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Export Controls I Overview of Risks

UC Compliance & Audit
Symposium

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Overview


- Export control regulatory framework
- Important terms
- Fundamental research exclusion
- Other important topics
- Risk areas and gate keepers
- Final thoughts and resources...

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Why is it important?

- Export controls are federal regulations that apply to all US persons and entities.
- Violations can result in criminal and civil penalties.

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AGENCY: U.S. Department of Commerce, Bureau of Industry and Security (BIS)
 Regulations: Export Administration Regulations (EAR)

- Commerce Control List (CCL)
- Denied Persons List
- Entity List

0 - Nuclear Materials, Facilities and Equipment and Misc.
 1 - Materials, Chemicals, Microorganisms and Toxins
 2 - Materials Processing
 3 - Electronics
 4 - Computers
 5 - Telecommunications and Information Security
 6 - Lasers and Sensors
 7 - Navigation and Avionics
 8 - Marine
 9 - Propulsion Systems, Space Vehicles and Related Equipment

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AGENCY: U.S. Department of the Treasury, Office of Foreign Assets Control (OFAC)

- Sanctions programs
- Specially Designated Nationals List

o Balkans, Belarus, Burma, Cote d'Ivoire, **Cuba**, Democratic Republic of the Congo, **Iran**, Iraq, Former Liberian Regime of Charles Taylor, **North Korea**, **Sudan**, **Syria**, and Zimbabwe

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Export Enforcement Agencies

- Federal Bureau of Investigation
- Immigration & Customs Enforcement
- Department of Commerce
- Air Force Office of Special Investigations
- Defense Criminal Investigative Services
- Naval Criminal Investigative Services
- Alcohol, Tabaco & Firearms
- United States Secret Service
- Customs & Border Protection
- Drug Enforcement Agency
- Intelligence Agencies (CIA, DIA, NSA, etc.)
- Army Criminal Investigation Command
- Others too

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Important Terms

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What is an Export?

Exports happen in many ways

- UPS, mail, freight forwarder
- hand carried on airplane, in luggage
- fax, phone and email
- “deemed” export



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Examples of Exports

- A U.S. citizen instant messages a South Korean national working together in New York City about technical drawings for items controlled under U.S. export regulations.
- A U.S. employee emails to India Software updates necessary to operate an item controlled under U.S. export regulations.
- A professor at Harvard University lectures in China on her research relating to a project with technology controlled under U.S. export regulations.

What is a Deemed Export (EAR)?

Any release of technology or source code subject to the EAR to a foreign national. Such release is deemed to be an export to the home country or countries of the foreign national.



What is Technology and Technical Data?

Technology (EAR):

- Specific information necessary for the "development", "production", or "use" of a product. (See part 772 of the EAR)

Technical Data (ITAR):

- Information, other than software as defined in §120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation. (See part 120.10 of the ITAR)

What is a Foreign National?

Foreign National
<ul style="list-style-type: none"> • Any person not a U.S. citizen or legal permanent resident (green card holder) • Any person not granted political asylum • Any U.S. Person employed or representing a foreign entity

Foreign Entity
<ul style="list-style-type: none"> • Any partnership or group not incorporated or organized to do business in the U.S. • Any foreign government

What is a Defense Service (ITAR)?

The **furnishing of assistance** (including training) to foreign persons, whether in the United States or abroad in the **design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles.** (See [120.9 of the ITAR](#)).



What is a Defense Article (ITAR)?

- Hardware, software and technical data specifically designed, developed, configured, adapted or modified for a military application, and
- Does not have predominant civilian applications, and
- Does not have a performance equivalent (defined by form, fit or function) to those of an article or service used for civil applications; or Is specifically designed, developed, configured, adapted or modified for a military application, and has significant military or intelligence applicability such that control is necessary



ITAR Includes

- Commodities and technologies that have **predominant military use or space application;**
- Items that started out as having civil application but were later **adapted or modified for military application;**
- Dual-Use items that contain or use ITAR controlled articles/technology, i.e., “see through rule”



Collaboration with Sanctioned Countries (OFAC)

The most restrictive sanctions programs (Cuba, Iran, North Korea, Sudan and Syria) prohibit U.S. Persons from:

- A broad range of services and transactions that benefit or provide value.
- Export of products, software, and transfer of technical data.
- Providing educational services and technical services, even where no monetary compensation occurs.



U.S. Persons:

- Any person within the U.S.
- Any U.S. citizen or permanent resident alien, wherever physically located
- Any entity or institution organized under U.S. law, including foreign branches

Licenses can be obtained from OFAC on case-by-case basis, but terms must be strictly complied with.

Screening for Listed Individuals and Entities (EAR, ITAR, OFAC)

All three government agencies maintain lists of individuals and entities both in the U.S. and abroad that have committed export violations or other offenses.

