

Middle Tennessee State University

Office of Research Services

Procedure No.: ORS 007: Export Control

Date Approved: December 08, 2011

1. INTRODUCTION:

It is the intent of Middle Tennessee State University (MTSU) to fully comply with federal regulations that control the conditions under which certain information, technologies, and commodities can be transmitted overseas to anyone, including US citizens, or to a foreign national on U.S. soil.

All faculty, staff, or students involved in restricted research, international collaborations, or foreign exchanges that risk export or violation of the regulations must comply with the provisions of any license (or other governmental approval), policy, procedure, or Technology Control Plan (TCP).

The three main export control regulations that implement these laws are:

The **International Traffic in Arms Regulations** (ITAR) 22 CFR § 120-130 is managed by the Department of State and regulates the exchange and security of defense articles, services, and related technical data determined to be inherently military in function and application and identified on the U.S. Munitions List.

The **Export Administration Regulations** (EAR) 15 CFR §734-774 is managed by the Department of Commerce and regulates commercial products and technologies that may have “dual use” civilian and military functions and applications.

The **Office of Foreign Assets Control** (OFAC) 31 CFR §500-599 is managed by the Department of Treasury and enforces trade sanctions based on U.S. foreign policy and national security goals. These regulations are not restricted to technologies, but restrict the transfer of assets to certain foreign countries, blocked persons, and organizations and individuals suspected of terrorism, drug trafficking, and/or money laundering.

2. Procedures for Implementing Export Control

A.: Conduct an Export Assessment

1. The Academic Unit and the Office of Research Services (ORS) shall together determine whether a project is covered under ITAR, EAR, or OFAC (collectively, “export control regulations”). ORS will utilize an online resource named Visual Compliance run by eCustoms, which provides updated information on export control regulations or search the Commerce Department’s Bureau of Industry Standards (BIS) Commerce Control List. The determination shall be reached by answering the following questions:
 - A. Is the equipment, software, chemical, bio-agent, or technology on the ITAR U.S. Munitions List? (22 CFR § 121). *Screen with Visual Compliance or BIS.*
 - B. Is the equipment, software, chemical, bio-agent, or technology designed or modified for military use, use in outer space, or is there reason to know that it will be used for or in weapons of mass destruction? Could this item have a dual military, civilian, or proliferation application or function as defined under EAR? (15 CFR § 772.1) *Screen with Visual Compliance or BIS.*
 - C. Is the equipment, software, chemical, bio-agent, or technology on the EAR Commodity Control List? (15 CFR §774). *Screen with Visual Compliance or BIS.*
 - D. Does the grant or contract contain a restriction on exporting to foreign nationals? Does it contain a restriction on foreign travel? Does the project involve the governments or citizens of a State Department embargoed or sanctioned nation? (See http://www.pmdt.c.state.gov/embargoed_countries/index.html). Does the project involve an OFAC country sanctioned program? (See <http://www.ustreas.gov/offices/enforcement/ofac/programs/index.shtml>).
 - E. Is there encrypted software involved?
 - F. Is the technology outside of the public domain? Is the material restricted, secured, or classified?
 - G. Does the grant or contract restrict publication or the presentation of research results? Is DFARS 252-204-7000 included? Did the PI execute a Non-Disclosure or Confidentiality Agreement? Is the research funded with other than 6.1 or 6.2 Congressional funds?
 - H. Does the grant or contract prohibit results or deliverables from being disclosed to any foreign country or foreign person?

If the answer to any of the above questions is yes, the project is subject to export control regulations.

2. The Contracts Office will attempt to negotiate, whenever possible, the removal of any publication or access provisions in an award document to allow the sponsored project to be conducted as fundamental research, not subject to export control regulations.
3. If amending the contract is not possible, the Principal Investigator (PI) must determine whether or not any foreign nationals (including foreign students) will be involved in any phase of the research.
 - a. If the answer is yes, then an export license is required from the relevant federal agency prior to conducting any controlled research activity.
 - b. If the answer is no, then a Technology Control Plan (TCP) must be developed by the PI prior to conducting any controlled research activity. All project participants must sign the certification. The TCP template is included as Attachment A.

B. Apply for a Federal License

With the PI's assistance, the Office of Research Services (ORS) will complete all necessary documentation and submit the license application to the appropriate federal agency involved.

