



**ITAR / EAR BOOT
CAMP:
A Survival Guide to Export
Control Regulations**

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INTRODUCTION

- ✦ What are “export control” regulations?
- ✦ Why do we care; and what should we do?
- ✦ Today’s agenda:
 - ◆ Summary of EAR and ITAR regulations.
 - ◆ Some exceptions available to educational institutions.
 - ◆ Common contract issues and approaches.
- ✦ CAVEAT: This is just an overview, in simplified terms. We strongly advise reading the applicable regulations for any specific issues that arise.

BACKGROUND BRIEFING

✦ WHY DO WE HAVE EXPORT CONTROLS?

- ✦ National Security: Terrorism; Weapons Control.
- ✦ Trade Protection: Supply Shortages; Crime Control.

✦ WHAT'S THE EFFECT ON THE UNIVERSITY?

- ✦ Research may involve controlled items & information; or involve foreign nationals.
- ✦ Potential conflicts - University mission vs. government's security and trade concerns.

QUICK OVERVIEW - EAR

Export Administration Regulations (EAR) (15 C.F.R. § 730-774).

- ✦ **Home Agency:** Department of Commerce, Bureau of Industry & Security (BIS).
- ✦ **What it regulates:** Exports of **commercial & dual-use** (commercial & military) items and information.
- ✦ **User-Friendly Guide:** 17 CFR § 732.1

EAR:

Commerce Control List (CCL)

✦ **CCL** (15 C.F.R. § 774, Supp. 1) :

- ✦ **Dual use** items & technology subject to EAR.
- ✦ **Before exporting** them –must have a license,
- ✦ **Unless** an EAR exception applies.

✦ **EAR 99**: Other items/technology subject to EAR restrictions, *e.g.*, exports to embargoed countries; restricted end uses.

PROHIBITED COUNTRIES/USES: Terrorism/Weapons Mass Destruction

- ✦ **EAR**: Embargoed countries; Restricted Persons and Uses (17 CFR 744, 746; 764): Cuba, Iran, Iraq, Libya, N. Korea, Sudan, Syria.
- ✦ **ITAR**: Prohibited Exports & Countries (22 CFR § 126.1). Belarus, Cuba, Iran, Iraq, Libya, N. Korea, Syria, Vietnam. Others: Arms embargoes; U.N. Sanctions...Check regulations for complete list.
- ✦ **US Policy**: Generally, export licenses will be denied in these areas; exceptions inapplicable.

AND NOW, A WORD ABOUT ITAR...

International Traffic In Arms

Regulations (“ITAR”) (22 CFR § 120).

- ✦ **Home agency**: State Department, Bureau of Defense Trade Controls.
- ✦ **What it regulates**: Export of **military** articles & information & defense services.
- ✦ **Before export** – get a license, unless an ITAR exception applies.

ITAR –

U.S. Munitions List (“USML”)

- ✦ **U.S. MUNITIONS LIST**: Defense Articles & Technical Data (22 CFR § 121.1).
- ✦ **DEFENSE SERVICES**: Furnish assistance or training re: USML articles/data (22 CFR § 120.17).
- ✦ **1999**: *Commercial* satellites from EAR to ITAR.
 - ✦ Major shift affecting university research.
 - ✦ ITAR complex and inconsistent definitions; more ambiguous than EAR
 - ✦ Higher risk – harsher penalties.

Definitions:

WHAT'S AN "EXPORT" ?

✦ **UNDER BOTH EAR AND ITAR --** an export can occur in two ways:

- ✦ **ACTUAL shipment or transmission** of items outside of the U.S.; or
- ✦ **DEEMED exports: Release or disclosure** to a foreign national within or outside U.S.
 - **Examples:** Disclosure at lectures, meetings, conferences; Lab access; Release of source code; International collaborations.

Definitions:

RE-EXPORTS

- ✦ **EAR**: Transfer of U.S. technology by an intermediary person or institution, to a national of a third country. Can be “actual” or “deemed.”
 - ✦ **Example**: University transfers controlled technology to Country A, which employs an individual who is a national of Country B.
- ✦ **BE AWARE**: Include applicable restrictions in sub-licensing agreements involving articles / information subject to export controls.

