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ORC Quick Course : Export Control Regulations

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ORC Quick Course: Export Control Regulations

Presented by:
University of Maine
Office of Research Compliance

Export Control Regulations (ECR)

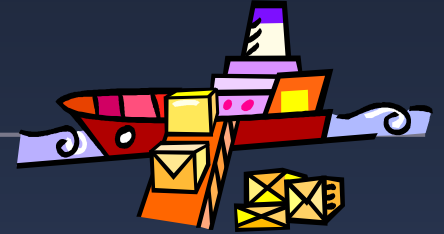
- ECR Basics
 - Terminology
 - What are ECR?
 - Purpose of ECR
- ECR Authority
 - Federal Agencies & Regulations
 - ECR Impact & Penalties
- ECR Compliance

Who is a Foreign National?

- Any individual who is not a U.S. citizen or lawful permanent resident of the U.S. (e.g., green card holder);
- Any individual who is not a protected individual (e.g., asylum holder or refugee);
- Any foreign corporation or other entity not incorporated or organized to do business in the U.S.;
- Any foreign government.



What is an Export?



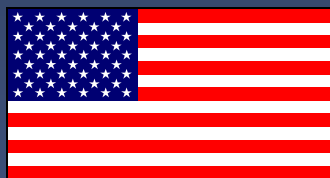
Three Types

- 'Actual' Export
- 'Deemed' Export
- 'Re-Export'

What is an 'Actual' Export?

An 'Actual' Export is:

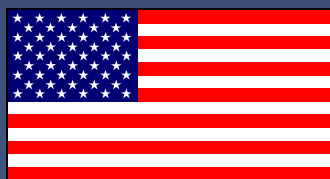
- An actual shipment or transmission out of U.S. of controlled items.



What is a 'Re-Export'?

A Re-Export is:

- The shipment or transmission of a controlled item from one foreign country to another foreign country;
- "Release" of technology or software (source code) subject to ECR in one foreign country to a national of another foreign country.



What is a 'Deemed' Export?

A 'Deemed' Export is:

- Any written, oral or visual release, disclosure or transfer of controlled technology (EAR)¹ or technical data (ITAR)², information or software to a foreign national in or outside of the U.S.
- Any actual use or application of controlled technology on behalf of or for the benefit of any foreign entity or person anywhere.

¹See EAR Part 772; ²See ITAR § 120.10

Deemed Exports



What is '*... written, oral or visual release, disclosure or transfer*' ?

- Face-to-face or telephone discussion
- Fax or e-mail communication
- Computer data disclosure
- Tour involving visual inspection
- Foreign student or professor conducting research
- Training or technical assistance

Deemed Exports



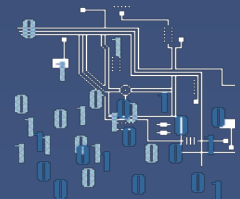
What is . . . '*controlled technology or technical data*' ?

- Specific information required to 'put into use' a product or defense article (resp.), such as:
 - Blueprints
 - Diagrams
 - Formulae
 - Photos
 - Manuals & Instructions

Deemed Exports (continued)

What is . . . '*controlled information and software*' ?

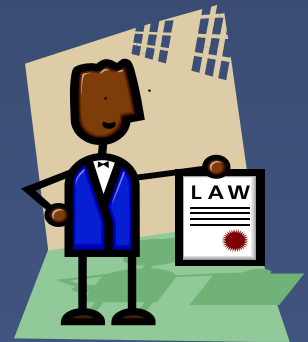
- Encryption source code and object code software (EAR);
- Classified information relating to defense articles and defense services (ITAR);
- Information covered by an invention secrecy order (ITAR);
- Software directly related to defense articles (ITAR).



What Are ECR?

U.S. Laws that prohibit the unlicensed transfer to foreign nationals of U.S. goods, services and technologies that:

- Are subject to trade restrictions;
- Have proprietary, military, or economic applications.