C. Complete a Technology Control Plan

The PI, together with the research team, will prepare a TCP before any research can begin. This detailed plan will outline the procedures, methods, and safeguards that will be put in place to secure all research data, technology, and results from being orally or visually exported to anyone not involved on the project. Each project participant must sign the Certification indicating their understanding of the requirements, consequences of a violation, and willingness to comply with the provisions of the TCP. This TCP, together with the executed Certifications, will be submitted to the University's Designated Official: the Assistant Director Office of Research Services (ORS).

The PI is responsible for conducting regular and routine self-assessments during the course of the restricted research to ensure the procedures outlined in the Technology Control Plan (TCP) are sufficient and in operation. (A routine self-assessment guide is included as Attachment B.) If, at any time during the project, it is determined that a revision is required to the TCP to ensure compliance with the export control regulations, the PI will make such amendments and submit the revised plan to the Designated Official. The PI will maintain appropriate records throughout the research period.

If a violation, real or perceived, of the export control regulations or TCP occurs during the course of the sponsored research, it must be brought to the attention of the Designated Official

immediately. At that time, it will be determined whether a self-disclosure to the federal agency is required.

D. Records Retention

Export Control regulations and the University maintain policies related to record retention. The PI and Academic Unit is responsible for maintaining documentation such as financial records, purchase orders, and shipping documentation related to export controlled activity. ORS will maintain approved TCPs and federal licenses related to sponsored projects.

E. Awareness Training

All university faculty members who might be involved in activities that fall under this policy must read the policy and undergo training by ORS staff concerning their Export Control responsibilities.

Export Control Red Flags

If the terms and conditions of an RFP, solicitation, or an award from a sponsor contain any of the following restrictions or limitations, there is a strong likelihood that the US Export Control Laws will apply. This list is a summary of the indicators to watch for:

1. Does the award specifically state that ITAR, EAR, or OFAC laws will apply?
2. Does the award specifically state that the technology involved is export controlled?
3. Has the sponsor specifically stated that the fundamental research exclusion otherwise available to universities does not apply?
4. Does the technology or data involved have military, security, or intelligence applications? Does it appear on ITAR's U.S. Munitions list?
5. Does the technology, data, or material involved have a dual civilian and military application? Does it appear on the Commerce Department's Control List? Does it have an Export Control Classification Number (ECCN)?
6. Does the research involve the use of encryption technology or encrypted software?
7. Does the research involve classified, secured, or top secret materials?
8. Will the PI be asked to maintain the confidentiality of sponsor information? Was an NDA or Teaming Agreement executed between the parties?
9. Does the award contain any publication restriction or limitation? This can include the right of the sponsor to review all proposed publications beforehand.
10. Does the award contain DFARS 252.204-7000, Disclosure of Information?
11. Is the award funded by other than 6.1 or 6.2 Congressional appropriations?
12. Does the award prohibit the involvement of foreign nationals? Are project participants limited to U.S. citizens or legal resident aliens only?
13. Does the award involve international travel?
14. Does the award involve the shipment or export of technology, data, or materials outside the United States?
15. Will collaborations with foreign consultants be required?
16. Will the work involve a country that has been embargoed or sanctioned by either the State or Treasury Departments? (*i.e.*, Afghanistan, Cote d'Ivoire, Democratic Republic of Congo, Haiti, Iraq, Iran, Lebanon, Liberia, Libya, North Korea, Rwanda, Sierra Leone, Somalia, Sri Lanka, Sudan, Viet Nam).

FREQUENTLY ASKED QUESTIONS

The following definitions/questions may help clarify some of the requirements;

What are export controls?

U.S. laws that restrict the transfer of militarily useful goods, technology, services, and information, including equipment and technology used in research, for reasons of foreign policy and national security.

Federal export controls are accomplished primarily through:

- (1) The International Traffic in Arms Regulations (ITAR) implemented by the Department of State, Directorate of Defense Trade Controls, for inherently military items.
- (2) The Export Administration Regulations (EAR) administered by the Department of Commerce, Bureau of Industry and Security, for “dual use” of items that have both a commercial and potential military use.
- (3) Regulations of the Treasury Department, Office of Foreign Assets Control (OFAC) relating to the transfer of technology or assistance to sanctioned countries or their citizens.

