# Embargoes & Export Controls Web page information – Pennsylvania State System of Higher Education

### Draft 6-15-11

### **Export Controls**

Regulations FAQs for Students

**Exceptions and Exemptions Penalties** 

FAQs for Faculty Glossary

The purpose of export controls is to restrict the dissemination of technology, goods, and information to foreign nationals, countries, banned entities, and sanctioned companies. Exporting information without taking the necessary precautions poses a serious security risk to the U.S. and could result in strict criminal and civil penalties.

Export controls are currently regulated by the U.S. Department of State through its Export Administration Regulations (EAR), U.S. Department of Commerce through its International Traffic in Arms Regulations (ITAR), and the U.S. Department of Treasury through its Office of Foreign Assets Control (OFAC).

This site is intended to provide information for faculty and students who may be traveling to foreign countries, working with foreign nationals on research projects, or transmitting equipment or information to foreign nationals. Importantly, **information does not have to be transmitted outside the U.S.** to violate export regulations. Exports of information that take place inside the U.S. are known as "deemed exports" because the information may be indirectly passed through a foreign national to a foreign country.

Consult the navigation menu to learn more about the specific entities involved and how to be sure that you are taking the necessary precautions to avoid export violations.

Importantly, the EAR, ITAR, and OFAC regulations are not intended to restrict all academic activities. Therefore, there are specific exceptions and exemptions (fundamental research, public domain, laptop, teaching, and bona fide employee) that may apply to the dissemination of information in some university instructional, research and service settings. Navigate the menu for more information on each of these exceptions.

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### Regulations

Export controls are currently regulated by the U.S. Department of State through its Export Administration Regulations (EAR), U.S. Department of Commerce through its International Traffic in Arms Regulations (ITAR), and the U.S. Department of Treasury through its Office of Foreign Assets Control (OFAC).

Although there are some similarities between the scope of the EAR and ITAR at the university level, the regulations differ in their primary focus. Specifically, the EAR is mostly concerned with dual-use items (those which are not inherently military in nature), and the ITAR is concerned with items listed on the United States Munitions List (USML) and the distribution of related information. OFAC, however, administers and enforces sanctions on targeted countries and individuals.

# **Export Administration Regulations**

The U.S. Department of Commerce implements the Export Administration Regulations (EAR) primarily for trade protection. The EAR differs from the ITAR because it focuses on dual use items. "Dual use" is used to distinguish EAR-controlled items that can be used in both military and commercial applications (EAR 730.3). Items regulated by the EAR are listed on the Commerce Control List (CCL). The EAR covers the transport of these items and dissemination of technical data about them to foreign nationals inside and outside of the U.S.

"Technical data" is defined in Part 772 of the EAR as "blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories." Part 734.2 of the EAR furthers this definition to include "oral exchanges of information in the United States or abroad."

If an export does not appear on the CCL or falls under one of the exceptions, it does not require an export license.

The CCL is divided into ten categories (see EAR Part 774):

0-Nuclear Materials, Facilities and Equipment, and Miscellaneous

- 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

Any goods or technologies that do not fit one of these categories are placed into a "catch-all category," EAR 99.

If your research fits into one of these categories and involves foreign nationals, consult the exceptions and exemptions section. If ineligible for these exceptions, contact the Grants Office about applying for a Bureau of Industry and Security (BIS) license before proceeding with your research.

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# **International Traffic in Arms Regulations**

International Traffic in Arms Regulations (ITAR) are concerned with items that are inherently military in nature. Commercial (dual-use) items are governed by the Export Administration Regulations (EAR). Items regulated by the ITAR are listed on the United States Munitions List (USML).

The distribution of these items and "technical data" related to them is strictly prohibited under ITAR. As described in ITAR 120.10 (5), technical data means information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of controlled articles.

The furnishing of technical data to a foreign national is classified as a defense service. Defense services are the provision of assistance to foreign nationals anywhere in connection with the design, development, or manufacture of articles listed on the USML (ITAR 120.9.).