The Purpose of ECR

- To restrict exports of goods and technology that could contribute to the military potential of U.S. international adversaries;
- To prevent proliferation of weapons of mass destruction;
- To advance U.S. foreign policy goals;
- To protect the U.S. economy and promote trade goals.

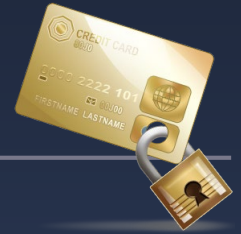
Federal ECR Authority¹



- Department of Treasury
 - Office of Foreign Assets Control
- Department of State
 - Directorate of Defense Trade Controls
- Department of Commerce
 - Bureau of Industry & Security

¹Federal Agencies & Departments w/ Export Responsibility

Department of the Treasury



Office of Foreign Assets Controls (OFAC) prohibits certain types of trade based on U.S. foreign policy and national security goals, including sanctions against:

- Persons on the Specially Designated Nationals (SDN) List;
- Targeted foreign countries and regimes on the Lists of Sanctioned Countries.

Foreign Assets Controls Can Impact . . .

- Payments (compensation, honoraria, contracts) to embargoed countries/nationals/entities;
- Surveys and services to embargoed entities;
- Attendance at/planning of international conferences;
- Editing or joint authorship of articles with nationals of sanctioned countries.



Supplemental resource: [OFAC Sanctions Programs](#)

Department of State



Directorate of Defense Trade Controls (DDTC) through the International Traffic in Arms Regulations (ITAR) controls the export and temporary import of defense articles and defense services¹ covered by the United States Munitions List (USML) including:

- Guided & Ballistic Missiles, Rockets, Torpedoes
- Range Finders, Optical & Guidance & Control Equipment
- Submersible Vessels, Oceanographic Equipment

¹ Defense Articles and Services ITAR § 120.3

Export Administration Regulations

Export Administration Regulations (EAR):

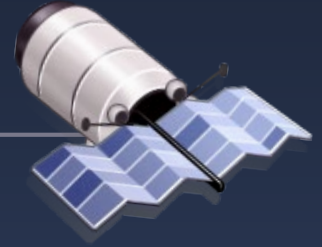
- Regulate export and re-export of:
 - 'dual-use'¹ items;
 - commercial items without any obvious military use - see Commerce Control List (CCL);
- Restrict exports to certain entities and individuals - see Country Chart, Entity List, Unverified List, Denied Persons List, and OFAC Sanctions Lists.

¹Dual use means having both commercial and military applications and includes items not regulated by other government agencies.

Supplemental resource: EAR Database with CCL & Country Chart



ITAR & EAR Can Impact . . .



- Ability to send controlled equipment to foreign countries;
- Ability to provide services (including training in the use of controlled equipment) to foreign nationals;
- Ability of foreign students to participate in research involving a controlled technology.¹

¹ primarily under ITAR

Penalties for ECR violations¹



	Criminal (per violation)	Civil & Administrative (per violation)
Institution	<ul style="list-style-type: none"> ♦ Fines up to: <ul style="list-style-type: none"> • \$1M (ITAR & EAR); • \$10M (FAC). 	<ul style="list-style-type: none"> ♦ Fines up to: <ul style="list-style-type: none"> • The greater of \$.25M or twice the value of the transaction (FAC) or export (EAR); • \$.50M (ITAR); <i>and/or</i>
Individual	<ul style="list-style-type: none"> ♦ Fines up to \$1M; <i>and/or</i> ♦ Imprisonment up to: <ul style="list-style-type: none"> • 10 yrs (ITAR); • 20 yrs (EAR); • 30 yrs (FAC). 	<ul style="list-style-type: none"> ♦ Revocation or denial of licenses; <i>and/or</i> ♦ Exclusion from practice; <i>and/or</i> ♦ Debarment or suspension including from government contracting; <i>and/or</i> ♦ Seizure and forfeiture of illegal exports and vessels carrying such exports.

