

# *Export Controls 101*

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Parts of this presentation are based on similar presentations developed by Susan W. Sedwick (University of Oklahoma and University of Texas at Austin) and Erica Kropp (University of Maryland).



# Office for Research Integrity and Compliance

## Export Controls

### What is an Export?

Physical shipment of goods or items;

Electronic or digital transmission of goods or items;

Release of specific technical data to any foreign national;

Access by a foreign national of any covered technology.



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## Export Controls

### What are Export Controls?

US laws and regulations that govern the distribution to foreign nationals and foreign countries of strategically important products, services and information for reasons of foreign policy and national security.



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## Export Controls

### Purpose of the Regulations:

Implement foreign policy goals and objectives;

Prevent terrorism;

Restrict exports of goods and technology that could contribute to U.S. adversaries' military potential;

Restrict exports of goods and technology that could damage the vitality and critical interests of the U.S. economy;

Prevent proliferation of weapons of mass destruction (chemical, biological, nuclear).



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## Export Controls

### Federal Agencies with Oversight of Export Control

#### Laws:

Department of State – International Traffic in Arms –(ITAR) - technologies with inherently military properties;

Department of Commerce – Export Administration Regulations (EAR) – technologies with “dual uses” but primarily commercial;

Department of the Treasury – Office of Foreign Asset Control (OFAC) – prohibits transactions of value with certain countries and individuals.



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## Export Controls

<u>Commerce Department</u>	<u>State Department</u>	<u>Treasury Department</u>
Export Administration Act	Arms Export Control Act	Trading with the Enemy Act, Int'l Emergency Economic Powers Act, & Others
Export Administration Regulations ("EAR") 15 C.F.R. Parts 700-799	International Traffic in Arms Regulations ("ITAR") 22 C.F.R. Parts 120-130	Iraq Sanctions Regulations, Terrorism Sanctions Regulations, & Others 31 C.F.R. Parts 500-599
Commerce Control List	U.S. Munitions List	List of Specially Designated Nationals & Blocked Persons



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## Export Controls

### Department of Treasury, Office of Foreign Assets Control (OFAC):

Economic sanctions focus on end-user or country rather than the technology and may limit transfer of technology/assistance to OFAC's list of sanctioned countries

Prohibitions on trade with countries such as Iran and Cuba

Limitations on activities in certain areas of countries or with certain non-state actors

OFAC prohibits payments or providing "value" to nationals of sanctioned countries and to specified entities even if the country is not subject to sanctions (ex. Baathists in Iraq).



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## Export Controls

### Differences Between ITAR and EAR:

#### ITAR:

Covers military items (munitions/defense articles);

Includes most space related technologies due to application to missile technology;

Includes technical data related to defense articles and services (furnishing technical assistance including design, engineering and use of defense articles);

Very strict, not much latitude, few exemptions.





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## Export Controls

### Differences Between ITAR and EAR:

#### EAR:

Regulates “dual use” items = 10 CCL categories of different technologies (equipment [including test equipment], tests, materials, software and technology);

Regulates items designed for commercial purposes but that can have military applications (computers, pathogens, civilian aircraft, etc.);

Covers goods, test equipment, materials and the technology (technical data and technical assistance) and software;

Covers “re-export” of foreign commodities incorporating U.S. origin controlled items outside the U.S.;

DOC easier to work with—more exemptions available.



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## Export Controls

### Deemed Exports:

Export controls cover transfers of goods and technology within the U.S. to a foreign national who is not a U.S. citizen or permanent resident (“green card” holder);

Applies to technology transfers under the EAR and ITAR’s technical data and defense services;



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## Export Controls

### Deemed Exports:

Applies to research assistants, students, visiting foreign researchers, U.S. citizens visiting a foreign country;

Does not apply to U.S. citizens or permanent residents (“green card”);



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## Export Controls

**No effect on 90+% of university research since most is fundamental (i.e. basic) research.**

**But there are potential impacts ...**



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## Export Controls

There are potential impacts on:

Sharing of data, materials, and software;

Classroom lectures;

Collaborations/discussions with professional colleagues;

Ability of foreign students to participate in research involving a controlled technology (mostly under ITAR);

Ability to provide services (including training in the use of controlled equipment) to foreign nationals (ITAR, EAR, OFAC);

Ability to send controlled equipment to foreign countries (ITAR, EAR, and OFAC).



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## Export Controls

### Dissemination of Information

Laws and regulations prohibit the disclosure without a license from Commerce or State of controlled technical information by any method to a foreign national in the U.S. or abroad.

Methods of disclosure include:

Fax Telephone discussions, e-mail communications, computer data disclosure, face-to-face discussion, training sessions, tours which involve visual inspections....



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## Export Controls

License Requirement for Dissemination of Information Does Not Apply If One of 4 exclusions applies:

Public Domain Exclusion (ITAR, EAR)\*

Education Exclusion (ITAR, EAR)

Fundamental Research Exclusion (ITAR, EAR)\*

Employment Exclusion (ITAR only)

\*Under the ITAR, the Fundamental Research Exclusion is a subset of the Public Domain Exclusion.