The twenty-one broad categories of the USML are as follows:

- I. Firearms, close assault weapons and combat shotguns
- II. Guns and Armament
- III. Ammunition/Ordnance
- IV. Launch vehicles, guided missiles, ballistic missiles, rockets, torpedoes, bombs, and mines
- V. Explosives and energetic materials, propellants, incendiary agents and their constituents
- VI. Vessels of war and special naval equipment
- VII. Tanks and military vehicles
- VIII. Aircraft and associated equipment
- IX. Military training equipment and training

- X. Protective personnel equipment and shelters
- XI. Military Electronics
- XII. Fire control, range finder, optical and guidance and control equipment
- XIII. Auxiliary military equipment
- XIV. Toxicological agents, including chemical agents, biological agents and associated equipment
- XV. Spacecraft systems and associated equipment
- XVI. Nuclear weapons, design and testing related items
- XVII. Classified articles, technical data and defense services not otherwise enumerated
- XVIII. Directed energy weapons
- XIX. Reserved
- XX. Submersive vehicles, oceanographic and associated equipment
- XXI. Miscellaneous Articles

If your research falls within these categories and you are exporting information or services, you may need to apply for an export license.

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## Office of Foreign Assets Control

The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury administers and enforces sanctions against targeted foreign countries and terrorists.

University researchers and students should primarily be concerned with OFAC's current list of sanctioned countries: Balkans, Belarus, Burma, Cuba, Democratic Republic of the Congo, Iran, Iraq, Ivory Coast, Liberia, North Korea, Sudan, Syria, and Zimbabwe. Distributing information to these countries without permission from the U.S. government may result in a federal violation. If you plan on carrying out research while traveling to these countries, you may need to apply for an export license.

Importantly, the export of some goods (chemical and biological weapons) are regulated when exported to ANY country. The sanctioned countries are those that carry the strictest regulations.

The list of sanctioned countries is constantly being changed and updated. Monitor the list as you proceed with your research.

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### **Exclusions and Exemptions**

The regulations administered and enforced by the EAR, ITAR, and OFAC are <u>not</u> intended to obstruct university research or teachings. For this reason, there are exclusions and exemptions that allow for the dissemination of information not thought to pose a risk to national security or foreign policy.

These exceptions, in general, allow for information that is openly accessible in the public domain to be distributed through teaching, research, and communication. Also, all exemptions require that information and research findings be published openly without restrictions. Any restrictions to access, participation, or dissemination by third parties will negate any exceptions or exemptions.

# **Fundamental Research Exemption**

Research conducted in a university setting is subject to the Fundamental Research Exemption. The ITAR and EAR define the exemption slightly differently. This page will first discuss the nature of fundamental research under the EAR and then the ITAR.

Fundamental research is defined in Part 734.8 of the EAR as "basic and applied research in science and engineering, where the resulting information is ordinarily published and shared broadly within the scientific community." Also, fundamental research only applies to the disclosure of information to foreign nationals **inside** the United States. Shipment of goods or services outside the U.S. are not covered by the Fundamental Research Exemption.

The EAR identifies several scenarios in which university research would be subject to the EAR. Since fundamental research must be made public, these distinctions apply to situations where the publication, details, or results of research are restricted:

- (1) The initial transfer of information from an industry sponsor to university researchers is subject to the EAR where the parties have agreed that the sponsor may withhold from publication some or all of the information so provided.
- (2) University based research is not considered "fundamental research" if the university or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity. Scientific and technical information resulting from the research will nonetheless qualify as fundamental research once all such restrictions have expired or have been removed.

Consult EAR Part 734.8 for more information on fundamental research exemptions under the EAR.

Section 120.11 of the ITAR defines fundamental research as:

"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."

Research that is subject to the ITAR and violates the Fundamental Research Exemption meets the following restrictions:

- (1) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or
- (2) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.

Consult section 120.11 of the ITAR for more information on the Fundamental Research Exclusion.

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# **Public Domain Exemption**

Information that is present in the public domain is free from EAR and ITAR regulations. Importantly, this exemption only applies to information within the United States. Shipments of commodities and technology outside the U.S. are subject to export control regulations. The definition and scope of public domain is covered in EAR 734.7 and ITAR 120.11.

EAR 734.7 indicates that the public domain consists of Information that is "published" in any form, including:

- (1) Publication in periodicals, books, print, electronic, or any other media available for general distribution to any member of the public 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
- (2) Ready availability at libraries open to the public or at university libraries
- (3) Patents and open (published) patent applications available at any patent office; and
- (4) Release at an open conference, meeting, seminar, trade show, or other open gathering.

Consult EAR 734.7 for a more comprehensive definition of what types of information are covered by the public domain exemption.

ITAR 120.11 provides a similar, yet more comprehensive, definition than the EAR: Information in the public domain is available

- (1) Through sales at newsstands and bookstores;
- (2) Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;
- (3) Through second class mailing privileges granted by the U.S. Government;
- (4) At libraries open to the public or from which the public can obtain documents;
- (5) Through patents available at any patent office;
- (6) Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States;
- (7) Through public release (i.e., unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency
- (8) 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.

