the anti-boycott regulations.

These restrictions may appear on pre-printed portions of agreements.

C. EXCEPTION

A major exception to the anti-boycott rules is the provision that permits compliance with the import requirements of a boycotting country. This exception permits firms to comply with import restrictions that prohibit imports from Israel or Israeli firms. The exception does not permit compliance with a boycott of blacklisted firms outside of Israel, nor does it allow for the issuance of

²² See Department of Treasury List of Countries Requiring Cooperation with an International Boycott, 77 Fed. Reg. 49864 (Aug. 17, 2012).

a negative certificate-of-origin of any type. Other exceptions allow firms to provide country-of-origin information on the shipping documents, or information required for immigration or employment purposes. The exceptions can be found at 15 C.F.R. § 760.3.

D. REPORTING

Any U.S. person or entity who is asked to enter into an agreement or provide information that would violate anti-boycott laws must report this to BIS using a form BIS-621-P in accordance with 15 C.F.R. § 760.5. Information regarding the reporting of suspected anti-boycott activities can be found at <http://www.bis.doc.gov/ComplianceAndEnforcement/index.htm>. In addition, the U.S. Internal Revenue Service (IRS) requires U.S. taxpayers to report operations in or relating to boycotting countries and nationals and request to cooperate with boycott activities. See IRS Form 5713, located online at: <http://www.irs.gov/pub/irs-pdf/f5713.pdf>.

These reporting requirements apply even where the U.S. person or entity refuses to participate. Crossing out the boycott language in a proposed contract does not end the matter. The duty to report remains even where the requesting foreign entity accepts the redaction of the boycott language.

For more information on anti-boycott rules see: <http://www.bis.doc.gov/complianceand enforcement/antiboycottcompliance.htm>. The Office of Boycott Compliance has also set up an advice line for questions about the anti-boycott rules, which can be reached at (202) 482-2381.

VII. PENALTIES FOR EXPORT VIOLATIONS

A. GENERAL OVERVIEW

Generally, any person or entity that brokers, exports, or attempts to export a controlled item without prior authorization, or in violation of the terms of a license, is subject to penalties. Violators may incur both criminal and civil penalties. Although there is a maximum amount for a civil or criminal penalty, the actual penalty imposed is often multiplied. For instance, each shipment might be considered a separate violation, and BIS will often find multiple violations of related restrictions in connection to each shipment (*e.g.*, export without a license, false representation, actions with knowledge of a violation, *etc.*). A series of violations occurring over a period of time may result in hundreds of thousand or even millions of dollars of penalties.

B. DEFENSE EXPORTS

The Arms Export Controls Act and the ITAR provide that wilful violations of the defense controls can be fined up to \$1,000,000 per violation, or twenty years of imprisonment, or both.²³ In addition, the Secretary of State may assess civil penalties, which may not exceed \$500,000 per violation.²⁴ The civil penalties may be imposed either in addition to, or in lieu of, any other liability or penalty. The articles exported or imported in violation, and any vessel, vehicle or aircraft involved in such attempt is subject to seizure, forfeiture and disposition.²⁵ Finally, the Assistant

²³ 22 U.S.C. § 2778(c) and 22 C.F.R. § 127.3.

²⁴ 22 U.S.C. § 2778(e) and 22 C.F.R. § 127.10.

²⁵ 22 C.F.R. § 127.6.

Secretary for Political-Military Affairs may order debarment of the violator, *i.e.*, prohibit the violator from participating in export of defense items.²⁶

While imposing criminal liability is fairly rare, many major U.S. companies have been assessed significant civil penalties in the millions of dollars.²⁷ For example, an investigation into the export practices of ITT Corporation, the leading manufacturer of military night vision equipment for the U.S. Armed Forces, resulted in the company's Night Vision Division being debarred from export of defense items for three years. In addition, pursuant to a plea agreement ITT agreed to pay a total of \$100 million for its violations of defense export laws, one of the largest penalties ever paid in a criminal or civil case.²⁸

Both DDTC and BIS have stated that they believe that many universities are in violation of the regulations based on the low number of licenses received in relation to the number of foreign students enrolled.

C. DUAL-USE ITEMS EXPORTS AND ANTI-BOYCOTT VIOLATIONS

Similarly to the ITAR, violations of the EAR are subject to both criminal and administrative penalties. Fines for export violations, including anti-boycott violations, can reach up to \$1,000,000 per violation in criminal cases, and \$250,000 per violation in most administrative cases. In addition, criminal violators may be sentenced to prison time up to 20 years, and administrative penalties may include the denial of export privileges.²⁹ A denial order is probably the most serious sanction because such order would bar a U.S. company from exporting for a period of years or bar a foreign entity from buying U.S. origin products for such period.

²⁶ 22 U.S.C. § 2778(g) and 22 C.F.R. § 127.7.

²⁷ For a thorough discussion of penalties imposed under the ITAR, *see* John C. Pisa-Relli, "Monograph on U.S. Defense Trade Enforcement" (February 2007).

²⁸ *See* Bureau of Political-Military Affairs; Statutory Debarment of ITT Corporation Pursuant to the Arms Export Control Act and the International Traffic in Arms Regulations, 72 Fed. Reg. 18310 (Apr. 11, 2007). For a detailed account of the ITT Corporation investigation, *see* the U.S. Department of Justice press release "ITT Corporation to Pay \$100 Million Penalty and Plead Guilty to Illegally Exporting Secret Military Data Overseas" (March 27, 2007), available at: http://www.usdoj.gov/opa/pr/2007/March/07_nsd_192.html.

