Sponsored Research Export Control Checklist

PI Name: _____ **College/Dept.:**_____

Project Title: _____

Sponsor Agency: _____ **Sponsor Foreign Entity**   Yes   No

Please answer the following questions to perform a preliminary evaluation of whether the project may be subject to export control regulations. Be sure to consider that the information provided below and the answers to the UTSA OSPA routing form are addressed in the proposal, award, NDA, MTA, etc.

Research Abroad

1. **Does the project involve <u>travel outside of the United States</u>?**   **Yes   No**

   a. Will you be taking any information, **technical data or technology**   **Yes   No**
   that is *<u>not</u>* widely available in the **public domain**, or *is* subject to
   export control regulations?

   If yes, please submit the [Export Control Related Activity Assessment Request](http://reeves2.it.utsa.edu/wp-content/uploads/2014/10/EC_Assessment_Request.pdf) (http://reeves2.it.utsa.edu/wp-content/uploads/2014/10/EC_Assessment_Request.pdf) to ORI for certification.

   <u>Technical Data (EAR) or Technology (ITAR)</u>: Information which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of <u>defense articles</u>. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation. Technical data includes classified information relating to defense articles and defense services, and some software may be considered technical data. *This definition does not include the controlled equipment/commodity itself, nor educational materials, basic marketing information on function, purpose or general system descriptions of defense articles contained in publicly available user manuals.* The "deemed export" rules apply to the transfer of such technical information to non-U.S. persons inside the U.S.

   <u>Public Domain/Publicly Available</u>:

   - **ITAR:** Information which is already published and generally accessible to the public is <u>not subject to ITAR</u>. Information is considered "in the public domain" if is available through books, periodicals, patents, open conferences in the U.S., websites accessible to the public with no access controls, or other public release authorized by the U.S. government, and through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community.

   - **EAR:** Items not subject to the EAR include publicly available technology and non-encryption software, such as information that is the subject of an open patent application, published in a book or periodical, released at an open conference anywhere, available on a website accessible by the public with no access controls or information that will be published. This includes submission of manuscripts to journals for consideration with the understanding that the article will be published if favorably received.

   b. Will you be taking any UTSA equipment with you?   **Yes   No**
   (Including a laptop computer, GPS, software, scientific equipment, etc.)

   If yes, please complete the [Certification of Temporary Export of UTSA Property and Review of U.S. Export Control Regulations](http://reeves2.it.utsa.edu/wp-content/uploads/2014/10/TempExport.pdf) (http://reeves2.it.utsa.edu/wp-content/uploads/2014/10/TempExport.pdf) or contact ORI at 458-4233 for further assistance.

c. Will the project involve financial payments **Yes   No**
from / to a foreign subcontract, other foreign contractual
agreement or financial support?

If yes, please submit the names of foreign individuals and / or entities to ORI for screening.

d. Will you be presenting information at an open conference or **Yes   No**
meeting held outside of the U.S.?

Note: Research information used in presentations overseas must be already in the public domain or available to the public.

2. Does the project involve collaboration (including shipping research **Yes   No**
material, sending technology / technical data, etc.) with a
Non-U.S. person or entity either while in the U.S. or abroad?

If yes, please submit the names of Non-U.S. individuals and / or entities to ORI for screening.

Note: A **non-U.S. person** is anyone who is not a U.S. citizen. A U.S. citizen is a U.S. born person, a lawful permanent resident alien of the U.S., a refugee or someone in the U.S. as a protected person. Any non- U.S. corporation, business association, partnership, trust, society or any other foreign entity or group as well as international organizations and foreign governments are considered "non-U.S. person(s)." **Non-U.S. entity** includes foreign institutions/universities, individuals with foreign citizenship outside of the United States, foreign governments, foreign associations and corporations, or foreign political parties, etc.

Export:

- Any oral, written, electronic or visual disclosure, shipment, transfer or transmission **outside** the United States to anyone, including a U.S. citizen, of any commodity, technology (information, technical data, or assistance) or software/codes.
- Any oral, written, electronic or visual disclosure, transfer or transmission to any person or entity of a controlled commodity, technology or software/codes with an intent to transfer it to a non-U.S. entity or individual, **wherever located** (even to a non-U.S. visitor, student or colleague at UTSA).
- Any transfer of these items or information to a foreign embassy or affiliate.
- Certain actions that you might not regard as an "export" in other contexts do constitute an export subject to the EAR. The release of technology to a foreign national in the United States through such means as demonstration or oral briefing is deemed an export.

a. Will you be sending or taking any research material **Yes   No**
or technology abroad? (e.g., technology, technical data,
export-controlled, biological, chemical or hazardous)

If yes, please contact OSPA Contracts & Industrial Agreements Office for information on Material Transfer Agreements at 458-6589. Please submit Export Control Related Activity Assessment Request (http://reeves2.it.utsa.edu/wp-content/uploads/2014/10/EC_Assessment_Request.pdf) to ORI for certification of export. For hazardous materials, review UTSA Procedures on Shipping Biological, Chemical and Radiological Materials (http://reeves2.it.utsa.edu/wp-content/uploads/2014/10/Shipping_Materials.pdf) and contact your department. Please contact ORI at 458-4233 for further assistance.