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## Export Controls

### Public Domain Exclusion (ITAR, EAR):

Export controls do not apply to information and research results already published and publicly available from:

Libraries, bookstores, or newsstands;

Trade shows, meetings, seminars in the U.S. open to the public;

Published in certain patent applications;

Websites accessible to the public;

Courses listed in a university catalog of a general nature.





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## Export Controls

### Education Exclusion (ITAR, EAR):

ITAR: No license is required to share with foreign nationals “information concerning general scientific, mathematical or engineering principles commonly taught in universities or information in the public domain” .

EAR is similar but pertain to materials included in courses found in the course catalogs of accredited institutions.

Students using controlled equipment to conduct research should be registered for a research credit class



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## Export Controls

### Fundamental Research Exclusion (ITAR, EAR):

No license is required to disclose to foreign nationals information which is “published and which is generally accessible or available to the public [through, for example] fundamental research in science and engineering at universities where the resulting information is *ordinarily published and shared broadly in the scientific community.*”

**NOTE:** ITAR states “published” rather than “ordinarily published.”

Source: NSDD 189



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## Export Controls

### Fundamental Research Exclusion (ITAR, EAR):

The FRE destroyed if the University accepts any contract/grant that:

Forbids the participation of foreign nationals;

Gives the sponsor a right to *approve* publications resulting from the research;  
or

Otherwise operates to forbid participation in research and/or access to and disclosure of research results

This includes “side deals” that may be made outside the terms of the award.



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## Export Controls

### Employment Exclusion (ITAR):

No license is required to share covered technical data with a foreign national who:

- Is not a national of a prohibited country;

- Is a full-time, bona fide university employee;

- Has a permanent address in the US while employed;

- Agrees in writing not to share covered technical data with other foreign nationals.



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## Export Controls

### Providing Services to Foreign Nationals/Entities:

ITAR and EAR prohibit assisting and training foreign nationals anywhere in the design, development, use, testing etc. of controlled equipment without a license from Commerce or State.

Example: fermenters having a capacity of at least 20 liters



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## Export Controls

### Providing Services to Foreign Nationals/Entities:

There are no **clear** exclusions or safe harbors from the requirement to obtain a license for foreign nationals to “use” controlled equipment, however....

It is reasonable to maintain that the Education Exclusion applies if the student uses the equipment as part of a program of instruction described in a course catalog or similar university publication.



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## Export Controls

### Providing Services to Foreign Nationals/Entities:

#### OFAC Restrictions:

OFAC prohibits the transfer of anything of value and the provision of services to countries subject to US sanction programs, boycotts, etc. without a license.

Sanctions are complicated and vary across countries.

#### Examples:

- Conducting surveys and interviews in sanctioned countries;
- Providing marketing & business services to persons in sanctioned countries.
- Creating new information materials at the behest of persons in a boycotted country;
- Engaging the services of persons in a boycotted country to develop new information materials.



# Office for Research Integrity and Compliance Export Controls

## OFAC Restrictions:

Balkans, Belarus, Burma, Cote d'Ivoire, Cuba, Iran, Liberia, North Korea, North Sudan, Syria, and Zimbabwe.

For full, up to date listing, see OFAC website:

<http://www.treas.gov/offices/enforcement/ofac/>





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## Export Controls

### Requirement of a license to ship controlled equipment out of US:

A license is required to ship equipment controlled by ITAR to any foreign country;

There are few exclusions or exceptions;

It can take months to obtain a license from State;

Notify either the Office for Research Integrity and Compliance or the Office for Sponsored Programs as early as possible.



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## Export Controls

### Requirement of a license to ship controlled equipment out of US: (cont.)

A license may be required to ship equipment out of the US under the EAR depending on whether the equipment is controlled, where it is being sent and whether an exception applies.

NOTE: A license may be required to ship software out of the US!

The process to classify equipment under the EAR can be very tedious, detailed and time consuming. **Contact ORIC early!**



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## Export Controls

### Requirement of a license to ship controlled equipment out of US: (cont.)

There is a presumption under export control laws and regulations that any and all shipments of equipment and provision of services to countries subject to US sanctions/boycotts or persons in those countries are **ILLEGAL**.



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## Export Controls

### Laptop Exclusion:

*Excluding embargoed countries*, faculty who wish to take their laptops out of the country to use in a university project that qualifies as fundamental research may be able to do so under the license exception for temporary export (TMP) if the laptop meets the requirement for "tools of trade" and is under control of the faculty member (15 CFR Part 740.9).

BUT a review must be done to ensure that the software on the laptop is not controlled,

AND the laptop must remain within the person's reasonable control – does not include, for instance, leaving the laptop in a hotel room while going out to dinner.



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## Export Controls

### Technology Control Plan:

Required for licensing;

Advisable in other situations;

Describes safeguards for protecting controlled technology:

- IT access;

- Building access;

- Data access.



# Office for Research Integrity and Compliance

## Export Controls

### Technology Control Plan:

Commitment in the form in compliance program;  
Physical security plan – badging, access, visitor logs;  
Information security plan – IT access, technical discussions, clean desk policy, data discard/return;  
Personnel screening – review of lists, background checks;  
Training and awareness;  
Self-assessment – corrective actions.