²⁹ These violations are based on the Export Administration Act of 1979, as amended (50 U.S.C. app. §§ 2401-2420), and inflation adjustments made in 15 C.F.R. § 6.4. From August 21, 1994, through November 12, 2000, the Act was in lapse. During that period, the President, through Executive Order 12924, which had been extended by successive Presidential Notices, continued the EAR in effect under the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1706 (IEEPA)). On November 13, 2000, the Act was reauthorized by Pub. L. No. 106-508 (114 Stat. 2360 (2000)) and it remained in effect through August 20, 2001. Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001, which has been extended by successive Presidential Notices, has continued the EAR in effect under IEEPA. The USA PATRIOT Improvement and Reauthorization Act of 2005, signed into law on March 9, 2006 (Pub. L. No. 109-177, 120 Stat. 192 (2006)), increased the limit of civil penalties available under IEEPA to \$50,000. On October 16, 2007, President Bush signed the International Emergency Economic Powers Enhancement Act, Pub. Law No. 110-96, which amends IEEPA by increasing civil penalties up to \$250,000 per violation, and criminal penalties up to \$1,000,000 per violation.

In most instances, BIS reaches negotiated settlements in its administrative cases, as a result of voluntary self-disclosures of violations by companies and individuals. Voluntary disclosures constitute a major mitigating factor in determining penalties, reducing the amount of penalty by up to 50 percent, provided certain conditions are met, such as the implementing of a comprehensive compliance program.³⁰

D. EXPORTS TO A SANCTIONED COUNTRY

Although potential penalties for violations of U.S. export laws vary depending on the country and product involved, an exporter may be subject to a maximum civil penalty of \$250,000 per violation under OFAC regulations, with the exception of exports to Cuba.³¹ Violations of the Cuban sanctions are subject to a maximum penalty of \$65,000 per violation.³²

The U.S. Government can also seek to criminally prosecute conduct where violations are willful and knowing. Such violations may reach \$1,000,000 per violation and imprisonment of up to 20 years. In addition, where there is egregious conduct by the offender, BIS (who assists OFAC in enforcing sanctions) may suspend the export privileges of a company.

In assessing penalties, DDTC, BIS, and OFAC will consider a number of factors, both aggravating and mitigating. Mitigating factors include (1) whether the disclosure was made voluntarily; (2) whether this was a first offense; (3) whether the company had compliance procedures; (4) whether steps were taken to improve compliance after discovery of violations; and (5) whether the incident was due to inadvertence, mistake of fact, or good faith misapplication of the laws. Aggravating factors include: (1) willful or intentional violations; (2) failure to take remedial action after discovery; (3) lack of a compliance program; and (4) deliberate efforts to hide or conceal a violation.

³⁰ For a review of BIS investigations and penalties, *see* "Don't Let This Happen to You! Actual Investigations of Export Control and Anti-boycott Violations" at <http://www.bis.doc.gov/complianceandenforcement/dontletthishappentoyou-2008.pdf>.

³¹ Violations of most of the Economic Sanction Regulations are set under the IEEPA. *See supra* note 30.

³² The OFAC embargo of Cuba was promulgated under the Trading with the Enemy Act (TWEA).

KEY ISSUES IN UNIVERSITY RESEARCH

I. 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. 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 nationals 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 national). 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 generally provides for the release of *technology*. Such transfer or release may be made through oral, visual, or other means. An export may occur through:

1. a demonstration;
2. oral briefing;
3. telephone call or message;
4. laboratory or plant visit;
5. presenting at conferences and meetings;
6. faxes or letters;
7. hand-carried documents, hardware or drawings;
8. design reviews;
9. the exchange of electronic communication;
10. posting non-public data on the Internet or the Intranet;
11. carrying a laptop with controlled technical information or software to an overseas destination; or
12. collaborating with other universities / research centers through research efforts.

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 are related to controlled equipment or technology, foreign students' or researchers' involvement may trigger export control compliance issues.

II. U.S. AND FOREIGN PERSONS

For purposes of defense and dual-use exports, 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 (8 U.S.C. § 1324b(a)(3) (*i.e.*, certain classes of asylees).³³ A U.S. person may be engaged in activities that are export controlled, unless there are some additional restrictions that limit participation to U.S. citizens.

The regulations define foreign person as anyone who is not a U.S. person. BIS looks at the person's most recent citizenship or permanent residence. DDTC looks at the person's country of origin (*i.e.*, country of birth) and all current citizenships.

Note that the definitions for a U.S. and a foreign person differ for purposes of the OFAC sanctions. For a discussion, see *Overview of Export Controls*, Section V, above.

III. INFORMATION NOT SUBJECT TO OR EXCLUDED FROM EXPORT CONTROLS

It is important to note that most of the activities that the University of Delaware engages in are fundamental research. As such, most activities are not subject to export controls, or even if controlled, do not require licensing. Both the ITAR and the EAR have special provisions relating to **information** that is not subject to export controls, including limited exclusions regarding the release of information in the context of university research and educational activities. Additionally, the embargo regulations have exceptions for certain information and informational materials.

A. PUBLICLY AVAILABLE

The ITAR and the EAR do not control information which is published and generally accessible or available to the public. Note that even though the two regimes have similar scope, the ITAR and the EAR vary in the specific information that qualifies as publicly available.