Note: Export controlled materials includes technology, software, and information related to the design, production, testing, maintenance, operation, modification, or use or controlled items or items with military applications. It **does not include** basic marketing information on function or purpose; information regarding general scientific, mathematical or engineering principles commonly taught in universities; or

information that is generally accessible in the public domain. Technologies, software or commodities that are subject to ITAR; proprietary, confidential or sensitive; subject to Non-Disclosure Agreements; or from the results from a project with contractual restrictions will not be exported outside of the United States.

b. Will the project involve financial transactions (payments) from / to a foreign subcontract, other foreign contractual agreement or financial support?   **Yes   No**

If yes, please submit the names of foreign individuals and / or entities to ORI for screening.

c. Will you be sharing USTA-developed, non-commercial encryption software in source code or object code?   **Yes   No**

Fundamental Research / Public Domain Exclusion

3. Is the project related to military applications in any way (e.g., funded by a defense agency directly or indirectly or somehow restricted from broad public access?   **Yes   No**

    a. Do you anticipate any UTSA international student or visiting scholar work in the project or have access to any parts of the project including data or technology?   **Yes   No**

Note: A **non-U.S. person** is anyone who is not a U.S. citizen. A U.S. citizen is a U.S. born person, a lawful permanent resident alien of the U.S., a refugee or someone in the U.S. as a protected person. Any non-U.S. corporation, business association, partnership, trust, society or any other foreign entity or group as well as international organizations and foreign governments are considered "non-U.S. person(s)."

4. Will there be any reason why you cannot publish or otherwise share the results of this project with the research community or general public?   **Yes   No**

Note: Principal Investigators should not automatically assume that the fundamental research exclusion and/or educational exclusion apply to their project. Please review contract and/or agreements for any restrictions on participation of foreign nationals and/or restrictions on publications and contact RSC/ORI if you have any questions.

Fundamental research (FR):

- As used in the export control regulations, means research in science, engineering, or mathematics, the results of which ordinarily are published and shared broadly within the research community, and for which the researchers have not accepted restrictions for proprietary or national security reasons. The fundamental research exclusion (FRE) *applies only to the information that results from Fundamental Research*, not to the transmission of material goods. Fundamental research does not cover the export of hardware, software, technical data and technology; financial dealings with prohibited parties or entities; export controlled activities like technical assistance; and other transactions that involves embargoed or sanctioned parties/ countries.
- "Technology" or "software" that arises during, or results, from fundamental research is intended to be published to the extent that the researchers are free to publish the "technology" or "software" contained in the research without restriction.
- a. University research will *not* qualify as fundamental research if (1) the institution accepts any <u>restrictions on the publication and/or access of the information resulting from the research</u>, other than limited prepublication reviews by research sponsors to prevent inadvertent divulging of proprietary information or to insure that publication will not compromise patent rights of the sponsor; or (2) the research is <u>federally</u>

funded and <u>specific access or dissemination controls</u> regarding the resulting information have been accepted by the university or the researcher.

    a. Do you anticipate any UTSA international student or visiting   **Yes**   **No**
scholar work in the project or have access to any parts of the
project including data or technology?

    <u>**Note:**</u> A <u>**non-U.S. person**</u> is anyone who is not a U.S. citizen. A U.S. citizen is a U.S. born person, a lawful permanent resident alien of the U.S., a refugee or someone in the U.S. as a protected person. Any non- U.S. corporation, business association, partnership, trust, society or any other foreign entity or group as well as international organizations and foreign governments are considered "non-U.S. person(s)."

5. Does this project involve accepting <u>confidential or proprietary</u>   **Yes**   **No**
<u>information</u> (e.g., non-Disclosure agreement or any other type
of agreement)?