¹As of June 10, 2008 penalties associated with violations of EAR and OFAC regulations were increased under the International Emergency Economic Powers Act (IEEPA).

Toeing the Line: ECR Compliance

- ECR Exclusions
- USCIS Form I-129 Part 6
 - What is the “Deemed Export Attestation”?
 - Changes to Expect with the Attestation
 - H1-B Deemed Export Screening Tool
- Researcher Role & Responsibility
 - Pre-award review
 - Post award monitoring
- Case Studies



ECR Exclusions

There are **no exceptions**
to the FAC licensing rules
and
FAC regulations **override**
any and **all** EAR and ITAR
exclusions.



Public Domain Exclusion



No export license required if information is:

- Published;
- Accessible and available to the public by means such as:
 - Sales at newsstands and bookstores;
 - Unlimited distribution at conferences, meetings, trade shows, etc. in the U.S. that are generally accessible to the public;
 - Public release in any form after approval by the cognizant U.S. government department or agency;
- Fundamental Research.

Fundamental Research Exclusion (1 of 3)

The Fundamental Research Exclusion pertains to basic or applied research:

- In science and/or engineering;
- At an accredited institution of higher learning in the U.S.;
- Where the resulting information is ordinarily published and shared broadly with the scientific community (e.g., public domain).

$$E=mc^2$$

$$E=mc^2$$

Fundamental Research Exclusion (2 of 3)

The Fundamental Research Exclusion **does not apply** to research that results in information that is restricted:

- For proprietary reasons;
- Pursuant to specific U.S. government access and dissemination controls.



Fundamental Research Exclusion (3 of 3)

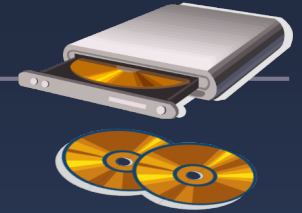
The Fundamental Research Exclusion **will not apply** if the research institution or researcher accepts **any** award restrictions regarding:

- Participation of foreign nationals;
- Publication of resulting research information;¹
- Access and dissemination of resulting research information.

This goes as well for 'side deals' between a PI and sponsor, which also violate University policy.

¹ Other than limited prepublication reviews by research sponsors to prevent inadvertent divulging of proprietary information provided to the researcher by sponsor or to insure that publication will not compromise patent rights of the sponsor

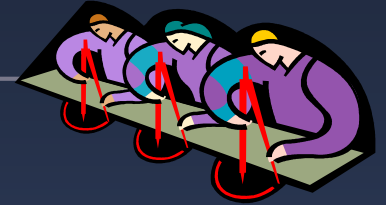
Exclusions to the Exclusions



The following articles **never** qualify for any of the foregoing exclusions:

- Physical goods;
- Encryption software exceeding 64 bits¹;
- Research when there is no intent to publish resulting information;
- Research conducted outside the U.S.

Education Exclusion



No license required for disclosure of educational information released:

- By instruction in courses listed in course catalogs;
- Through general scientific, mathematical or engineering principles.

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

Temporary Export 'Laptop' Exclusion

The Temporary Export 'Laptop' Exclusion authorizes the export or re-export of technology by U.S. persons for temporary use abroad when:

- The country of travel is not under U.S. sanctions;
- The technology is a 'tool of trade' for fundamental research;
- The technology remains in the exporters possession and control at all times;
- The technology is security protected by firewalls, passwords, secure connections, etc.



Full-Time Employment Exclusion

Authorizes U.S. institutions of higher learning located in the U.S. to disclose *unclassified, uncontrolled* technical data and technology to foreign persons who are their 'bona fide and full time regular employees'.

Restrictions Apply!

Employment Exclusion: Restrictions

- Employee's permanent abode throughout the period of employment must be in the U.S.;
- Employee must not be a national of a country to which exports are prohibited by ITAR or OFAC;
- Institution must inform employee in writing that the *unclassified, uncontrolled* technical data and technology may not be transferred to other foreign persons without the prior written approval of the Directorate of Defense Trade Controls.