- **ITAR provision:** The ITAR describes such information as information in the *public domain*.³⁴ 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. (See *Key Issues in University Research*, Section III.C. *Fundamental Research*, below.)

³³ 22 C.F.R. § 120.15; 15 C.F.R § 734.2(b).

³⁴ 22 C.F.R. §§ 120.10(a)(5) and 120.11.

- **EAR provision:** The EAR does not control publicly available technology if it is already published or will be published.³⁵ 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 university libraries;
 - patents and open patents applications available at any patent office; or
 - release at an open conference, meeting, seminar, trade show, or other gathering open to the public.

The EAR requires that the publication is available for distribution free or at price not to exceed the cost of reproduction and distribution; however, the ITAR does not have such a requirement.

Note also that the 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.

B. EDUCATIONAL INFORMATION

Both the ITAR and the EAR address the issue of general educational information that is typically taught in schools and universities. Such information, even if it relates to items included on the USML or the CCL, does not fall under the application of export controls.

- **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.³⁶
- **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.³⁷

Therefore, a university graduate course on design and manufacture of very high-speed integrated circuitry will not be subject to export controls, even though the technology is on the CCL. The key factor is the fact that the information is provided by instruction in a catalogue course. Foreign students from any country may attend this course because the information is not controlled.

³⁵ 15 C.F.R. §§ 734.3(b)(3) and 734.7.

³⁶ 22 C.F.R. § 120.10(a)(5).

³⁷ 15 C.F.R. §§ 734.3(b)(3) and 734.9.

The information will not be controlled even if the course contains recent and unpublished results from laboratory research, so long as the university did not accepted separate obligations with respect to publication or dissemination, *e.g.*, a publication restriction under a federal funding mechanism.³⁸

C. FUNDAMENTAL RESEARCH

During the Reagan administration, several universities worked with the Federal government to establish national policy for controlling the flow of information produced in federally funded fundamental research at colleges, universities and laboratories resulting in the issuance of the National Security Decision Directive 189 (“NSDD”), National Policy on the Transfer of Scientific, Technical and Engineering Information on September 21, 1985. In a letter dated November 1, 2001, President George W. Bush’s administration reaffirmed NSDD 189. NSDD 189 provided the following definition of *fundamental research* that has guided universities in making licensing decisions relative to fundamental research exclusions provided under both the EAR and ITAR.

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.

Research conducted by scientists, engineers, or students at a university normally will be considered fundamental research. University based research is not considered *fundamental research* if the university or its researchers accept (at the request, for example, of an industrial sponsor) other restrictions on publication of scientific and technical information resulting from the project or activity. Scientific and technical information resulting from the research will nonetheless qualify as fundamental research once all such restrictions have expired or have been removed.

Both the ITAR and the EAR provide that information published and generally accessible to the public through fundamental research is not subject to export controls. However, there are certain restrictions. In order to take advantage of this 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);³⁹
- it is essential to distinguish the information or product that results from the fundamental research from the conduct that occurs within the context of the fundamental research;
- while the results of the fundamental research are not subject to export controls, an export license may be required if during the conduct of the research export controlled technology is to be released to a foreign national. Such export controlled technology

³⁸ 15 C.F.R. § 734, Supp. No. 1, Questions C(1) to C(6).

³⁹ ITAR § 120.11(a)(8); EAR §§ 734.3(b)(3) and 734.8(a).

may come from the research sponsor, from a research partner institution, or from a previous UD research project.⁴⁰

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

Under both the ITAR and the EAR, **research performed at universities will not qualify as fundamental if the university (or the primary investigator) has accepted publication or other dissemination restrictions.**

- **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.⁴¹
- **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.⁴² 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.⁴³

The EAR instructs 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.

The 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.⁴⁴

While the ITAR does not contain such descriptive provisions, the EAR is instructive as to interpreting the limitations on fundamental research.

⁴⁰ See BIS Revisions and Clarification of Deemed Export Related Regulatory Requirements, 71 Fed. Reg. 30840, 30844 (May 31, 2006). (This interpretation of fundamental research by BIS, while not binding, is instructive as to how DDTC might interpret its regulations.)

⁴¹ 22 C.F.R. §§ 120.11(a)(8) and 120.10(a)(5).

⁴² EAR § 734.8(a).

⁴³ EAR § 734.8(b)(5). However, once the sponsor has reviewed and approved the release, the results may be published as fundamental research.

⁴⁴ EAR § 734.11(b).

D. FULL-TIME UNIVERSITY EMPLOYEES

Under a specific exemption, the ITAR allows a university to disclose unclassified technical data 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 (See current list of countries at http://www.pmdtc.state.gov/regulations_laws/documents/official_itar/ITAR_Part_1_26.pdf);
- 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*.

Note that 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.

This exemption only applies to the transfer of *technical data* and discussions related to the data. Discussions may occur between the foreign full-time employee and other university employees working on the project. Additionally, the outside company (sponsor of the research) would have to apply for a DSP-5 license to provide technical data directly to the foreign national employee, and if the outside party and the employee are to engage in discussions and interchange concerning the data, then the proper authorization would be a Technical Assistance Agreement (TAA) rather than the DSP-5.

THE UNIVERSITY OF DELAWARE EXPORT CONTROL POLICY & PROCEDURES

I. COMMITMENT TO EXPORT CONTROL COMPLIANCE

UD 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. Participation of students in research is considered important. University research is traditionally basic in nature, but in those cases where the University can be of service to the community, applied research is considered a legitimate university activity. Typically, the University does not undertake research that cannot be published or is militarily classified, nor does it house research that bears no relationship to its educational activities.