Note: Principal Investigators, faculty, and staff should contact the Office of Contracts and Industrial Agreements if the research involves accepting confidential or proprietary information. PI must provide copies of agreements to the RSC.

    a. Is the information clearly identified?   **Yes**   **No**

    <u>**Note:**</u> Proprietary information must be clearly identified and marked. Contact ORI at 458-4233 for assistance.

    b. Can the information be appropriately protected?   **Yes**   **No**
    <u>**Note**</u>: Proprietary data and/or materials must be physically shielded from observation by unauthorized individuals by operating in secured spaces/work areas or during secure time blocks when observation by unauthorized persons is prevented. Contact ORI at 458-4233 for assistance.

    c. Can proprietary information be removed from research results,   **Yes**   **No**
    so that results may be freely published?

6. Does this project involve the <u>purchase or loan of equipment / technology</u>?   **Yes**   **No**

If yes, please request a letter from the vendor stating that the technology or equipment and components are not controlled by the Export Administration Regulations (Department of Commerce) or the International Traffic in Arms Regulation (Department of State). If they are controlled by the EAR, we need the Export Control Classification Number. For ITAR, we need the United States Military List number. Please notify ORI if the technology or equipment is controlled by the Export Administration Regulations (Department of Commerce) or the International Traffic in Arms Regulation (Department of State) or if you need assistance.

Export Control Overview

I. <u>**Background Export Controls**</u>

The [Export Administration Regulations (EAR)](#) and the [International Traffic in Arms Regulations (ITAR)](#) impose licensing requirements on the export, re-export, and in-country transfer of a wide variety of technologies involving items that are controlled for national security, foreign policy, and other reasons. The requirements include an obligation for U.S. persons, including corporate employers, to seek and receive a U.S. Government license before releasing in the United States to foreign persons, including foreign person employees, from certain countries various types of technology controlled by these regulations. This obligation is often informally referred to by the Commerce Department as the "deemed export" rule because releases of controlled technology to foreign persons in the United States are "deemed" to be an export to the person's country or countries of nationality.

To know whether such a license is required, one must first determine if the technology / technical data to be released to the foreign person is (a) controlled by either the EAR or the ITAR and (b) if so, whether the EAR or the ITAR requires a license to export or otherwise release it to the Non-U.S. person's country or countries of nationality. A non-U.S. person means any person who is not a U.S. citizen, or a lawful permanent resident as defined by 8 U.S.C. 1101(a) (20) ("i.e. green card holder), or who is not a protected individual as defined by 8 U.S.C. 1324(a) (3) (i.e. person granted political asylum). It also means any foreign corporation, business association, partnership, trust, society or any other entity or group that is not incorporated or organized to do business in the United States, as well as international organizations, foreign governments, and any agency or subdivision of foreign governments (e.g. diplomatic missions).

In addition prior authorization may be required before conducting activities/transaction if the person or entities are listed on the U.S. Government Restricted Parties Lists, including the U.S. Commerce Department's Entity List, Denied Parties List, and Unverified List, the Treasury Department List of Specially Designated Nationals, and the State Department's List of Statutorily Debarred Parties and list of foreign entities subject to nonproliferation sanctions.

The Commerce Department's [Bureau of Industry of Security (BIS)](#), which administers the EAR, has published guidance to help persons in the United States determine if the EAR requires as license to release technology in the United States to foreign persons and, if so, how to apply for such a license. The State Department's [Directorate of Defense Trade Controls (DDTC)](#) which administers the ITAR, has published guidance to help persons in the United States determine if the ITAR requires a license to release technology - or "technical data" - in the United States to foreign persons and, if so, how to apply for such a license.

Both the ITAR and the EAR control different types of technology and technical data, have different licensing requirements, and define foreign persons differently. As described in more detail on the BIS and DDTC websites,

- The EAR generally controls on its Commerce Control List (CCL) "dual use" technology that has both commercial and significant military applications. The ITAR generally controls on its U.S. Munitions List (USML) "technical data" that is directly related to defense articles or commercial satellites or spacecraft.
- The EAR's licensing requirements vary depending upon the reasons (e.g., national security or foreign policy) why a technology is controlled. The ITAR's licensing requirements generally apply equally worldwide and have a larger list of countries to which USML-controlled technical data may not be exported.
- BIS looks to a foreign person's most recent country of citizenship or nationality when determining the licensing requirements for technology subject to the EAR that are or are not applicable to the foreign person. DDTC requires that all foreign persons, regardless of nationality, in the United States be licensed prior to disclosure, whether oral or visual, to USML controlled technical data.