JUST ONE MORE DEFINITION...

✦ Foreign National or Foreign Person:

- ✦ **A Company** or other entity not organized to do business in the U.S.
- ✦ **An Individual** who is not:
 - (1) A U.S. citizen; or lawful permanent resident (“Green Card”) - 8 USC 1101(a)(20); or
 - (2) A “protected individual” (political asylum) - 8 USC 1324b(a)(3).

WHEN DO YOU NEED AN EXPORT LICENSE?

✦ **CONSIDER** these factors:

- ✦ **WHAT** you are exporting (CCL or USML?)
- ✦ **HOW** will your item or information be used (Restricted end use?)
- ✦ **WHERE** are you exporting (Embargoed country?)
- ✦ **WHO** will receive the item or information (Foreign Persons; Restricted end users?)

PUTTING IT TOGETHER:

What does it all mean?

IF:

- ✦ The article or information is of a type listed on CCL or USML; or
- ✦ The University will train a foreign person in connection with military articles/data or defense services; or
- ✦ Actual or deemed export of EAR99 items to embargoed country, or for restricted use;

PUTTING IT TOGETHER: What does it all mean?

AND if **NO exception** is available under the applicable regulations,

THEN:

- ✦ **A LICENSE** must be obtained before any actual or deemed “export” occurs, **or**
- ✦ **NO EXPORT** and foreign nationals must be excluded.

PUTTING IT TOGETHER: What does it all mean?

✦ What if you mess up?

- ✦ Loss of federal funding;
- ✦ Fines (\$1MM personal liability under ITAR);
- ✦ Potential civil and criminal liability.

Exception #1:

Unclassified Sponsor Information

✦ **UNDER ITAR ONLY:** University release of Sponsor's unclassified information is exempt from licensing, **IF** released to:

- ✦ Full time, bona fide university employee;
- ✦ U.S. permanent residence during employment;
- ✦ Not a national of an embargoed country; **and**
- ✦ Institution informs employee in writing of export control restrictions.

22 CFR 125.4(b)(10)

ADD TO PRESENTATION

- ✦ Exemptions applicable to the involvement of foreign national students and faculty in university research: fundamental research; teaching exemption; bona-fide, full time regular university employees
- ✦ . See, e.g., 15 CFR §§ 734.8, 734.9; and 22 CFR §§ 120.10(5), 120.11, 123.16(b)(10).

Exception #2: ITAR Exports to NATO Countries

- ✦ **Responds to concerns** over transfer of commercial satellites to ITAR jurisdiction.
- ✦ **Applies** only to fundamental research at accredited U.S. colleges/universities.
- ✦ **Exports** of defense articles, services and data related to research, experimental and scientific satellites (USML, Category XV (a) or (e)), IF:
 - ◆ To NATO allies, for fundamental research.
 - ◆ NOT applicable to launch activities, missiles.

22 CFR Parts 123.16(b)(10), 125.4(d); Fed.Reg. Vol. 67, pp. 15099-15101 (3/29/02) .

Exception #2: ITAR Exports to NATO Countries

- ✦ Collaborators: Must guarantee not to disclose to researchers from non-approved countries.
- ✦ Criticisms:
 - ◆ Requires license for disclosure of fundamental research outside designated countries – NSDD 189 conflict?
 - ◆ Imposes special conditions on satellite research
 - ◆ Fundamental research - definition still ambiguous

Exception #3: Encryption Technology (EAR)

- ✦ **Applies to encryption technology and software source code.**
- ✦ **Changes “deemed export” rule to permit foreign employees of U.S. entities to work in the U.S. without a license.**

(See EAR License exception ENC, updated 1/14/2000)

Exception #4 –

Publicly Available Information

EAR

- ✦ Published information (print, film, recordings, etc.).
- ✦ Certain publicly available technology & software (subject to limitations).
- ✦ Under exclusive jurisdiction of another agency (e.g. patents/PTO).
- ✦ **Fundamental Research.**

ITAR

- ✦ Information in “public domain” (*i.e.*, “published and generally accessible”) through:
 - ◆ Sale, subscription, library
 - ◆ Unlimited distribution at public meeting, conference
 - ◆ Public release after government approval; or
 - ◆ **Fundamental Research.**

SIMILARITIES & DIFFERENCES: Fundamental Research exception

✦ What's the same in ITAR & EAR?