In rare cases, exceptions may be made to the restriction on undertaking unclassified externally funded research with limits on publication under these terms and conditions:

- The work is a continuation of a significant and ongoing research effort;
- The work is recognized by the sponsor as being important to the national interest;
- The work is in the overall best interests of the University and its mission.

While UD endorses the principles of freedom of inquiry and open exchange of knowledge, UD recognizes its obligation to comply with the U.S. export control regulations.

The export of certain technologies, software and hardware is regulated and controlled by Federal law for reasons of national security, foreign policy, prevention of the spread of weapons of mass destruction and for competitive trade reasons. UD 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”).

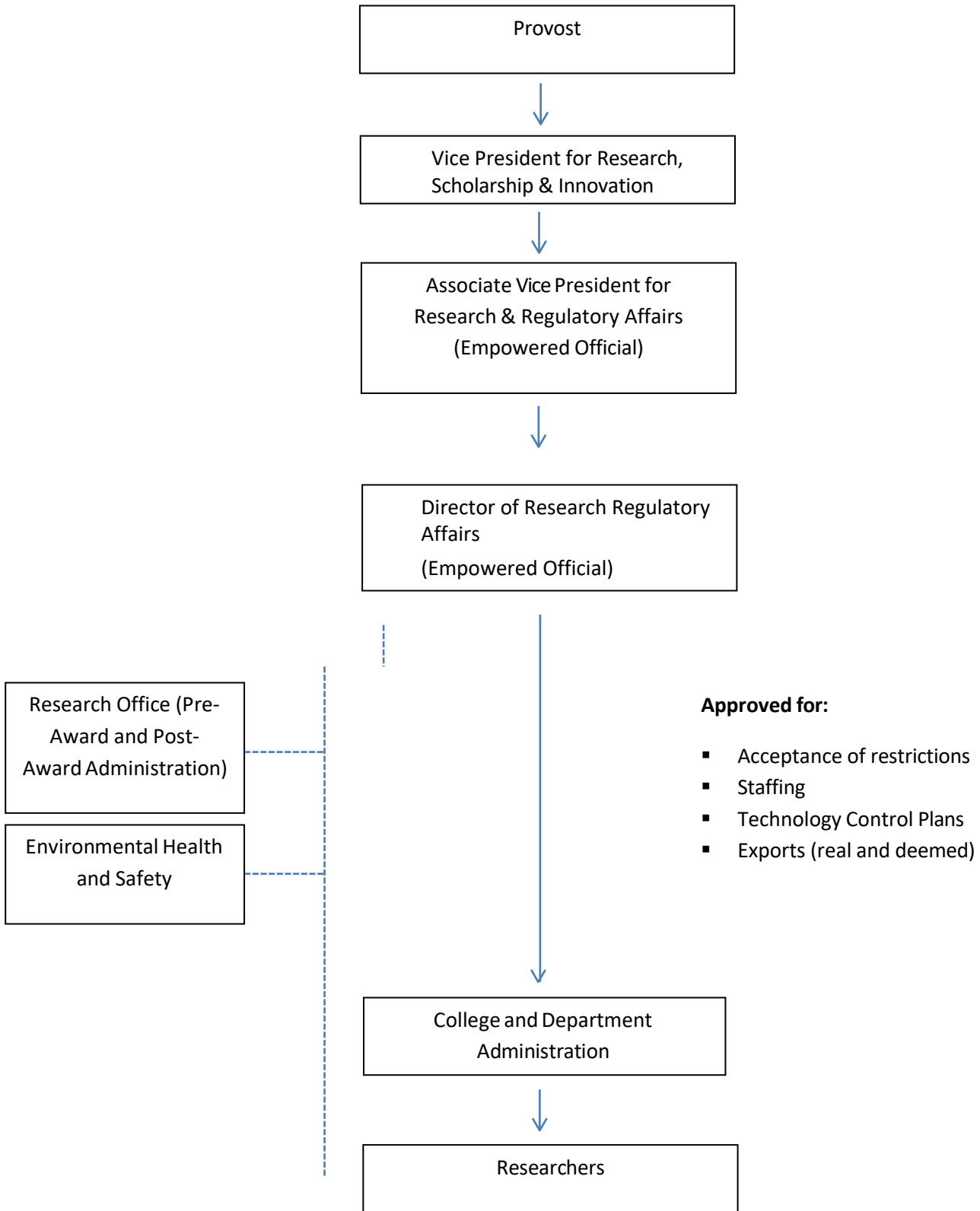
While most research conducted on U.S. college and university campuses is excluded from these regulations under the Fundamental Research Exclusion, university research involving specified technologies controlled under the EAR and/or ITAR, or transactions and exchanges with designated countries, individuals and entities may require UD to obtain prior approval from the appropriate agency before allowing foreign nationals to participate in controlled research, collaborating with a foreign company and/or sharing research—verbally or in writing—with persons who are not United States citizens or permanent residents. The consequences of violating these regulations can be quite severe, ranging from loss of research contracts and exporting privileges to monetary penalties and jail time for the individual violating these regulations. Institutional consequences may range from fines, to revocation of institutional export privileges, to institutional debarment from receipt of federal research funds.