What is considered a “foreign” entity for purposes of export controls?

- Foreign government
- Foreign organization not incorporated or organized to do business in the U.S.
- Individual who is not a U.S. citizen or lawful permanent resident of the U.S. (green card holder)

What is an export?

Any oral, written, electronic, or visual disclosure, shipment, transfer, or transmission of goods, technology, services, or information to:

- Anyone outside the U.S. (including a U.S. citizen physically located in a foreign country)
- A non-U.S. entity or individual regardless of location
- A foreign embassy or affiliate

What is a “deemed” export subject to export controls?

Disclosure or transfer of export controlled items, including technology and information, to a foreign entity or individual within the U.S. These releases are deemed to be an export to the home country of the foreign national and can occur by such means as:

- Tours of laboratories
- Involvement of foreign researchers or foreign students in the research
- Oral exchanges, emails, or visual inspection
- Hosting a foreign researcher

What is subject to the International Traffic in Arms Regulations (ITAR)?

Transfer and export (including deemed exports) of items with military applications listed on the U.S. Munitions List (USML):

http://www.pdpc.state.gov/regulations_laws/itar_consolidated.html

What is subject to the Export Administration Regulations (EAR)?

Transfer and export (included deemed export) of “dual-use” items listed on the Commerce Control List (CCL): http://www.access.gpo.gov/bis/ear/ear_data.html#ccl

What is subject to the Office of Foreign Assets Control (OFAC)?

Transactions with countries subject to boycotts, trade sanctions and embargoes and with individuals identified on the Specially Designated Nationals and Blocked Persons List (SDN): <http://www.treas.gov/offices/enforcement/ofac/>

What happens if we violate the export control laws?

The consequences for noncompliance are very serious for both the University and the researcher. Penalties may include fines up to \$1,000,000 and, for individual researchers, imprisonment up to 10 years. These penalties apply to single violations; multiple violations from the same transaction can easily result in enormous penalties. Sanctions on both individuals and institutions may also include termination of export privileges, suspension/debarment from federal government contracting, and loss of federal funding.

Are there any exclusions from or exceptions to the export control requirements?

Yes, there are exclusions from or exceptions. These include:

- (1) Fundamental Research Exclusion – applies to the products, but not the underlying data or documents, of basic and applied research in science and engineering performed by universities as long as the resulting information is ordinarily published and shared broadly within the scientific community.

- (2) Educational Information – information commonly taught for instruction in courses and associated with general scientific, mathematical, or engineering principles
- (3) Publicly Available – information generally accessible to the public, such as information in libraries, bookstores, open seminars, and published patent information. However, the State Department has determined that information contained on internet sites is not necessarily considered to be in the public domain.

How can we lose the “fundamental research” exclusion?

- Accept restrictions on publication or release of information
- Allow sponsor approval rights on publications
- Limit access of foreign nationals to research
- Enter into Non-Disclosure Agreements (NDAs) that limit disclosure of information
- PIs accept “side deals” directly with a sponsor

How can export controls affect my research?

“Export” is defined not only as a physical transfer or disclosure of an item outside the U.S., but also as a transfer or disclosure in any form of a controlled item or information within the U.S. to anyone who is a foreign national (not a U.S. citizen or permanent resident). This is called the “deemed export” rule. As a result, unless an exclusion or exception is available, the University is required to obtain prior governmental approval in the form of an export license before allowing the participation of foreign national faculty, staff, or students in affected research.

In addition to affecting who may participate in the research project, export controls may affect research by requiring licenses in the following situations, among others:

- Presentation or discussion of previously unpublished research at conferences and meetings where foreign national scholars may be in attendance
- Research collaborations with foreign nationals and technical exchange programs
- Transfers of research equipment abroad
- Visits to your lab by foreign scholars

What kinds of projects raise export control questions?

Any activity regardless of funding type may be subject to export controls if it involves the actual export or “deemed” export of any item that is either “**dual use**” (commercial in nature with possible military application) or **inherently military**.

Work in the following areas is considered high risk:

- Engineering
- Space sciences
- Computer Science

- Research with encrypted software
- Research with controlled chemicals, biological agents, and toxins

In addition, any of the following raise export control questions for your project regardless of the area of research:

Sponsor restrictions on the participation of foreign nationals in the research

- Sponsor restrictions on the publication or disclosure of the research results
- Indications from the sponsor or others that export-controlled items, including information or technology, will be furnished for use in the research
- The physical export of controlled goods or technology is expected

What do I need to do as a Principal Investigator?