- Financial dealings or export transactions with Restricted or Prohibited parties is *prohibited without a license*.
- Violations are subject to severe penalties and fines.

Restricted Party Screenings (RPS) recommended depending on transaction



Fundamental Research Exclusion

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Fundamental Research Exclusion (FRE) From NSDD-189

Fundamental research is "**basic and applied research** in science and engineering where the resulting information is ordinarily **published** and **shared broadly** within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls."



Publish



Share broadly

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November 1, 2001

Dr. Harold Brown
Co-Chairman
Center for Strategic & International Studies
1800 K Street, N.W.
Washington, D.C. 20006

NSDD-189

Dear Dr. Brown:

Thank you for conveying the concerns of the Council on the Future of Technology and Public Policy regarding export controls and fundamental research. On behalf of the President, I would like to respond to your comments on this matter.

The key to maintaining U.S. technological preeminence is to encourage open and collaborative basic research. The linkage between the free exchange of ideas and scientific innovation, prosperity, and U.S. national security is undeniable. This linkage is especially true as our armed forces depend less and less on internal research and development for the innovations they need to maintain the military superiority of the United States. In the context of broad-based review of our technology transfer controls that will begin this year, this Administration will review and update as appropriate the export control policies that affect basic research in the United States. In the interim, the policy on the transfer of scientific, technical, and engineering information set forth in NSDD-189 shall remain in effect, and we will ensure that this policy is followed.

Again, thank you for your views on this important matter. I hope that we will be able to draw upon the Council's expertise as we review this issue in the coming months.

Sincerely,
Condoleezza Rice, Assistant to the President for National Security Affairs

<http://www.fas.org/rp/offdocs/nsdd/nsdd-189.htm>

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What is published information (EAR) or in the public domain (ITAR)?

Information generally accessible to the public through:

- publication in periodicals, books, print, electronic, or other media available for general distribution (including websites that provide free uncontrolled access) or to a community of persons interested in the subject matter, such as those in a scientific or engineering discipline, either free or at a price that does not exceed the cost of reproduction and distribution;
- readily available at libraries open to the public or at university libraries;
- patents and published patent applications available at any patent office;
- general descriptions/marketing material relating to function/purpose of defense article (ITAR);
- release at an open conference, meeting, seminar, trade show, or other open gathering held in the U.S. (under ITAR) or anywhere (under EAR).

A conference or gathering is "open" if all technically qualified members of the public are eligible to attend and attendees are permitted to take notes or otherwise make a personal record of the proceedings and presentations.

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Using the FRE

To preserve the FRE no restrictions can be accepted from a sponsor that:

- directly or indirectly prohibit dissemination or publication of research results, or
- mandate foreign national restrictions as to who can access research

Except for:

- Limited pre-publication review by sponsors within a reasonable timeframe but

Only to:

- prevent inadvertent divulgence of proprietary information or government classified information (as having been mutually defined) and provided by the sponsor, or
- to ensure that pre-defined proprietary content will not compromise the sponsor's patent rights

Note publication restrictions and foreign national restrictions can be found in funding opportunities as well as research agreements. Be proactive.


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Other Reasons a Project May Be Controlled

The research

- Involves the use of ITAR equipment, materials or technical data
- Has an exclusive military or spacecraft (regulations currently changing) end-use
- Involves the receipt of ITAR or EAR export controlled technology


The faculty member agreed to restrictions on publication or foreign national access "on the side".

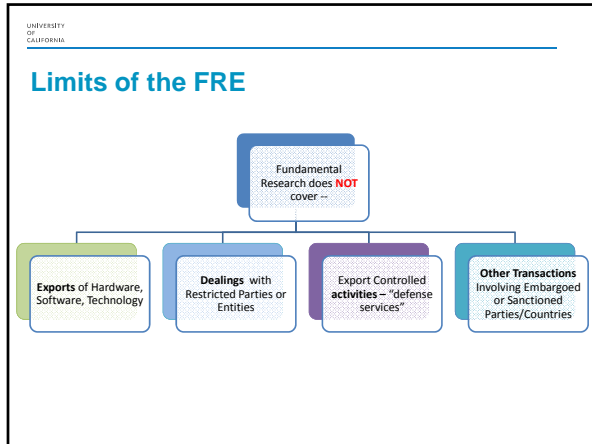


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Specific examples of technologies likely to trigger export controls or discussion of export controls

- Materials science
 - Materials used on airplanes, rockets, space vehicles that need a certain hardness or need to withstand high heat
 - Paints
- Computer science
 - Artificial intelligence
- Engineering
 - Combustion related to rocket fuel
 - Sensors
- Optics
 - Mirrors





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Export Licenses

When it is determined a license is required:

- EAR
 - Campus would apply for export license
- OFAC
 - Campus would apply for export license
- ITAR
 - UCOP would apply for export license

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Use License Exception TMP (Tools of Trade) for EAR related exports

- Applies to usual and reasonable kinds/quantities of tools (commodities/software) for use by exporter.
- Must remain under effective control exporter or exporter's employee (physical possession, locked in safe, guarded).
- Must accompany exporter when traveling or be shipped within one month before departure or any time after departure, and be returned no later than one year post export.