The export control regulations affect not only research conducted on campus, but also travel and shipping items outside the U.S. Simply traveling to certain sanctioned countries could require a license from OFAC. OFAC sanctions prohibit transactions and exchange of goods and services in certain countries and with designated persons and entities. Multiple lists of denied individuals and parties are maintained and enforced by federal agencies including the Departments of State, Commerce, and Treasury. Shipping items outside the U.S. as well as taking controlled items on a

flight, even if shipping or traveling in the conduct of research, could require a license from these agencies.

UD is committed to export controls compliance, and the Regulatory Affairs group in the Research Office is staffed to advise and assist faculty in conducting activities related to research and sponsored projects. More information and resources regarding these and other regulations that impact university activities can be found at <http://www.udel.edu/research/preparing/exportreg.html> or by contacting the DRRA in the Research Office at 302-831- 7445.

II. UNIVERSITY FUNCTIONAL ORGANIZATIONAL CHART FOR EXPORT CONTROLS



III. KEY ACTORS RESPONSIBLE FOR EXPORT CONTROL COMPLIANCE

A. EMPOWERED OFFICIAL

The Associate Vice President for Research & Regulatory Affairs (AVPRRA) and the Director of Research Regulatory Affairs (DRRA) are UD's Empowered Officials for export control matters. In this capacity, the Empowered Official has the authority to represent the university before the export control regulators in matters related to registration, licensing, commodity jurisdiction requests, or voluntary disclosures. While certain oversight functions may be delegated, only the Empowered Official has the power to sign such paperwork and bind the university in any proceeding before DDTC, BIS, OFAC, or any other government agency with export control responsibilities.

B. DIRECTOR OF RESEARCH REGULATORY AFFAIRS

The DRRA reports to the AVPRRA, serves as the University export compliance officer, and in this capacity has the authority and the responsibility for the implementation of the procedures set forth in this Export Compliance Program.

The DRRA together with the AVPRRA:

1. identifies areas at UD relative to research and other activities that are impacted by export control regulations;
2. develops control procedures to ensure the university remains in compliance;
3. recommends procedures to the senior UD administration to strengthen UD's compliance;
4. educates inventors, principal investigators, research centers, and academic units about export control regulations and procedures followed at UD;
5. educates other units within UD such as Accounting, Purchasing, Travel, International Programs, Human Resources, and Technology Commercialization about export control regulations and procedures followed at UD;
6. monitors and interprets legislation;
7. works with others on campus to facilitate understanding and compliance with export controls;
8. conducts training and outreach on export controls;
9. assists investigators, researchers and offices within UD when research or research results are export controlled;
10. seeks legal assistance when uncertain about classification and in filing license applications;
11. assists the principal investigator ("PI") with developing a Technology Control Plan ("TCP") for each export-controlled project consistent with these procedures to aid the PI in meeting his or her export control responsibilities;

12. audits TCPs for compliance at regular intervals;
13. applies for export licenses and files export related paperwork as required and;
14. oversees record keeping associated with export-controlled activities at UD.

C. RESEARCH OFFICE

The Research Office (RO) provides assistance and expertise with export controls by working through the DRRA and AVPRRA in identifying export control issues and providing support for such issues. The RO:

1. provides assistance to PIs in reviewing the terms of a sponsorship agreement or grant to identify restrictions on publication and dissemination of the research results, and to help PIs negotiate such issues;
2. communicates with the DRRA and the PI to ensure that no award accounts for controlled work are activated until the TCP is approved and all required staff training is complete; and
3. communicates with the DRRA about any changes of award status that necessitate a further review of the project for export controls.

The DRRA will conduct trainings for the university community and coordinate the maintenance of an export controls website.

D. KEY UNIVERSITY MANAGERS

Academic deans, directors, and department heads share the responsibility of overseeing export control compliance in their respective schools, departments, centers, or institutes and supporting the DRRA in implementing procedures as deemed necessary for export control compliance.

In addition, the directors of other offices or units on campus including, but not limited to, Accounting, Environmental Health and Safety, General Counsel, Human Resources, International Programs, Technology Transfer, and Travel share the responsibility of overseeing export control compliance in their units and supporting the DRRA in implementing procedures as deemed necessary for export control compliance.

E. PRINCIPAL INVESTIGATOR (“PI”)

PIs have expert knowledge of the type of information and technology involved in a research project or other university activity, such as presenting at conferences, and discussing research findings in class with fellow researchers or collaborators. PIs must ensure that they do not disclose controlled information or transfer controlled articles or services to a foreign national without prior authorization as required. To meet his or her obligations, each PI:

1. must understand his or her obligations under export controls and participate in regular trainings (export control trainings must be maintained within three years of implementation and continuation of an effort.) to help him or her

identify export control issues;

2. must assist the DRRA to classify the technology involved in the research or other university activity;
3. identify foreign nationals that may be involved and, if export control is likely, initiate the process of clearing foreign national participation well in advance to ensure that a license is obtained in a timely manner, or implement proper measures to isolate foreign nationals from participation;
4. must refrain from beginning work on an export-controlled project until UD has signed the award agreement and all appropriate controls are in place;
5. must, if undertaking an export-controlled project, inform the students and other researchers involved in the project of their obligations under export controls; and
6. cooperate with the DRRA in developing the TCP of which the PI has the responsibility to follow and implement.

IV. EXPORT CONTROL ANALYSIS

An export control analysis should be performed when a PI receives an award or changes the scope of an existing project. See Appendix A for a summary of the procedures.