USCIS Form I-129 Part 6

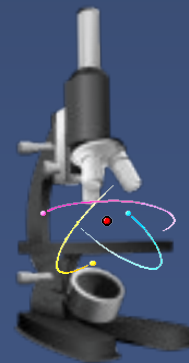
USCIS Form I-129 Part 6: *"Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States"*

- aka "Deemed Export Attestation"
- Effective February 20, 2011
- Required for New, Renewed, Amended Petitions
 - H1-B, H-1B1 Chile/Singapore, L-1, O-1A

Supplemental resource: [I-129, Petition for a Nonimmigrant Worker](#)

What is the Deemed Export Attestation?

- Requires petitioner (employer) to certify that the technology and/or technical data that will be released, or to which the foreign national will be given access:
 - Does not require an export license; OR
 - Does require an export license; *and*
 - Petitioner will prevent the foreign national access to the controlled technology/technical data
 - and/or encryption software until and
 - Unless a license for release is received.



Changes to Expect with the Attestation

- Involvement of ORC-ECR Office in H1-B Petition Process;
- Increased time to prepare and file a petition;
- Additional time and fees if license is required;
- Establishment of 'Technology Control Plan' (TCP) to prevent the release of controlled technology, technical data and software before, until and unless a license is acquired;
- Ongoing monitoring of employee job duties for material changes requiring an amended petition.

Deemed Export Screening Tool

- Information requested includes:
 - Copy of beneficiary's passport ID page - full name, photo, country of birth, country of citizenship, etc.;
 - Detailed description of position duties, including:
 - List of technology, technical data, encryption source code
 - to which employee will have access;
 - List of grants & projects on which employee will work;
 - Statement of employee's anticipated foreign travel.
 - Name of hiring department/unit and immediate supervisor;
 - Signature of department chair/unit director.

Must be submitted with visa petition or petition will not be filed!

Researcher Pre-Award Review

Review research proposal for possible ECR issues, such as:

- ❖ Hiring of foreign nationals;
- ❖ Shipping of foreign nationals
- ❖ Collaborating with foreign colleagues in the U.S. or abroad;
- ❖ Working with a foreign country subject to U.S. sanctions;
- ❖ Training foreign nationals in the use of equipment;
- ❖ Using another party's proprietary information;
- ❖ Using controlled information/equipment on a subcontract;
- ❖ Purchasing equipment/supplies controlled by EAR/ITAR.

Don't delay! Licensing takes time and can delay project start up.

Post-Award Monitoring

- PI checks award agreement for any restrictive clauses eliminating the Fundamental Research Exclusion¹;
- PI monitors -
 - Foreign travel by all project personnel;
 - Purchases from foreign entities;
 - Shipments to foreign locations;
 - Changes in project scope or staffing that could alter ECR-exempt status;
- PI documents and retains records of exemptions for at least 5 years.

Do You Need an Export License?

At minimum, Pls must:

- Be able to recognize that an ECR issue might exist;
- Know who to contact for assistance in determining the need for an export license.
 - Contact the Export Control Officer



Do You Need an Export License?

(continued)



What are you exporting?

- Is the item on the CCL or USML?

To Where are you exporting?

- Is the country on any ECR screening list?

Who will be the end-user of the item?

- A foreign national?
- A person/entity on an ECR screening list?

What will be the end-use of the item?

- Proliferation of weapons of mass destruction?
- Terrorism?

Supplemental resources: [Decision Tree](#); [BIS Guide to the EAR](#); [Steps for Using the EAR](#); [ITAR Full Text](#); [OFAC's Role in Controlling Exports](#)

ECR Compliance: Bottom Line

Ignorance of the law is **never** an acceptable excuse for not complying with award terms and conditions, federal regulations, or University policies and procedures!

