

Xavier University of Louisiana

**Export
Compliance Guide**

Overview of Export Control Regulations

Introduction

Export control laws are a complex set of federal regulations designed to protect United States (U.S.) national security; to prevent the proliferation of weapons of mass destruction; to further U.S. foreign policy including the support of international agreements, human rights and regional stability; and to maintain U.S. economic competitiveness. The export control regulations govern how information, technologies, and commodities can be transmitted overseas to anyone, including U.S. citizens, or to foreign nationals in the U.S. In addition to controlling exports to countries or individuals who are citizens of or located in those countries, the export control regulations ban exports to individuals and companies that have been involved in terrorist or drug trafficking activities as well as those who are barred from conducting exports because of previous violations of the export control laws.

Several federal agencies have jurisdiction over the control of exports, including the Department of Commerce, the Department of Energy, the Department of State, the Department of Treasury, the Nuclear Regulatory Commission, and the U.S. Department of Agriculture. The three principal agencies among these are the Department of State, which administers controls of defense exports through its Directorate of Defense Trade Controls (DDTC), the Department of Commerce, which administers export of commercial, 'dual-use' and less sensitive defense items and technologies through the Bureau of Industry and Security (BIS), and the Department of Treasury, which administers exports to embargoed countries and specially designated nationals through its Office of Foreign Asset Controls (OFAC). While the discussion below focuses on these three agencies, it is important to remember that meeting the export requirements of one of these agencies alone is not sufficient, and the applicability of all of these regulations to a specific activity should be evaluated in order to ensure full compliance with the U.S. export control regulations.

Export Control Laws at Xavier

- Applies to many activities that do not involve research, such as entering into a contract with certain people listed on certain government lists, or sending money to certain countries, may require a license from the U.S. government.
- The Department of State and Department of Commerce export control laws carve out special provisions whereby unrestricted research and classroom teaching activities at universities in the U.S. are excluded from the regulations.

- The burden of understanding and complying with the regulations is placed on the University.¹
- Xavier researchers should verify what, if any, information is export controlled in the conduct of collaborative research with other institutions.
- The export control laws may apply to research activities on campus if controlled equipment, data, or information is used in the conduct of that research.

The following brief descriptions of the export control laws are meant to be only an overview of the regulations as they impact activities at Xavier . The information should be used with caution, and the Xavier community is encouraged to consult with the Office of Research and Sponsored Programs (ORSP) when contemplating new export activities.

Department of State Regulations (ITAR)

Regulatory Authority and Scope

- The Arms Export Control Act (AECA), 22 U.S.C. § 2778 grants authority to the President of the U.S. to designate and control the export and import of defense articles and services. Presidential executive order 11958 delegates this responsibility to the Secretary of State. The Department of State Directorate of Defense Trade Controls (DDTC) administers this authority through implementation of the International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 120-130.
- The ITAR contains the United States Munitions List (USML), which includes defense articles and related technical data that are controlled for export purposes.

Important ITAR Definitions

- **Defense article** is defined in 22 C.F.R. § 120.6 - any item or technical data that is specifically designed, developed, configured, adapted, or modified for a controlled use listed on the USML. Other items that reveal technical data related to USML items are also considered to be defense articles.
- **Technical data** is defined in 22 C.F.R. § 120.10 - includes information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles including blueprints, drawings, photographs, plans, instructions and documentation.
- **Defense Service** is defined in 22 C.F.R. § 120.9 - the definition includes furnishing of assistance, including training, to a foreign person, whether in the U.S. or

¹ See GAO Report "Export Controls: Agencies Should Assess Vulnerabilities and Improve Guidance for Protecting Export-Controlled Information at Universities", December 2006, available at <http://www.gao.gov>
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abroad, in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles. It also includes providing any foreign person any technical data as defined above.

The ITAR considers fundamental research in science and engineering at accredited institutions in the U.S. to be in the public domain, and, therefore, no export license would be needed to export the resulting information abroad, or share it with foreign nationals in the U.S.

- **Fundamental Research** - 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. University research will not be considered fundamental research if: (i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project activity, or (ii) the research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable. (22 C.F.R. § 120.11).
- **Public Domain** is defined in 22 C.F.R. § 120.11 - information which is published and which is generally accessible or available to the public. The ITAR describes means by which public domain information might be available, which in addition to libraries, subscriptions, newsstands and bookstores, include published patents and public release at conferences, meetings and trade shows *in* the U.S. where those venues are generally accessible to the public.

The USML Categories

The USML defines twenty-one classes of defense articles. The USML is found at 22 C.F.R. § 121. In the interest of brevity, only the main headings of the USML categories are listed here. For detailed descriptions of what is included in each category, the ITAR may be accessed on line at <http://pmddtc.state.gov/regulationslaws/itarofficial.html>. Note that category XXI Miscellaneous Articles is reserved for use by DDTC for controlling new technologies under the ITAR.