- ✦ Shared Rationale: Both exempt publicly available **information**.
- ✦ Covers both basic & applied research in science & engineering.
- ✦ Limited to domestic “deemed” exports.
- ✦ Neither exempts actual exports, or export of **items** (other than recorded or stored data).

SIMILARITIES & DIFFERENCES: Fundamental Research exception

EAR

- ❖ Research anywhere by various types of entities (but university must be a U.S. entity);
- ❖ The results are “ordinarily published” and shared within scientific community.

ITAR

- ❖ Research must be conducted at an accredited higher education institution in the United States;
- ❖ The information must be in the “public domain” (i.e. means “published”?).

ITAR: NEED FURTHER CLARIFICATION?

✦ **June 2003**: AAU asked State Dept to further clarify ITAR “fundamental research” definition.

- ✦ Recommended that ITAR adopt EAR standard.
- ✦ “Ordinarily Published” vs Actual Publication.
- ✦ So far, no response.

WHAT'S THE RATIONALE?

-- PRESIDENTIAL POLICY

Nat'l Security Decision Directive 189:

- ✦ 1985 - Pres. Reagan: To “maximum extent possible” fundamental research results should be unrestricted; and
- ✦ National security classification “the only basis” for restricting such information. 22 CFR 9.5(a)(1)-(3)
- ✦ Nov. 2001 - Condoleezza Rice confirmed NSDD 189 as Bush Administration policy (Nov. 1, 2001).

POST 9-11: DEVELOPMENTS

✦ 2002 Memo - Andrew Card, White House Chief of Staff:

- ✦ Protect “sensitive but unclassified” research.
- ✦ Government contracts – More limitations on publication and who may participate.

✦ Conflicts with Presidential Policy expressed in NSDD 189.

✦ Currently – Policy is being reviewed.

POST 9-11: DEVELOPMENTS

✦ AAU / COGR Task Force:

- ✦ Asking universities to report provisions inconsistent with NSDD 189.
- ✦ Will send report & recommendations to White House Office of Science & Technology.

CONTRACT ISSUES: How NOT to Lose the FRE...

✦ **BE ALERT TO:**

- ✦ **PUBLICATION** restrictions.
- ✦ **CONFIDENTIALITY** or **NON-DISCLOSURE** restrictions.

✦ **WHY?** Can defeat the exception:

- ✦ Not publicly available information;
- ✦ Not shared with scientific community.

CONTRACT Issue #1: Publication Restrictions

	<u>EAR</u>	<u>ITAR</u>
<u>Sponsor Pre-Publication Review</u>	Reasonable pre-publication review for protection of proprietary rights is ok; but <u>not</u> right to approve, or any further restrictions.	ANY restriction, including pre-publication review, may defeat exception.
<u>Government Contracts</u>	Publication restrictions ok for some “national security controls.”	ANY access or dissemination controls defeat the exception.

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CONTRACT ISSUE #1A: **HIDDEN LAND MINES**

- ✦ **STANDARD GOVERNMENT CLAUSES**, incorporated by reference, restrict publication:
 - ◆ **Army Cl. 52.005-4401** (Release of Information); **FAR 52.227-17** (Rights in Data, Special Works); **DFARs 252.204-7000** (Disclosure of Information)
- ✦ **Consider Context**: Try to narrow applicability: only to services “for hire”; not to research activity
- ✦ **Review Instructions** in regulations: have criteria for including the clause been met?
- ✦ **Refer to NSDD 189**: Presidential Policy Directive.

CONTRACT ISSUE #2:

Confidentiality / Non-Disclosure

✦ **THE SCOPE OF RESTRICTION affects the Scope of the FRE:**

- ✦ **Non- disclosure of Sponsor's information pre-dating the research:** No exception with respect to the protected information only.
- ✦ **Non-disclosure of research results:** No exception for the research as a whole.