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# **Laptop Exception**

Personal computers, such as laptops, are listed on the Commodities Control List (CCL) of the EAR. However, a combination of the Temporary Export Exemption and "tools of the trade" classification make it acceptable, in some cases, for individuals to travel with a laptop.

Temporary Export Exemptions allow for commodities and software to be used temporarily abroad. A commodity is only eligible for temporary export if it is a "tool of the trade." A 'tool of the trade" is defined in EAR Part 740.9 as "Usual and reasonable kinds and quantities of commodities and software for use in a lawful enterprise or undertaking of the exporter." These items must remain under the control of the researcher at all times and be returned to the U.S. within one year of export date.

The laptop exception does not apply if you are traveling to an embargoed or T-7 country (Balkans, Burma, Ivory Coast, Cuba, Democratic Republic of the Congo, Iran, Iraq, Liberia, Libya, North Korea, Sudan, Syria, and Zimbabwe). Your laptop must also not be modified for military purposes or use in outer space.

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# **Teaching Exemption**

The disclosure of information to foreign nationals in classroom settings falls under the teaching exemption of the EAR and ITAR. In Part 734.9 of the EAR, this exemption is defined as instruction in catalog courses and associated teaching laboratories of academic institutions.

ITAR Section 120.10 (5) provides a similar definition: information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain.

Consult EAR 734.9 and ITAR 120.10 for more information on the teaching exemption.

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# **Bona Fide Employee Exemption**

The bona fide employee exemption of the ITAR allows for the disclosure of unclassified technical data in the U.S. by U.S. institutions of higher learning to foreign persons who are their bona fide and full time regular employees (ITAR 125.4 (10)).

This exemption is only applicable if:

- (1) The employee's permanent abode throughout the period of employment is in the United States;
- (2) The employee is not a national of a country to which exports are prohibited;

(3) The institution informs the individual in writing that the technical data may not be transferred to other foreign persons without the prior written approval of the Directorate of Defense Trade Controls.

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### **Regulated Entities**

Consult the resources and lists below for information on entities, persons, and countries banned from export through the ITAR, EAR, and OFAC. The most significant to university research is the OFAC list of sanctioned countries. Research involving any entity or country on these lists almost always requires an export license.

These lists are only meant to be a resource. The University is required to keep records of compliance with export controls regulations.

EAR Denied Persons List

EAR List of Entities with License Requirements

**EAR Unverified Entities** 

EAR General Order Restricting Exports Involving Dubai, UAE, and Germany

**ITAR Debarred List** 

**ITAR Sanctioned Parties** 

**OFAC List of Specially Designated Nationals** 

**OFAC List of Sanctioned Countries** 

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#### **Penalties**

### Penalties for Violation of EAR

Violating the EAR may result in civil and criminal penalties. This page is by no means comprehensive. Consult EAR Part 764 for additional information on the reporting of sanctions and specific penalties.

Civil Penalties:

- (1) Civil monetary penalty
- (2) Denial of export privileges.
- (3) Exclusion from practice.

**Criminal Penalties:** 

- (1) Fine of not more than five times the value of the exports or reexports involved or \$50,000, whichever is greater, or imprisoned not more than five years, or both.
- (2) Willful violations. Fine of not more than five times the value of the export or reexport involved or \$1,000,000, whichever is greater; and, in the case of an individual, shall be fined not more than \$250,000, or imprisoned not more than 10 years, or both.
- (ii) Any person who is issued a license under the EAA or the EAR for the export or reexport of any items to a controlled country and who, with knowledge that such export or reexport is being used by such controlled country for military or intelligence gathering purposes contrary to the conditions under which the license was issued, willfully fails to report such use to the Secretary of Defense, except in the case of an individual, shall be fined not more than five times the value of the exports or reexports involved or \$1,000,000, whichever is greater; and in the case of an individual, shall be fined not more than \$250,000, or imprisoned not more than five years or both (EAR 764.3).

#### Penalties for Violation of ITAR

Exports that violate ITAR may carry serious penalties. Violations are outlined in ITAR Part 127 - Violations and Penalties. Part 127.3 focuses specifically on penalties for violations. Violations fall under U.S. code 2778, Control of Arms Import and Export. The law indicates that any person who willfully violates any provision of this section, or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein shall upon conviction be fined for each violation not more

than \$1,000,000 or imprisoned not more than ten years, or both. Please consult the documents and sections indicated above to learn more about ITAR violations. Use the resources on this site to ensure that your research is in compliance.