A. INITIAL REVIEW

The RO performs the initial review by completing the University of Delaware Export Controls Review in Appendix B. The RO will look for the following red flags indicating possible export control issues:

1. references to U.S. export regulations (beyond a mere statement to comply with the law);
2. restrictions on publication or dissemination of the research results;
3. pre-publication approval from sponsor;
4. proprietary or trade secret claims on project results;
5. restriction of access or participation to U.S. citizens only;
6. involvement of foreign sponsors or collaborators;
7. travel, shipping, or work performed outside the U.S.;
8. military applications of the project results; or
9. funding from the Department of Defense, the Department of Energy, the Army, the Air Force, the Office for Naval Research, NASA, the National Security Agency, The Department of Homeland Security, the Central Intelligence Agency, or other U.S. government agencies.

B. DRRA / EO REVIEW

If the initial review flags a possible export controls issue, the project will be referred to the DRRA for additional review upon award. Upon completing this review, the DRRA will advise the PI concerning the export controls which apply to the project, the restrictions on access by foreign persons, and any other relevant requirements pursuant to ITAR and EAR. The DRRA will be responsible for corresponding with the Sponsor about contract language and terms specific to Export Controls.

V. TECHNOLOGY CONTROL PLAN

A. DEVELOPMENT

If the DRRA determines a project is export controlled, the DRRA will work with the PI to develop and implement a TCP to secure the controlled technology from access by unlicensed non-U.S. citizens (see Appendix C for template). The TCP will include:

1. a commitment to export controls compliance;
2. identification of the relevant export control categories and controlled technologies;
3. identification of the project's sponsors;
4. identification and nationality of each individual participating in the project;
5. appropriate physical and informational security measures;
6. personnel screening measures; and
7. appropriate security measures for and following project termination.

B. APPROPRIATE SECURITY MEASURES

The TCP will include physical and informational security measures appropriate to the export control categories involved in the project. Examples of security measures include, but are not limited to:

- Laboratory Compartmentalization. Project operation may be limited to secured laboratory areas physically shielded from access or observation by unauthorized individuals. These areas must remain locked at all times.
- Time Blocking. Project operation may be restricted to secure time blocks when unauthorized individuals cannot observe or access.
- Marking. Export controlled information must be clearly identified and marked as export-controlled.
- Personnel Identification. Individuals participating in the project may be required to wear a badge, special card, or other similar device indicating their access to

designated project areas. Physical movement into and out of a designated project area may be logged.

- Locked Storage. Tangible items such as equipment, associated operating manuals, and schematic diagrams should be stored in rooms with key-controlled access. Soft and hardcopy data, lab notebooks, reports, and other research materials should be stored in locked cabinets.
- Electronic Security. Project computers, networks, and electronic transmissions should be secured and monitored through User IDs, password controls, 128-bit Secure Sockets Layer encryption or other federally approved encryption technology. Database access should be managed via a Virtual Private Network.
- Confidential Communications. Discussions about the project must be limited to the identified and authorized project participants, and only in areas where unauthorized individuals are not present. Discussions with third party sub-contractors must occur only under signed agreements which fully respect the non-U.S. citizen limitations for such disclosures

C. TRAINING & CERTIFICATION

Before any individual may observe or access the controlled technology, he or she must be informed on the procedures authorized under the TCP, certify his or her agreement to comply with all security measures outlined in the TCP, and have his or her certification authorized by the DRRA or AVPRRA.

VI. LICENSING

If a project is export controlled and a license is needed to involve a foreign national, an Empowered Official may apply for an export license to allow the disclosure of information to that foreign national. Note that each foreign national student must be specifically licensed for each controlled project. Also note that a TCP, as described in Section IV above, must be implemented. The DRRA, in coordination with the AVPRRA and outside legal counsel, will prepare and sign the necessary documentation for obtaining a license. The PI, his department and College are responsible for all costs associated with such licensing.

VII. LICENSE EXCEPTIONS AND EXEMPTIONS RELATED TO TRAVEL OUTSIDE THE U.S.

Travel or transmissions to destinations outside the U.S. can also implicate export control regulations. A license may be required depending on which items are taken, which countries are visited, or whether defense services are provided to a foreign person. It is important to note that presenting results at a scientific conference OUTSIDE of the U.S. is also considered to be an export. However, an exception or exemption from license requirements may exist.

*A License Exception*⁴⁵ may be available for EAR controlled items, technology, or software if the individual travelling outside the U.S. can certify that he or she:

⁴⁵ See 15 C.F.R. § 740.1

1. will ship or hand-carry the items, technology, or software for UD business only;
2. will return or certify the destruction of the items, technology, or software within 12 months of leaving the U.S.;
3. will keep the items, technology, or software within his or her effective control;
4. will take necessary security precautions to protect against the unauthorized export of the technology; and
5. will not ship or hand-carry the items, technology, or software to Iran, Syria, Cuba, North Korea, or Sudan⁴⁶ without first consulting with the DRRA.

A *License Exemption*⁴⁷ may be available to ITAR controlled technical data transmitted outside the U.S. if the individual transmitting the technical data can certify that:

1. the technical data is to be used overseas solely by a U.S. person(s);
2. the U.S. person overseas is an employee of UD or the U.S. Government and is not an employee of a foreign subsidiary;
3. if the information is classified, it will be sent overseas in accordance with the requirements of the Department of Defense Industrial Security Manual; and,
4. no export will be made to countries listed by 22 C.F.R. § 126.1.⁴⁸

Please note that other exceptions or exemptions may be available.