The PI needs to read and understand the University's Export Control Policy. You need to educate yourself about export controls. You don't have to become an expert, but you need to have a fundamental understanding of the subject to be able to know when to raise questions and alert University Officials to a possible export controls issue.

What resources are available to ensure compliance with export control regulations?

Office of Research Services will provide periodic trainings and seminars on export control regulations. ORS staff will closely monitor RFPs, proposals, award documents and other agreements to highlight potential export control issues. The University has registered for an online tool called Visual Compliance that will provide updated information on export control regulations and will assist in determining if items are controlled. As necessary, ORS staff will work with PIs to complete Technology Control Plans (TCPs) or License requests.

What is a Technology Control Plan (TCP)?

A project-specific plan that establishes procedures to secure controlled items, including technology and information, from use and observation by unlicensed non-U.S. citizens and is signed by the PI and approved by officials in the attached TCP form with final approval by the Senior Vice President.

Does a sponsoring agency have the authority to waive export control requirements?

No. Waivers of export control requirements are provided for in the regulations as either "exemptions" (ITAR) or "exceptions" (EAR), but they must be authorized by either the Department of State (for ITAR) or the Department of Commerce (for EAR). No other federal agency has the authority to waive the export control regulations on behalf of State or Commerce.

May a foreign national use the equipment in my lab if the “fundamental research” exclusion applies to my research?

Not necessarily. The transfer of controlled technology or source code of a controlled item may require a license even if the normal operation of the equipment does not.

What do I need to keep in mind if I travel abroad?

Taking equipment, such as laptops, abroad may require a license for controlled technology loaded on the computer. Financial transactions and information exchanges may be restricted.

Attachment A

Part I

TECHNOLOGY CONTROL PLAN

(TCP)

Purpose

Middle Tennessee State University is committed to compliance with export control laws. The Principal Investigator (PI) of an export controlled Sponsored Project shall be responsible for complying with applicable export control regulations, and preparing and implementing a project-specific TCP. The finalized TCP shall be reviewed by the University Designated Official for export controls and approved by the University officials with the final approval by the Senior Vice President. The individual responsible for and committed to ensuring compliance with this TCP is *(insert name of PI)*.

This TCP will establish procedures to be followed during the course of Sponsored Projects subject to International Traffic in Arms Regulations (ITAR), Export Administration Regulations (EAR), Office of Foreign Asset Control Regulations (OFAC) and other applicable export control regulations.

1. Responsible Person(s):

2. Department(s):

3. Background and Description of the Use of Controlled Items and Information

(PI to insert information here)

4. Physical Security

(PI to insert description of how equipment, technology, data, and other controlled information will be shielded from unauthorized persons—including descriptions of relevant security systems, and other types of building access restrictions).

5. Information Security

In compliance with export control laws, Middle Tennessee State University researchers are to ensure that sensitive digital research data are appropriately protected. All project data and other related digital materials will be strongly password-protected and encrypted using commercially available encryption technology. The computer(s) on which this data will be stored shall not be connected to any networks. When this computer has reached its usable life, the hard drive will be forensically erased or destroyed using hard drive destruction services.

(PI to insert an outline of additional measures that will be taken to ensure that information access controls will be utilized and the requirements are being met. This should include the use of passwords and encryption protection. Data discard procedures should also be included, as well as other plans for controlling access to information. These procedures should address system backup, who will have access, transmission procedures, how computers storing sensitive digital data will be sanitized upon completion of the project, and other procedures necessary to provide the required security. Due to their portable nature, the use of laptops for storage of research data must be justified and will require additional security procedures.)

6. Personnel Screening

The names and nationalities of all personnel with access to the controlled technology shall be listed.

(PI to insert this information, including the proof obtained to verify US citizenship status)

7. Training and Awareness

All personnel with access to controlled information on this project must read and sign the “Briefing and Certification on the Handling of Export-Controlled Information” certification.

(PI to attach all executed Certifications to this TCP).

