

## DEEMED EXPORT CONTROL BACKGROUND INFORMATION

### Background on Technology Export Controls

The **Export Administration Regulations (EAR)** and the **International Traffic in Arms Regulations (ITAR)** impose licensing requirements on the export, re-export, and in-country transfer of a wide variety of technologies involving items that are controlled for national security, foreign policy, and other reasons. The requirements include an obligation for U.S. persons, including corporate employers, to seek and receive a U.S. government license before releasing in the United States to foreign persons, including foreign person employees from certain countries, various types of technology controlled by these regulations. This obligation is often informally referred to by the Commerce Department as the “deemed export” rule because releases of controlled technology to foreign persons in the U.S. are “deemed” to be an export to the person’s country or countries of nationality.

To know whether such a license is required, one must first determine if the technology to be released to the foreign person is (a) controlled by either the EAR or ITAR and (b), if so, whether the EAR or the ITAR requires a license to export or otherwise release it to the foreign person’s country or countries of nationality. A foreign person means any person who is not a U.S. citizen, or a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) (i.e., green card holder), or who is not a protected individual as defined by 8 U.S.C. 1324(a)(3) (i.e., person granted political asylum). 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 U.S., as well as international organizations, foreign governments, and any agency or subdivision of foreign governments (e.g., diplomatic missions).

The Commerce Department’s **Bureau of Industry Security (BIS)**, which administers the EAR, has published guidance at <http://www.bis.doc.gov/index.php/policy-guidance/deemed-exports> to help persons in the U.S. determine if the EAR requires a license to release technology in the U.S. to foreign persons and, if so, how to apply for such a license. The State Department’s **Directorate of Defense Trade Controls (DDTC)**, which administers the ITAR, has published guidance at [http://www.pmdtcc.state.gov/faqs/license\\_foreignpersons.html](http://www.pmdtcc.state.gov/faqs/license_foreignpersons.html) to help persons in the U.S. determine if the ITAR requires a license to release technology—or “technical data”—in the U.S. to foreign persons and, if so, how to apply for such a license.

Although the Obama Administration plans to harmonize the government’s various export control regulations and hopes to create a single export control system, both the ITAR and the EAR need to be taken into account until this is completed because they control different types of technology and technical data, have different licensing requirements, and define foreign persons differently as described on their respective websites.

- The EAR generally controls on its Commerce Control List (CCL) “dual use” technology that has both commercial and significant military applications. The ITAR generally controls on its U.S. Munitions List (USML) “technical data” that is directly related to defense articles or commercial satellites or spacecraft.
- The EAR’s licensing requirements vary depending upon the reasons (e.g., national security or foreign policy) why a technology is controlled. The ITAR’s licensing requirements generally apply equally worldwide and have a larger list of countries to which USML-controlled technical data may not be exported.
- BIS looks to a foreign person’s most recent country of citizenship or nationality when determining the licensing requirements for technology subject to the EAR that are or are not applicable to the foreign person. DDTC requires that all foreign persons, regardless of nationality, in the U.S. be licensed prior to disclosure, whether oral or visual, to USML-controlled technical data.

### “Published” Technology and “Publicly Available” Technical Data are NOT Subject to the EAR or the ITAR

The EAR and ITAR do not control, respectively, “technology” or “technical data” the regulations define as “publicly available” or in the “public domain.” Thus, the EAR and the ITAR do not require licenses to allow a foreign person to receive publicly available or public domain information, regardless of the content. The only technology or technical data the petitioner/employer would release to the foreign person beneficiary at issue in the petition falls within the scope of these definitions, then the petitioner would not need a license from either the BIS or DDTC to release the technology or

technical data to the foreign person. The following is a summary of these provisions with citations to the relevant EAR and ITAR provisions. They are a guide to help petitioners navigate the relevant provisions of the EAR and ITAR. They are not a substitute for reviewing the potentially relevant provisions of the EAR or the ITAR.