Any individual intending to travel or transmit controlled data outside the U.S. should first consult with the DRRA. The DRRA and AVPRRA have the final authority on the applicability of the proposed license exception and may consult with counsel if necessary in making that determination. All exceptions or exemptions must be documented with the RO and the record maintained for at least three years after the termination of the project or the travel return date, whichever is later.

VIII. **TRAINING PROGRAMS**

Training is the foundation of a successful export compliance program. Well-informed employees minimize the likelihood that inadvertent violations of the law will occur. The greatest risk of non-compliance of export laws and regulations occurs during casual conversations in person, on the telephone, or via e-mail. The way to prevent these types of violations is through awareness and training.

The DRRA will prepare updated training materials and will ensure that employees or students engaged in an export controlled project receive the appropriate instruction. The DRRA will also maintain records of training provided. General export control information will be available for the university community online at the following link: <http://www.udel.edu/research/preparing/exportreg.html>. Academic deans, directors, or department heads will assist the DRRA in implementing the export control training sessions or briefings relative to their respective schools, departments, centers, or institutes. In addition, the directors of other offices or units on campus including, but not limited to: Accounting, Environmental Health and Safety, Human Resources, International Programs, Technology Commercialization, and Travel

⁴⁶ This list is subject to change. For most current list, see 15 C.F.R. § 742.1.

⁴⁷ See 22 C.F.R. § 125.4.

⁴⁸ The full list of proscribed countries may be found at http://www.pmdtc.state.gov/regulations_laws/documents/official_itar/ITAR_Part_126.pdf.

will assist the DRRA in implementing the export control training sessions or briefings relative to their units.

IX RECORDKEEPING

UD's policy is to maintain export-related records on a project basis. Unless otherwise provided for, all records indicated herein shall be maintained consistent with the UD record retention policy, and shall be retained no less than three years after the project's TCP termination date or license termination date, whichever is later. A copy of the approved TCP will be maintained by the DRRA. All export review documents and an additional copy of the TCP will be kept with the RO project documents.

If ITAR-controlled technical data are exported under an exemption, certain records of the transaction must be kept beyond UD's three year retention period.⁴⁹ Those records include:

1. a description of the unclassified technical data;
2. the name of the recipient /end-user;
3. the date / time of export;
4. the method of transmission (*e.g.*, e-mail, fax, telephone, FedEx); and
5. the exemption under which the export took place.

Note that information which meets the criteria of being in the public domain, being educational information, or resulting from Fundamental Research is not subject to export controls under the ITAR. Therefore, the special requirement for recordkeeping when using an exclusion, exception, or exemption may not apply. However, it is a good practice to provide such description for each project to establish a record of compliance. The DRRA will maintain records of all approved exports of ITAR controlled technical data.

BIS has specific record-keeping requirements.⁵⁰ Generally, records required to be kept by EAR must be kept for a period of five years from the project's termination date. However, if BIS or any other government agency makes a request for such records following a voluntary self-disclosure, the records must be maintained until the agency concerned provides written authorization otherwise.

X MONITORING AND AUDITING

In order to maintain UD's export compliance program and ensure consistent adherence to U.S. export laws, the DRRA may conduct internal reviews of TCPs and certain projects. The purpose of the reviews is: (i) to identify possible violations; and (ii) to identify deficiencies in training, procedures, *etc.*, that can be rectified.

XI DETECTING AND REPORTING VIOLATIONS

It is the policy of UD to voluntarily self-disclose violations as required. Since September 11, 2001, government agencies have dramatically increased the investigation in and successful prosecution of export regulation violations. The penalties for these violations can be very severe, including personal liability, monetary fines, and imprisonment. Institutional penalties may include

⁴⁹ See 22 C.F.R. §§ 122.5 and 123.26.

⁵⁰ See 15 C.F.R. § 762.6.

finances and debarment. However, government agencies assign great weight to voluntary self-disclosures as a mitigating factor.

Any individual who suspects a violation has occurred must immediately notify an Empowered Official in the RO, and only an Empowered Official. The DRRA will then, in consultation with the AVPRRA, send an initial notification about the suspected violation to the appropriate government agency.⁵¹ The DRRA will conduct an internal review of the suspected violation by gathering information about the circumstances, personnel, items, and communications involved. Once the review is complete, the DRRA will provide the government agency with a supplementary letter with a thorough narrative account of:

1. the project's description and background;
2. a description of the suspected violation;
3. which items and controlled categories were involved;
4. which dates the violations occurred on;
5. which countries were involved;
6. who was involved and their citizenships;
7. an explanation of why the violation occurred; and
8. any corrective actions taken; and
9. UD's commitment to export controls compliance.

Once the initial notification and supplementary letter have been sent, DRRA will follow the government agency's instructions.

⁵¹ For EAR violations, see 15 C.F.R. § 764.5. For ITAR violations, see 22 C.F.R. § 127.12(c).