- 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, 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
- X Protective Personnel Equipment
- XI Military Electronics
- XII Fire Control, Range Finder, Optical and Guidance and Control Equipment
- XIII Auxiliary Military Equipment
- XIV Toxicological Agents and Equipment and Radiological 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 Submersible Vessels, Oceanographic and Associated Equipment
- XXI Miscellaneous Articles

Exporting under the ITAR

An export as defined under the ITAR includes sending or taking a defense article out of the U.S., disclosing (including oral or visual disclosure) technical data to a foreign person whether in the U.S. or abroad, or performing a defense service on behalf of a foreign person whether in the U.S. or abroad. (See 22 C.F.R. § 120.17 for a complete listing of export meaning under the ITAR). **This includes taking controlled technical data out of the U.S. on a laptop computer, regardless of whether or not that information is viewed or accessed while abroad. It also includes allowing a foreign person to view or use a defense article in the U.S. Most exports of defense articles and defense services must be licensed by DDTC.**

Generally, a U.S. person that manufactures, brokers or exports defense articles or services must be registered with DDTC. DDTC reviews license requests on an individual basis, and consults with other agencies, such as the Department of Defense in consideration of the request. Exports of ITAR controlled items are prohibited to some countries and individuals. The list of proscribed destinations may be found at http://www.pmdtdc.state.gov/embargoed_countries/index.html.

Commodity Jurisdiction

The DDTC has the responsibility to determine if an item or technology falls within the scope of the ITAR or if the item/technology is under the jurisdiction of the Department of Commerce for the purposes of export controls. While it is possible to self-classify an item, DDTC should be consulted if there is any doubt as to whether an article or service is subject to the ITAR. **At Xavier , the Assistant and Associate VP of ORSP will assist with the submission of commodity jurisdiction requests as well with the determination of any export licensing requirements.**

Department of Commerce Regulations (EAR)

Regulatory Authority and Scope

The EAR controls the export of “dual use” items, which are items that have civilian uses, but which may also have military or other strategic applications, including certain chemicals, microorganisms, vectors, and toxins as well as laboratory equipment such as centrifuges, analyzers and fabrication equipment such as milling machines and etching equipment for electronics. These items are classified on the Commerce Control List (CCL). The CCL is a “positive list”; in other words, if an item is NOT listed on the CCL, then, generally, the EAR does not apply. The EAR also controls the export of purely commercial commodities in support of U.S. trade and embargo policies. Purely commercial items are classified as EAR99 and have very few export restrictions.

Many activities are not subject to the EAR. In addition to activities subject to the exclusive authority of another agency, e.g. the export of a defense article which is controlled under the ITAR, the EAR lists several exclusions from the regulations. These include published information, information resulting from fundamental research, educational information, and the export or reexport of items with less than *de minimis* U.S. content (where applicable). It is important to understand the definitions and limitations of each of these exclusions in order to correctly evaluate their applicability to specific activities.

Important EAR Definitions and Concepts

- **Export** is defined in 15 C.F.R. § 732.2(b) as an actual shipment or transmission of items subject to the EAR out of the U.S. as well as the release of technology or software subject to the EAR in a foreign country or to a foreign national either in the U.S. or abroad.
- **Deemed Export** is defined in 15 C.F.R. § 732(b)(ii). A deemed export is any release of technology or source code subject to the EAR to a foreign national, regardless of location. The release is deemed to be an export to the home country or countries of the foreign national. For the purposes of the EAR, legal U.S. permanent residents, naturalized citizens, and individuals protected under the Immigration and Naturalization Act (8 U.S.C. § 1324b(a)(3)), are not considered to be foreign nationals.
- **Reexport** means an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country. It also means the release of technology or software subject to the EAR to a foreign national outside the United States (**deemed reexport**). Reexport is defined in 15 C.F.R. § 732(b)(4).
- **De Minimis U.S. content** is the amount of U.S. content, as determined by percentage of value of the U.S. content in the end item, required to make a

foreign produced item subject to the EAR. For some items, there is no *de minimis* content, meaning that any U.S. content will make the foreign-produced item controlled under the EAR. For other items the *de minimis* U.S. content for foreign produced items may be 10% or 25% of the total value. See 15 C.F.R. § 734.4 for a complete discussion of the *de minimis* U.S. content rules.