8. Compliance Assessment

As a critical component to the University’s ongoing compliance monitoring, self-evaluation is an internal assessment process whereby procedures are continually reviewed and findings are reported to the Designated Official. Any changes to the approved procedures or personnel having access to controlled information covered under this TCP must be cleared with the Designated Official.

9. Project Termination

Security measures as deemed appropriate will remain in effect after the project has ended in order to protect the export-controlled information unless the project has been terminated and the information has been destroyed or has been determined to no longer be export-controlled.

Principal Investigator Date

Department Chair Date

Academic Dean Date

Vice Provost for Research Date

Senior Vice President Date

Part II

Briefing and Certification on The Handling of Export-Controlled Information

This project involves the use of Export-Controlled Information. As a result, the project implicates either the International Traffic in Arms Regulations (ITAR) under the jurisdiction of the Department of State, the Export Administration Regulations (EAR) under the jurisdiction of the Department of Commerce, or the regulations of the Office of Foreign Asset Control (OFAC) under the jurisdiction of the Department of Treasury.

It is unlawful under ITAR to send or take export-controlled information out of the United States, **OR** to disclose or transfer, either orally or visually, export-controlled information to a foreign person *inside or outside* the United States, without proper authorization from the Federal government. Under ITAR and EAR, a license may be required for foreign nationals to access export-controlled information. A foreign person is a person who is not a United States citizen or permanent resident alien of the U.S. *The laws make no exceptions for foreign graduate students.*

In general, export-controlled information means activities, items, and information related to the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, operation, modification, demilitarization, destruction, processing, or use of items with a capacity for military application. It does not matter if the actual *intended* end use of export-controlled information is military or civil in nature.

Researchers may be held personally liable for violations of the U.S. export control laws. Both civil and criminal penalties, including incarceration, may be imposed for unlawful export and disclosure of export-controlled information. As a result, extra caution is required when sharing export-controlled technology with others. All technology generated from this project, including technical information, data, materials, software and hardware, must be secured from use and observation by unlicensed, non-U.S. citizens (including students).

Certification:

I hereby certify that I have read and understand this Briefing, and that I understand and agree to follow the procedures outlined in the Technology Control Plan. I understand that I could be held personally liable if I unlawfully disclose, regardless of form or format, export-controlled information to unauthorized persons.

STET Date

Attachment B

Self-Assessment Guide

Periodically throughout the course of the research, the PI and key personnel on the project should review the procedures, terms, and direction of the research to verify that they remain in compliance with the Export Control Laws. The PI should consider the following questions:

- | Yes | No | |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | Has the sponsor issued a modification to the terms and conditions of the award that affect publication of the research results? |
| <input type="checkbox"/> | <input type="checkbox"/> | Has the sponsor issued a modification to the terms and conditions of the award that affect the involvement of foreign nationals to the project? |
| <input type="checkbox"/> | <input type="checkbox"/> | Has the research project evolved to now include technology or devices for use in military, security, or intelligence activities? |
| <input type="checkbox"/> | <input type="checkbox"/> | Has the research project evolved to now include technology or data with a substantial or dual-use military application? |
| <input type="checkbox"/> | <input type="checkbox"/> | Are there currently foreign nationals working on the research project? |
| <input type="checkbox"/> | <input type="checkbox"/> | Have any new members joined the research team since the initial TCP was prepared who have not provided proof of US citizenship or legal resident alien status? |
| <input type="checkbox"/> | <input type="checkbox"/> | Is any member of the research team collaborating with a foreign colleague in a foreign country? |
| <input type="checkbox"/> | <input type="checkbox"/> | Has any member of the research team travelled to a foreign country since the research activities began? |
| <input type="checkbox"/> | <input type="checkbox"/> | Are laptops, cell phones, or global positioning systems being used by any member of the research team specifically for this project? |

- Has encrypted technology been newly introduced to the project since the development of the TCP?
- Has any research related technology or data been emailed or shipped outside of the United States?
- Is the research being conducted in a space which is accessible by anyone other than a member of the research team?
- Has the research team deviated from the procedures outlined in the original TCP prepared for this project?
- Does the current TCP inadequately protect the research team members and the University from a violation of the federal export control regulations?

If the answer to any of the above questions is “yes,” either the TCP needs to be revised or a license is required from the appropriate Federal agency. In either event, please secure all research materials, cease research activity, and contact the University’s Designated Official for further guidance.