II. "Published" Technology and "Publicly Available" Technical Data ARE Not Subject to the EAR or the ITAR

The EAR and the ITAR do not control, respectively, "technology" or "technical data" that the regulations define as "publicly available" or in the "public domain." Thus, the EAR and the ITAR do not require licenses to allow a foreign person to receive publicly available or public domain information, regardless of content. If the only technology or technical data the petitioner/employer would release to the foreign person beneficiary at issue in the petition falls within the scope of these definitions, then the petitioner would not need a license from either the BIS or DDTC to release the technology or technical data to the foreign person. The following is a summary of these provisions with citations to the relevant EAR and ITAR provisions. They are a guide to help you navigate the relevant provisions of the EAR and the ITAR. They are not a substitute for reviewing the potentially relevant provisions of the EAR or the ITAR.

A. EAR

According to EAR section 734.3(b) (3), "technology," as defined in the EAR, is "publicly available," and thus not subject to the EAR. Thus, it:

1. Is "already published or will be published," as described in EAR section 734.7;
2. "Arise[s] during, or result[s] from, fundamental research," as described in EAR section 734.8;
3. Is "educational," as described in EAR section 734.9; or
4. Is "included in certain patent applications," as described in EAR section 734.10.

B. ITAR

According to ITAR section 120.10(a) (5), information otherwise within the scope of the ITAR's definition of "technical data" is not subject to the ITAR if it is:

1. "information in the public domain as defined in [ITAR] § 120.11;"
2. "information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities;" or
3. "basic marketing information on function or purpose or general system descriptions of defense articles."

If information that is otherwise within the definitions of EAR-controlled technology or ITAR controlled technical data is not within the scope of any of these provisions, then one must review the applicable regulations to determine whether its release to the foreign person beneficiary requires a license.

III. Important Definitions

Educational Information Exclusion: No license is required to share with foreign persons "information concerning general scientific, mathematical or engineering principles commonly taught in universities or information in the public domain."

Publicly Available and Public Domain:

The "**public domain**"/ "**publicly available**" exclusions apply if the information is in the public domain and is generally accessible to the public through unrestricted distribution (15 CFR 734.3(b) (3) under the EAR; 22 C.F.R. § 120.11 under the ITAR). Public domain information (ITAR) and publicly available information and software (EAR) is published and generally accessible or available to the public through:

- Publication in periodicals or books, print, electronic, or any other media available for general distribution to any members of the public;
- Subscriptions that are available without restriction to any individual who desires to obtain or purchase the published information;

6

- Websites available to the public free of charge or at a cost that does not exceed the cost of reproduction or distribution;
- Libraries open to the public, including most university libraries;
- Patents and open (published) patent applications;
- Release at an "open" conference, meeting, seminar, trade show or other open gathering in the U.S. (ITAR) or anywhere (EAR), which is generally accessible by the public for a fee reasonably related to the cost and where attendees may take notes and leave with notes;
- Educational information (see below), or
- Fundamental research (see below)

Educational Information Exclusion:

- "Educational information" is that information released by instruction in catalog courses and associated teaching laboratories of academic institutions.

Fundamental Research Exclusion: No license is required to disclose to non-U.S. persons information that is "published and which is generally accessible or available to the public through fundamental research in science and engineering at universities where the resulting information is ordinarily published and shared broadly in the scientific community."

If the research falls under the Fundamental Research Exclusion, there would be no further concern about the need for an export license. The Fundamental Research Exclusion also does not cover export controlled confidential information provided by a 3rd party (i.e. sponsor), or government- provided technologies that are controlled for security purposes.

The fundamental research exemption will not apply if the university accepts any restrictions on the publication of resulting information, other than a brief (~90 day) advance review by sponsors to:

- Prevent divulging propriety information provided to the investigator by the sponsor
- Ensure that publication will not compromise patent rights of the sponsor

Fundamental Research Exclusion is forfeited by any clause (regardless of sponsorship - federal, state, private, nonprofit, etc.) that:

- Gives the sponsor the right to approve publications
- Restricts participation of foreign nationals in conduct of research by precluding access to research results
- Otherwise operates to restrict participation in research and/or access to and disclosure of research results.

"Side deals" between a researcher and a sponsor destroy the Fundamental Research Exclusion and may also violate university polices on openness in research. A "side deal" may occur where the researcher enters into a private agreement with a sponsor that they will conduct their research project in a manner which will permit the sponsor the right to approve a publication and/or to restrict foreign nationals on a research project to comply with the sponsor's requirements.

It is also important to note that The Fundamental Research Exclusion applies only to the dissemination of research data and information, not to the transmission of material goods. Shipment of material goods or taking material goods/equipment outside of the United States is considered an "export," and may require a license under the law. If a license is required to ship a physical item to a foreign country and not obtained prior to such shipment, the exporter risks both criminal and civil penalties.

The important message: Research that is subject to restrictions in access, dissemination, or participation does not qualify as fundamental research!