- **Published Information and Software** is defined in 15 C.F.R. § 734.7. Information is published when it is accessible to the interested public in any form. Publications may take the form of periodicals, books, print, electronic, public web sites, or any other media available for general distribution. General distribution may be defined as available to an interested community, such as a technical journal available to scientists in a relevant field, so long as the price charged for the publication does not exceed the cost of reproduction and distribution. Articles submitted to journals for consideration for publication are considered to be published, regardless of whether or not they are accepted. Published information also includes information readily available in libraries (including university libraries), as well as patents and published patent applications. Finally, release of information at a conference open to the participation of all technically qualified persons, is considered to be publication of that information. Software is published when it is available for general distribution either free or at the cost of distribution. *However, strong encryption software remains controlled, regardless of general availability.*
- **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. Such research can be distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary reasons or specific national security reasons* The complete definition and discussion of fundamental research, including University based research is found at 15 C.F.R. § 734.8. University research is considered to be fundamental to the extent that researchers do not accept restrictions on the publication of scientific and technical information resulting from the research. Temporary delays in publication for the protection of sponsor proprietary information do not remove research from the fundamental domain. However, if that sponsor's proprietary information is subject to the EAR, then that information remains subject in the conduct of the research. **Xavier researchers receiving proprietary information from corporate research sponsors should consult the ORSP to ensure compliance with the EAR in the conduct of the related research.**

- **Educational Information** is defined in 15 C.F.R. § 734.9. Educational Information is information released as part of a course listed in the University’s course catalog, and through instruction in the classroom or teaching laboratory. Participation in the course should be open to any qualified student enrolled at the academic institution. Educational information is not subject to the EAR, even if the faculty member is teaching the class at an institution outside the U.S.

The Commerce Control List

- The CCL is found at 15 C.F.R. § 774, which may be accessed at: <http://beta-www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl>. Items included on the CCL are assigned an export control classification number (ECCN) based on a category and product group. The categories and product groups are as follows:

Commerce Control List Categories	
0	Nuclear and Miscellaneous items
1	Materials, Chemicals, Microorganisms, and Toxins
2	Materials Processing
3	Electronics
4	Computers
5 (Part 1)	Telecommunications
5 (Part 2)	Information Security
6	Sensors and Lasers
7	Navigation and Avionics
8	Marine
9	Aerospace and Propulsion

Commerce Control List Product Groups	
A	Systems, equipment and components (finished or unfinished goods)
B	Test, inspection and production equipment (manufacturing equipment)
C	Material
D	Software
E	Technology

- Under the EAR, licensing requirements for export activities depend on what is being exported, the export destination, who will be using it, and what it will be used for.

While the most common controls are for anti-terrorism and national security, many other potential controls exist. The complete list of controls is found in 15 CFR§ 742.

License Exceptions

- While the CCL is much more extensive than the USML, many fewer licenses are required for items controlled under the EAR than under the ITAR. This is because of the many license exceptions that may be available for EAR controlled exports. It is important to understand that there are limitations on the use of license exceptions (see 15 C.F.R. § 740.2), and that the use of a license exception may have an associated recordkeeping and notification requirement.
- Consult with ORSP when making decisions as to the applicability of EAR license exceptions for proposed export activities.

A complete listing of EAR license exceptions may be found in 15 C.F.R. § 740. Exceptions commonly applicable to members of the Xavier community traveling abroad are BAG, which applies to personally-owned items taken abroad for personal use while abroad, and TMP, which applies to the temporary export of Xavier - owned equipment, including laptop computers and other equipment listed on the CCL, for work-related activities, including professional presentations, teaching, and field research. It is important to note that there are limitations on the use of the TMP license exception; items must be returned to the U.S. within one year of export, or if not returned, documentation of disposal is required. Items exported using the TMP license exception must be kept under the effective control of the traveler while abroad. Additionally TMP is not applicable to some restricted locations, such as Cuba.

Commodity Classification

- BIS encourages exporters to use the detailed descriptions in the CCL to self-classify items to be exported.
- In the event of an incorrect classification, the exporter is liable for any resulting violations of the EAR and may be subject to resulting penalties.
- When unsure about a self-classification, the exporter may submit the item/technology to BIS for a formal classification. Contact ORSP if assistance in classification is needed.

Anti-Boycott Restrictions

The Anti-Boycott provisions of the EAR found in 15 C.F.R. § 760 were designed and implemented to address foreign governments' boycott of countries friendly to the U.S. As of February, 2012, Arab Countries including Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, the

United Arab Emirates, and Yemen continue to impose boycott restrictions on Israel and companies that do business with Israel.² Such companies are “blacklisted” under the boycott.