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## Export Controls

### Time Considerations:

#### Average processing times

EAR: 45 days

ITAR: 90 days

OFAC: 60-90 days (but very often much longer)

#### Validity period

EAR: 2 years

ITAR: 4 years

OFAC 1 year

Licenses include provisos and limitations.



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## Export Controls

### Post-Licensing Requirements:

Ongoing oversight;  
Self-assessment;  
Modifications;  
Recordkeeping (5 years);  
Reporting requirements.





# Office for Research Integrity and Compliance

## Export Controls

### Administrative Penalties for Noncompliance:

Termination of export privileges (EAR and ITAR);

Suspension and/or debarment from government contracting (EAR and ITAR);

Voluntary disclosure of violations serves as a “mitigating factor” in deciding penalties.



# Office for Research Integrity and Compliance

## Export Controls

### Penalties for EAR Violations/Noncompliance:

#### Criminal (willful violations):

Up to \$1 million for the University or company;

Up to \$250K per violation for *individuals* and/or up to 10 years in prison.

#### Civil:

Up to \$12k per violation for individuals and the University/corporations.



# Office for Research Integrity and Compliance

## Export Controls

### Penalties for ITAR Violations/Noncompliance:

#### Criminal (willful violations):

Up to \$1 million for the University or company;

Up to \$1 million per violation for *individuals* and/or up to 10 years in prison.

#### Civil violations:

Up to \$500k per violation for *individuals* and the University or company.



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## Export Controls

### Penalties for OFAC Violations/Noncompliance:

#### Criminal (willful) violations:

Fine of no more than \$1m for companies;

Fine of no more than \$100k for individuals (including corporate officers) and/or 10 years imprisonment.

#### Civil penalties:

Fine up to \$55k for each violation by any person.



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## Export Controls

### Red Flags:

#### Does the Project involve:

Travel to a foreign country?

Use of proprietary/confidential information?

Shipping equipment to a foreign country?

Collaborating with foreign colleagues in foreign countries?

Training foreign nationals in using equipment?

Working with a country subject to a US boycott?

Is the RFP marked "Export Controlled"?

Is the sponsor demanding pre-approval rights over publications or the participation of foreign national students ?



# Office for Research Integrity and Compliance

## Export Controls

### University/PI Responsibilities

PI should review research program for potential EAR/ITAR issues;

Classify research - find ECCN (EAR) and/or check Munitions List (ITAR);

If you are planning to hire a foreign national, check the regulations to see if a license may be required for the research;

At the award stage, the Office for Sponsored Programs will check for restrictive clauses that would eliminate the Fundamental Research Exemption.

**cont.**



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## Export Controls

### University/PI Responsibilities (cont.):

Document exemptions;

Records must be kept 5 years (license valid 2 years);

Discuss questions with the Office for Research Integrity and Compliance or the Office for Sponsored Programs BEFORE project begins to see if licenses are needed-- process can take 2-6 months or longer for EAR and ITAR licenses. OFAC licenses can easily take several months and up to a year to obtain.



# Office for Research Integrity and Compliance

## Export Controls

### Questions to Ask *Early* in the Process

1. Has the subject of export controls, publication restrictions, or restrictions on using foreign nationals on the project arisen in any form (discussions, program announcement text, etc) in connection with this proposal?
2. Will the project involve an agreement or collaboration with any foreign entity or foreign national?

**cont.**





# Office for Research Integrity and Compliance

## Export Controls

### Questions to Ask *Early* in the Process (cont.):

3. Will the project involve the shipment of equipment, materials, or data outside the U.S.?
4. Will the project involve the use of proprietary or confidential information or materials from the sponsor or any third party?



# Office for Research Integrity and Compliance Export Controls

## Roles and Responsibilities at BC

### ORIC:

- Perform Screens on:
  - physical shipments;
  - export recipients;
  - visiting scholars and foreign grad students;
  - visiting groups/tours.
- Assist attorneys in the I-129 Visa process;
- Manage license application process;
- TCPs;
- Advice and education;
- Write policies and procedures.



# Office for Research Integrity and Compliance Export Controls

## Roles and Responsibilities at BC

### OSP:

- Screen foreign collaborators, subcontractors, consultants.
- Advise researchers on foreign travel and provide general guidance.
- Negotiate sponsored agreements that preserve our Fundamental Research Exclusion.



# Office for Research Integrity and Compliance Export Controls

## Roles and Responsibilities at BC

### PIs and Departments:

- Ensure foreign travel is explained fully;
- Submit requests for export approval;
- Comply with travel advisories and regulations;
- NO SIDE DEALS on publications and hiring of foreign nationals;
- Notify ORIC **in advance** if sponsoring visiting group tours/events;
- Notify ORIC **in advance** of short informal visits by foreign collaborators;
- Cooperate with ORIC and OSP when asked questions about proposed shipments, the nature of collaborations, and foreign travel.



# Office for Research Integrity and Compliance

## Export Controls

### Questions?

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