## A. EAR

According to EAR section 734.3(b)(3), “technology,” as defined in the EAR, is “publicly available,” and thus not subject to the EAR, if it is:

1. “already published or will be published,” as described in EAR section 734.7;
2. “Arise[s] during, or result from, fundamental research,” as described in EAR section 734.8;
3. Is “educational,” as described in EAR section 734.9; or
4. Is “included in certain patent applications,” as described in EAR section 734.10.

## B. ITAR

According to ITAR section 120.10(a)(5), information otherwise within the scope of the ITAR’s definition of “technical data” is not subject to the ITAR if it is:

1. “information in the public domain as defined in [ITAR] § 120.11;”
2. “information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities;” or
3. “basic marketing information on function or purpose or general system descriptions of defense articles.”

Definitions of important terms described above can be found at the end of this document for ease of reference.

If information that is otherwise within the definitions of EAR-controlled technology or ITAR-controlled technical data is not within the scope of any of these provisions, then one must review the applicable regulations to determine whether its release to the foreign person beneficiary requires a license.

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

### Publicly Available and Public Domain

The “**public domain**”/“**publicly available**” exclusions apply if the information is in the public domain and is generally accessible to the public through unrestricted distribution (15 CFR 734.3(b)(3) under the EAR; 22 CFR § 120.11 under the ITAR). Public domain information (ITAR) and publicly available information and software (EAR) is published and generally accessible or available to the public through:

- Publication in periodicals or books, print, electronic, or any other media available for general distribution to any members of the public;
- Subscriptions that are available without restriction to any individual who desires to obtain or purchase the published information;
- Websites available to the public free of charge or at a cost that does not exceed the cost of reproduction or distribution;
- Libraries open to the public, including most university libraries;
- Patents and open (published) patent applications;
- Release at an “open” conference, meeting, seminar, trade show or other open gathering in the U.S. (ITAR) or anywhere (EAR), which is generally accessible by the public for a fee reasonable related to the cost and where attendees may take notes and leave with notes;
- Fundamental research (see below); or
- Educational information (see below).

**Fundamental Research Exclusion:** No license is required to disclose to foreign persons information that is “published and which is generally accessible or available to the public through fundamental research in science and engineering at universities where the resulting information is ordinarily published and shared broadly in the scientific community.”

If the research falls under the Fundamental Research Exclusion, there would be no further concern about the need for an export license. The Fundamental Research Exclusion also does not cover export controlled confidential information provided by a third party (i.e. sponsor), or government-provided technologies that are controlled for security purposes.

The fundamental research exemption will not apply if the university accepts any restrictions on the publication of resulting information, other than a brief (~90 day) advance review by sponsors to:

- Prevent divulging proprietary information provided to the investigator by the sponsor
- Ensure that publication will not compromise patent rights of the sponsor

The Fundamental Research Exclusion is destroyed by any clause (regardless of sponsorship—federal, state, private, nonprofit, etc.) that:

- Gives the sponsor the right to approve publications
- Restricts participation of foreign nationals in conduct of research by precluding access to research results
- Otherwise operates to restrict participation in research and/or access to and disclosure of research results.

“Side deals” between a researcher and a sponsor destroy the Fundamental Research Exclusion and may also violate university policies on openness in research. A “side deal” may occur where the researcher enters into a private agreement with a sponsor that they will conduct their research project in a manner which will permit the sponsor the right to approve a publication and/or to restrict foreign nationals on a research project to comply with the sponsor’s requirements. Such actions can destroy the fundamental research exclusion and expose both the individual researchers on the project and the university itself to penalties.

**It is also important to note that the Fundamental Research Exclusion applies only to the dissemination of research data and information, not to the transmission of material goods.** Shipment of material goods outside of the U.S. is considered an “export,” and may require a license under the law. If a license is required to ship a physical item to a foreign country and not obtained prior to such shipment, the exporter risks both criminal and civil penalties.

**The important message:** Research that is subject to access, dissemination, or participation restrictions does not qualify as fundamental research!