EXAMPLE 1 - MTAs

Biological Materials :

- ✦ EAR – Potential use in chemical, biological weapons: (e.g., pathogens, toxins, genetically altered microorganisms). 15 CFR § 742, Supp.1(12)
- ✦ ITAR – specifically developed for the purpose of producing casualties, degrading equipment or damaging crops. 22 CFR § 121.1, Supp. XIV(b)-(c).

EXAMPLE 1 - MTAs

✦ MTA Non-Disclosure Restrictions:

- ✦ Defeats fundamental research exception with respect to restricted information.
- ✦ Remember: Exports of objects (e.g., compounds, physical materials) generally are not subject to the FRE.

EXAMPLE 2:

TEAMING AGREEMENTS

- ✦ **Inter-institutional agreements** – e.g., Joint proposal for a sponsored research project.
- ✦ **Confidentiality restrictions** – e.g., restricting sharing of information.
- ✦ **Same rule applies** – Scope of Fundamental Research exception depends on scope of confidentiality restrictions.

Example #3: COMMON CONTRACT CLAUSES

“University must comply with export control laws.”

✦ Government Contracts: Often contain non-negotiable standard terms & conditions:

- ✦ Evaluate carefully - Does FRE apply?
- ✦ If so, try to include statement that FRE applies.
- ✦ If items / information are not included in CCL or USML, so state in the contract.

COMMON CONTRACT CLAUSES

“University will comply with export control laws.”

PRIVATE COMPANY SPONSORS:

- ✦ Sponsor has primary obligation to comply, prior to release of restricted items or information, when university researchers may include foreign nationals. (15 CFR Part 734, Supp. 1, Question D-2)
- ✦ But University also may violate ITAR/ EAR as a “participant” in Sponsor violation; OR by releasing to a foreign national after receipt.

COMMON CONTRACT CLAUSES

Private Company Contracts:

- ◆ **Require Sponsor** to identify in writing what is subject to export controls & which regs apply.
- ◆ **Negotiate** for Sponsor to obtain / pay for export control licenses required for the research.
- ◆ **Require** Sponsor to warrant its compliance with regulations *prior* to transfer to University.
- ◆ **Evaluate** availability of FRE, and if applicable, have contract state that FRE applies.

RISK MANAGEMENT: STRATEGY SUGGESTIONS

- ✦ **Contracts:** Avoid restrictions on publication or personnel; export controls compliance clauses.
- ✦ **PIs:** Screen all research with foreign involvement (researcher, collaborator, sponsor, subcontractor).
- ✦ Determine services/articles/information subject to EAR or ITAR in time to apply for a license if necessary. Stay up to date – e.g., new researchers.
- ✦ Implement compliance plan *at least* for high-risk research (Biological Materials; Satellites).

See: Robert E. Bienstock, Esq., UNM, *How the Issue Arises - Compliance Strategies*, NACUA Conference, October 2002.

ITAR / EAR: ONLINE RESOURCES

➤ **Dept. of Commerce - EAR Compliance Information:**

<http://www.bxa.doc.gov/>

➤ **ITAR Compliance Guidelines (State Dept):**

http://pmdtc.org/docs/Compliance_Programs.pdf

➤ **U.S. State Department (ITAR):**

<http://pmdtc.org/reference.htm>

ITAR / EAR: ONLINE RESOURCES

- **“Balancing Scientific Publication & National Security Concerns: Issues for Congress (1/10/03):** <http://www.fas.org/irp/crs/RL31695.pdf>.
- **University of Maryland: Information and Guidelines – US Export Control Laws:**
http://www.umresearch.umd.edu/ORAA/export_control/
- **Johns Hopkins Univ. - Export Controls Tutorial:** <http://jhuresearch.jhu.edu>
- **Association of American Universities:**
<http://www.aau.edu/research/traffic.html>

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 - ✦ **Export Controls and Restrictions on Release of Research Results:**
 - *How the Issue Arises - Compliance Strategies*, Robert Eisig Bienstock, University of New Mexico; and
 - *Deemed Exports Under the EAR and the ITAR*, Joseph P. Dennin, McKenna Long & Aldridge LLP, Washington, D.C.