The provisions apply to any person or entity in the U.S. as well as to U.S. persons or entities abroad. For example, Xavier is a U.S. person because it is located and organized under U.S. law. The anti-boycott provisions specifically prohibit the following activities:

- Agreement to refuse or actual refusing to do business with a boycotted country or with blacklisted person
- Agreement to discriminate or actual discrimination against other persons based on race, religion, sex, national origin, or nationality (for example, agreeing to refuse to hire Israeli nationals)
- Providing information about race, religion, sex, or national origin of another person
- Furnishing information about business relationships with boycotted countries or blacklisted persons (for example, providing information about current or previous business in Israel)
- Furnishing information about membership concerning associations with charitable and fraternal organizations
- Paying or otherwise implementing letters of credit containing prohibited conditions or requirements.

Exceptions to these prohibitions exist but are limited. **Additionally, U.S. persons asked to engage in the prohibited activities are required to report the request to BIS.** If you encounter boycott language in a Xavier activity, please contact ORSP for assistance in determining whether an exception is applicable and if reporting to BIS is required.

Department of Treasury Regulations (OFAC)

Regulatory Authority and Scope

- The Office of Foreign Asset Controls (OFAC) administers and enforces economic and trade sanctions based on U.S. foreign policy and national security interests. In addition to foreign countries and regimes, OFAC imposes sanctions on individuals, such as people the U.S. government deems to be terrorists and narcotics traffickers. The implementing regulations for the OFAC sanctions are found in 31 C.F.R. §§ 500-599, the Foreign Asset Control Regulations.

² <https://www.federalregister.gov/articles/2012/02/13/2012-3090/list-of-countries-requiring-cooperation-with-an-international-boycott>

The OFAC sanctions broadly prohibit most transactions between a U.S. person and persons or entities in an embargoed country or who have been declared specially designated nationals (SDNs). The prohibition generally includes importation and exportation of goods and services as well as related financial transactions or engaging in business activities with SDNs. As of 2012, OFAC sanctioned countries include the **Balkans, Belarus, Burma, Cote d'Ivoire, Cuba, the Democratic Republic of Congo, Iran, Iraq, Lebanon, the Former Liberian Regime of Charles Taylor, Libya, North Korea, Somalia, Sudan, Syria, and Zimbabwe.**

OFAC Licensing for Country Based Programs

- review the specific sanctions program before conducting activities with an OFAC sanctioned entity or person, or in an OFAC-sanctioned country.
- The individual sanctions specifically describe what activities are exempt from the embargo (for instance personal communications, exchange of informational materials, etc.) as well as what activities may be permitted under an applicable license.
- Activities which are permitted under a general license do not require specific permission from OFAC prior to engaging in the activity; however, the conditions of a general license must be carefully reviewed and the use of the general license documented.
- Activities that do not fall under an available general license may be eligible for a specific license from OFAC prior to engaging in the sanctioned activity.
- Activities conducted under both general and specific licenses are subject to OFAC audit, and records must be maintained for five years after the conclusion of the activity.
- ORSP should be contacted when considering any proposed OFAC sanctioned activities.

Additional Considerations

Records/ Record Retention

- The ITAR, EAR and OFAC regulations all stipulate record keeping requirements for regulated export activities.
- Records must be retained for five years after the completion of the activity and made available to the regulating authority upon request.
- Records that should be retained include all memoranda, notes, correspondence (including email), financial records, shipping documentation, as well as any other information related to the export activities.

- When a license exception (EAR) or license exemption (ITAR) is used, additional records documenting the applicability of the exception/exemption may be required and in some cases there may be additional reporting requirements.
- Shipment of items controlled under the ITAR or EAR should be clearly marked as controlled with the appropriate regulatory control cited.
- Any licensed export, as well as exports with a dollar value greater than \$2,500 must be entered into the Department of Census Automated Export System (AES) prior to the export of the item or information.

Penalties for Export Violations

- Can result in both civil and criminal penalties including fines and imprisonment
- A single unauthorized export may result in multiple violations (e.g. export without a license, false representation on shipping documents, acting with knowledge of a violation, etc.).
- Maximum penalties under the OFAC, ITAR and EAR are \$1M and criminal prison sentences can be up to 20 years
- May result in the loss of future export privileges (EAR) or even from debarment from participation in future federal contracts (ITAR).
- In assessing penalties, DDTC, BIS, and OFAC will consider mitigating factors, such as whether the disclosure of the violation was made voluntarily, whether the violation is an isolated incident or part of a pattern of continuing behavior, whether the company had a compliance program in place at the time of the violations, whether steps were taken to improve the compliance program after the discovery of the violation and whether the violation was due to inadvertence, mistake of fact, or a good faith misinterpretation of the laws.
- Violations discovered at Xavier should be reported to the Assistant and/or Associate VP for ORSP. Most importantly, if there is a question as to whether an activity would be a violation of the export control laws, it is important to consult with ORSP prior to engaging in the activity.