Does not apply to:

- Satellite or space-related equipment, components, or software
- Exports related to nuclear activities except for a limited number of countries
- Technology associated with high-level encryption
- Travel to Iran, Syria, Cuba, North Korea, or Sudan
- Anything regulated by the Department of State's International Traffic in Arms Regulations (ITAR)

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Other Important Topics

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Export Control Issues Related to Travel Abroad

- Taking certain items outside the US might require a license, for example:
 - Laptops
 - Cell phones
 - Data, technology
 - Blueprints, schematics



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Record Keeping

- Export Administration Regulations (EAR) Part 762
 - Recordkeeping
- International Traffic in Arms Regulations (ITAR)
 - Maintenance of Records by Registrants (122.5),
 - Recordkeeping requirement for exemptions (123.26)
- **Records must be kept for five years**



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Risk Areas and Gate Keepers

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Risk Areas

- Deemed Exports
- Shipping, physical exports by any means
- Restricted party screening
- Travel
- Sanctioned country issues

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Gate Keepers

Gate Keeper Responsibilities: Sample activities that may involve export issues

Activity	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party
Restricting Research, Funding, Grants, Deemed Exports and Controls	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party
Shipping, Physical Exports to any means	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party
Restricting party screening	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party
Travel	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party
Restricting deemed exports	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party	Responsible Party

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Best Practices - Export Control Compliance Program

- Build Relationships with Potentially High Risk Areas
 - Shipping
 - Procurement
 - Sponsored Research & Tech Transfer
 - Key Departments
- Develop Processes, Tools and Templates
 - Checklists/Processes
 - Technology Control Plans
 - A file licenses
 - Documentation/Record Keeping
- Website for communication
- Training
 - Administrators, faculty, other units



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Resources

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Acronyms

AECA	Arms Export Controls Act	OFAC	Office of Foreign Assets Control
AES	Automated Export System	RFP	Request for Proposals
BIS	Bureau of Industry and Security	RPS	Restricted Parties Screening
CCL	Commerce Control List	SDN	Specialty Designated National
CDA	Confidential Disclosure Agreement	USML	US Munitions List
DFARS	Defense Federal Acquisitions Regulations System		
DDTC	Directorate of Defense Trade Controls		
EAR99	Subject to the EAR but not listed in the CCL		
EEL	Electronic Export Information		
EAR	Export Administration Regulations		
ECCN	Export Control Classification Number		
FARS	Federal Acquisitions Regulations System		
FRE	Fundamental Research Exclusion		
ICE	Immigration Custom Enforcement		
IEPPA	International Emergency Economic Powers Act		
ITAR	International Traffic in Arms Regulations		
NLR	No License Required		
NDA	Non-disclosure Agreement		
MTA	Material Transfer Agreement		

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Export Laws and Regulations

- Department of State: International Traffic in Arms Regulations (ITAR) <http://www.treas.gov/offices/enforcement/ofac/>
- Department of Commerce, Bureau of Industry & Security (BIS): Export Administration Regulations (EAR) http://www.access.gpo.gov/bis/ear/ear_data.html
- Department of the Treasury, Office of Financial and Asset Controls (OFAC) <http://www.treas.gov/offices/enforcement/ofac/>
- U.S. Customs Regulations
Imports -- Harmonized Tariff Code (HTS #) <http://www.usitc.gov/tata/hts/bychapter/index.htm>
Schedule B (US Census) <http://www.census.gov/>

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Training and Updates

BIS Online Training
<http://www.bis.doc.gov/seminarsandtraining/webinars.htm>

Export Control Reform News
http://www.bis.doc.gov/export_control_reform.htm

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Export Compliance Program

BIS Elements of an Effective Compliance Program
http://www.bis.doc.gov/complianceandenforcement/emcp_core_compliance.htm

BIS Export Management and Compliance Program Tools Website
<http://www.bis.doc.gov/complianceandenforcement/emcp.htm>

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May 24, 2010

Memorandum on Fundamental Research from Ashton Carter, Undersecretary of Defense

- Provides clarifying guidance to DOD Program Officers and Contracting Officers to ensure that fundamental research efforts remain unrestricted, including subcontracted unclassified fundamental research.
- “Unclassified contracted fundamental research awards should not be structured, managed or executed in such a manner that they become subject to controls under U.S. statutes and regulations, including U.S. export control laws and regulations.”

<http://www.fas.org/irp/doddir/dod/research.pdf>

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