### Penalties for Violation of OFAC

OFAC penalties fall under the Trading with the Enemy Act (TWEA). Please consult 50 USCS Sec. 5 for a comprehensive description of criminal and civil charges that may result from an OFAC violation. Also, make certain that you apply for an export license if your research involves one of the nations embargoed by the OFAC (Balkans, Belarus, Burma, Cuba, Democratic Republic of the Congo, Iran, Iraq, Ivory Coast, Liberia, North Korea, Sudan, Syria, Zimbabwe).

In addition to the forfeiture of any property involved with the violation, any person not in compliance with OFAC is subject to the following:

Persons who willfully violate any provision of TWEA or any license, rule, or regulation issued thereunder, and persons who willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of TWEA shall, upon conviction, be fined not more than \$1,000,000 or, if an individual, be fined not more than \$100,000 or imprisoned for not more than 10 years, or both; and an officer, director, or agent of any corporation who knowingly participates in such violation shall, upon conviction, be fined not more than \$100,000 or imprisoned for not more than 10 years, or both.

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#### Partial Glossary

(For additional defined terms, please see "Embargoes & Export Controls Procedures and Guidelines" for PASSHE, available as a PDF file.)

#### **Actual Export**

Technology and information leaving the shores of the United States.

#### Commerce Control List (CCL)

A list of goods and technology regulated by the Department of Commerce through the Export Administration Regulations (EAR). Items on this list are marked for dual-use, which means that they are commercial goods that could be used for military purposes.

### **Commodity Jurisdiction Ruling**

A request that can be made to the State Department to determine whether the Export Administration Regulations (EAR) or International Traffic in Arms Regulations (ITAR) have jurisdiction over the export of a good or technology.

#### **Controlled Physical Items**

Defense articles listed on the International Traffic in Arms Regulations (ITAR) and dual use items listed under Export Administration Regulations (EAR).

#### **Deemed Export**

An export of technology or information to a foreign national within the United States.

#### **Defense Article**

(ITAR 120.6) Any item designated in the U.S. Munitions List. Examples include specified chemical agents, cameras designated for military purposes, specified lasers, and GPS equipment. It also means any technical data recorded or stored in any physical form, models, mock-ups, or other items that reveal technical data directly relating to the

particular item or "defense article" listed in the USML.

#### **Defense Service**

(ITAR 120.9) 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; and the dissemination of technical data to any foreign person in the United States or abroad.

#### **Dual-use**

Items that are listed on the Commerce Control List (CCL). These goods and technologies are commercial in nature but could be used for military purposes.

#### **Export Administration Regulations (EAR)**

Federal regulations on dual-use items through the U.S. Department of Commerce.

#### **Export**

(ITAR 120.17) There are multiple definitions under the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR): 1. Actual shipment of any goods covered by the EAR or ITAR outside the United States. 2. Release or disclosure of any information covered by the EAR or ITAR to any foreign person in the United States or abroad. 3. The definition of export under ITAR also includes the performance of any defense service for the benefit of a foreign national whether in the United States or abroad.

#### **EAR 99**

The "catch-all category" that applies to any good or technology subject to the EAR that does not fall under one of the ten specific CCL categories.

#### **Foreign National**

(ITAR 120.16) Any person who is not a lawful permanent resident of the United States. 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).

#### **Fundamental Research**

According to the Association for American Universities (AAU), fundamental research is basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.

#### International Traffic in Arms Regulations (ITAR)

The State Department's regulations for goods or technologies inherently military in nature.

#### Office of Foreign Assets Control (OFAC)

Administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals through the Department of the Treasury.

#### **Public Domain**

(ITAR 120.11) Information that is published and that is generally accessible or available to the public: (1) through sales at newsstands and bookstores; (2) through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information; (3) through second class mailing privileges granted by the U.S. government; (4) at libraries open to the public or from which the public can obtain documents; (5) through patents available at any patent office; (6) through unlimited distribution at a conference, meeting, seminar, trade show, or exhibition, generally accessible to the public, in the United States; (7) through public release (i.e., unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency; and (8) 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.

#### **Technical Data**

(ITAR 120.10) Information 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. Also, classified information relating to defense articles and defense services, and information covered by an invention secrecy order.

#### **United States Munitions List (USML)**

A list featuring twenty-one categories of defense articles and services that are monitored by the International Traffic in Arms Regulations (ITAR).

#### U.S. Person

(ITAR 120.15) A person who is a lawful permanent resident of the United States. It also means any corporation, business association, partnership, society, trust, or any other entity, organization or group that is incorporated to do business in the United States. It also includes any governmental (federal, state or local) entity.

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