Appendix A

University of Delaware Export Control Review Procedures

1. The empowered officials are the Associate Vice President for Research & Regulatory Affairs and the Director of Research Regulatory Affairs.
2. At award, contract and grant specialist will identify problematic language or clauses in the BAA, RFP, or award. If issues are identified, the contract and grant specialist will communicate concerns and forward potentially problematic language and the statement of work to the DRRA
3. The DRRA will review the BAA, RFP, and/or agreement language and statement of work.
4. If export control issues are identified at the time of the award, the DRRA will review and the Sponsor will be contacted, as necessary, for clarification or negotiation to properly understand and/or modify export language (e.g., restriction or approval of foreign nationals or restriction on publications) and the PI will be contacted for completion of a Technology Control Plan (TCP) as required. The PI will be responsible for providing the DRRA correct information for all staff and students associated with the project so that:
 - i. Mandatory Export Control Training may be verified
 - ii. All individuals working (paid or not) on the project are properly checked for eligibility.
5. Approved personnel will be trained on the Export Control restrictions associated with the specific project. Completed forms will be submitted to the DRRA.
6. The DRRA will complete a review of approval of the Technology Control Plan of approved staff prior to the initiation of the project.
7. The PI will notify the DRRA of all proposed additions or deletions of staff. New staff (paid or unpaid) may not begin work on the project until their eligibility has been verified. Proposed modifications may be implemented when verified by the DRRA.
8. If the PI or staff wishes to present the controlled work to any foreign visitors on campus or

at any international conferences OUTSIDE the U.S., they must coordinate the approval with the DRRA. Similarly, if a staff member working on a controlled project travels outside the U.S., prior approval must be obtained before any export-controlled project related work may be transported on a personal computer, accessed on UD servers remotely from the foreign location, or otherwise conducted via oral or visual communication.

9. At the termination of the project, the PI will submit written verification that the approved disposition of controlled information is complete. The DRRA will review the closure of the TCP and an empowered official will sign off on the disposition of the project.

Appendix B

University of Delaware Export Control Review

Title of Sponsored Project:
Proposal/Award Number:
Principal Investigator:
Department/Center/College:
Sponsor:

AGREEMENT REVIEW (to be completed by C&G Specialist)

Does the agreement include any clause that:	Yes	No
references U.S. export regulations?	<input type="checkbox"/>	<input type="checkbox"/>
restricts non-U.S. entity participation based on country of origin?	<input type="checkbox"/>	<input type="checkbox"/>
prohibits access by non-U.S. citizens to project information?	<input type="checkbox"/>	<input type="checkbox"/>
prohibits or requires prior approval for the hiring of non-U.S. persons?	<input type="checkbox"/>	<input type="checkbox"/>
restricts the use of proprietary/confidential information?	<input type="checkbox"/>	<input type="checkbox"/>
grants the sponsor a right to prepublication review and approval for matters other than the inclusion of patent and/or proprietary sponsor information?	<input type="checkbox"/>	<input type="checkbox"/>
allows the sponsor to claim resulting information as proprietary or trade secret?	<input type="checkbox"/>	<input type="checkbox"/>
Does the project include:		
International travel?	<input type="checkbox"/>	<input type="checkbox"/>
Shipment of equipment internationally or international collaboration?	<input type="checkbox"/>	<input type="checkbox"/>

Completed by:

Date:

TECHNICAL REVIEW (to be completed by DRRA and PI)

This sponsored project agreement contains language that suggests that the work MAY be subject to U.S. Export Control regulations administered by the U.S. Department of State (ITAR) or by the U.S. Department of Commerce. The final determination of the applicability of these regulations depends on the details of the specific technology involved in the research. The PI of the project is the person most qualified to provide the technical detail. The DRRA will assist the PI in the assessment of the applicability of the regulations to that technology.

PI has completed the Export Control Proposal Certification form and has indicated that:

<input type="checkbox"/>	This project does not involve technologies that are covered by either the EAR or the ITAR OR the Fundamental Research Exemption applies
<input type="checkbox"/>	This project may involve technologies that are covered by the EAR or the ITAR

Appendix C

Technology Control Plan

1. Project Title:
2. Purpose:
3. Start/End Date:
4. PI/Task Leader (responsible for Technology Control Plan)
5. Name (and contact information) of responsible sponsor contact who has approved the TCP.
6. Description of technology/information to be controlled/maintained and media (U.S. mail, email, fax, courier, etc.) for communicating information (describe for each level of control required). Note if encryption of email or fax is required.
7. Reason for Control (required approval foreign nationals, IP, etc)?

8. List of persons [with citizenship status and any access (level of information) limitations] authorized to access information

Person	U.S. Citizen or permanent resident	Access/level limitations	TCP and Export Control Training Complete (Y/N)

9. How will controlled information be identified (Hardcopy, electronic, other media)? Describe for each level of control required (password protection, file storage, etc).

10. How/Where will information be stored (List all locations and person responsible for control at each location)? Describe for each level of control required.

11. How will information be controlled in 1) office areas and 2) common use areas (laboratories, conference rooms, etc.)? Describe for each level of control required. Unauthorized persons must not be permitted to observe or have access to data or hardware.

12. How and where will controlled information be stored at the end of the project?

13. PI/Task Leader's statement of disposition of all controlled information at the end of the project (signature and date required).

Signatures:

Principal Investigator

Date

Empowered Official

Date

Acknowledgement of Disposition:

Empowered Official

Date

Appendix D

Request for Authorization to Export Controlled Technical Data

Title of Award :

Sponsor:

P.I.:

Description of data to be exported and justification for the export:

UD person exporting the information:

Name:

Department: Campus

address: Phone:

Email:

Person receiving the export:

Name: Department:

Campus address:

Phone:

Email:

Physical address for Export (or where exported information will be received):

Street Address:

City:

Country:

Method of proposed export:

Regular mail Shipping
company Email (specify
address)

Presentation (specify where):

Other (specify):

Please submit completed form to the DRRA