

Key Terms

Export

Export means an actual shipment or transmission of items subject to the EAR out of the United States, or release of technology or software subject to the EAR to a foreign national in the United States. Release of export-controlled technology and source code can also occur through transmission via e-mails, faxes, designs, and verbal correspondence.

Under the ITAR regulations, export means not only sending or taking a defense article out of the U.S. in any manner, but also disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the U.S. or abroad. An export also means performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the U.S. or abroad.

“Deemed” Exports

In addition to actual shipment of a commodity out of the country, the export regulations also control the transfer, release or disclosure to foreign persons in the United States of technical data about controlled commodities. The “deemed export” regulation states that a transfer of source code or “technology” (EAR term) or “technical data” (ITAR term) to the foreign person is “deemed” to be an export to the home country of the foreign person. This deemed export rule does not apply to persons lawfully admitted for permanent residence in the United States and does not apply to persons who are protected individuals under the Immigration and Naturalization Act (8 U.S.C.1324b(a)(3)). Accordingly, for all controlled commodities, a license or license exception is required prior to the transfer of “technology” or “technical data” about the controlled commodity to foreign persons inside the U.S.

“Foreign National and Foreign Entity”

The term "foreign national" refers to everyone other than a US citizen, a permanent resident alien, & certain "protected individuals" (refugees and those with asylum); it includes any company not incorporated in the United States.

"Technology" or "Technical Data"

These phrases refer to technical information beyond general and basic marketing materials about a controlled commodity. They do not refer to the controlled equipment/commodity itself, or to the type of information contained in publicly available user manuals. Rather, the terms "technology" and "technical data" mean specific information necessary for the development, production, or use of a commodity, and usually takes the form of blueprints, drawings, photographs, plans, diagrams, models, formulae, tables, engineering specifications, and documentation. The "deemed export" rules apply to the transfer of such technical information to foreign nationals inside the U.S.

Defense Service

The ITAR defines defense service as (1) The furnishing of assistance (including training) to foreign persons, whether in the U.S. or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles; (2) The furnishing to foreign persons of any controlled technical data; and (3) Military training of foreign units and forces. A Technical Assistance Agreement would need to be put in place before transfer of ITAR controlled technical data to a foreign person.

Technology Control Plan (TCP)

A TCP is simply a plan that outlines the procedures to secure controlled technology (e.g., technical information, data, materials, software, or hardware) from use and observation by unlicensed non-U.S. citizens.

"Use" Technologies

The routine "use" of controlled equipment by foreign nationals (e.g., using it in the ordinary way specified in the user manual, in such a manner that does not disclose technical information about the equipment beyond what is publicly available, does not require a license. However, a license may be required if a foreign national is "using" the equipment in such a way as to access technical information beyond what is publicly available (for example, accessing the source code of software or modifying a piece of equipment in such a way as to gain non-publicly available technical information about its design.)

"Published" Information

Information is "published" (and therefore not subject to export controls) when it becomes generally accessible to the interested public in any form, including:

1. publication in periodicals, books, print, electronic, or other media available for general distribution (including websites that provide free uncontrolled access) 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. readily available at libraries open to the public or at university libraries;
3. patents and published patent applications available at any patent office; and
4. release at an open conference, meeting, seminar, trade show, or other open gathering held in the U.S. (ITAR) or anywhere (EAR).

Note, a conference or gathering is "open" if all technically qualified members of the public are eligible to attend and attendees are permitted to take notes or otherwise make a personal record of the proceedings and presentations. A conference is considered open notwithstanding a registration fee reasonably related to cost, and there may be a limit on actual attendance as long as the selection is either 'first come' or selection based on relevant scientific or technical competence.

Fundamental Research Exclusion (FRE)

The export control regulations exempt from licensing requirements technical information (but not controlled items) resulting from "fundamental research." Fundamental research is defined as *basic and applied* research in science and engineering conducted at an accredited U.S. institution of higher education where the resulting information is ordinarily published and shared broadly within the scientific community. Such research can be distinguished from proprietary research the results of which ordinarily are restricted for proprietary reasons or specific national security reasons. Research conducted by scientists, engineers, or students at a university normally will be considered fundamental research. The Fundamental Research Exclusion (FRE) permits U.S. universities to allow foreign members of their communities (e.g., students, faculty, and visitors) to participate in research projects involving export-controlled technical information on campus in the U.S. without a deemed export license. Further, technical information resulting from fundamental research may be shared with foreign colleagues abroad and shipped out of the United States without securing a license.

Prepublication review by a sponsor of university research solely to ensure that the publication does not compromise patent rights or inadvertently divulge proprietary information that the sponsor has furnished to the researchers does not change the status of the research as fundamental research, so long as the review causes no more than a temporary delay in publication of the research results. However, if the sponsor will consider as part of its prepublication review whether it wants to hold the research results as trade secrets (even if the voluntary cooperation of the researcher would be needed for the company to do so), then the research would no longer qualify as "fundamental". As used in the export regulations, it is the actual and intended openness of research results that primarily determines whether the research counts as "fundamental" and not subject to the export regulations. University based research is not considered "fundamental research" if the university or its researchers accept (at the request, for example of an industrial sponsor) restrictions on publication of scientific and technical information resulting from the project.

"Educational" Information

Whether in the U.S. or abroad, the educational exclusions in EAR and ITAR cover instruction in science, math, and engineering taught in courses listed in catalogues and associated teaching laboratories of academic institutions, even if the information concerns controlled commodities or items. Dissertation research must meet the standards for "fundamental research" to qualify as "publicly available."

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