ORAA Export Control Guidance

Definitions and Commonly Used Phrases

Commerce Control List: A list of “dual use” items, materials, software, and technology, subject to export regulation, maintained by the Department of Commerce that can be used both in military and other strategic uses (e.g., nuclear) and commercial applications. The CCL is divided into ten categories under Part 774:

(0) Nuclear Materials, Facilities and Equipment, and Miscellaneous;
(1) Materials, Chemicals, "Microorganisms," and Toxins;
(2) Materials Processing;
(3) Electronics Design, Development and Production;
(4) Computers;
(5) Telecommunications;
(6) Sensors;
(7) Navigation and Avionics;
(8) Marine;

Each of the above CCL categories is subdivided into five groups, designated by the letters A through E:

(A) Equipment, assemblies, and components;
(B) Test, inspection and production equipment;
(C) Materials;
(D) Software;
(E) Technology.

Deemed Export: 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 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. See BIS Deemed Export Resources for additional information and a Q&A.

Defense Article: Any item or technical data (these include military and commercial satellite and space related items, equipment, vehicles, instrumentation, software, and materials), designated by the Department of State in the International Traffic in Arms Regulations. This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items on the United States Munitions List. It does not include basic marketing information on function or purpose or general system descriptions.
Defense Service: (Certain information to be exported may be controlled even if in public domain) Furnishing technical data or assistance (including training) to foreign persons (i.e., foreign nationals), 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; or, military training of foreign units and forces.

Dual Use items: Items that can be used both in military and other strategic uses and in civil applications.

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.”

ITAR – Export Controls do not apply to information concerning “general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities.”
EAR – Export Controls do not apply to “educational information” released by instruction in catalog courses and associated teaching laboratories.
The exclusion includes courses available globally on-line (“distance learning”) - but not to OFAC-embargoed countries.
As a general rule, no license is needed for classroom/lab teaching of foreign nationals registered for classes in U.S. universities.

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

The exclusion does not apply to encrypted software.

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.

EAR: Export Administration Regulations are issued by the United States Department of Commerce, Bureau of Industry and Security (BIS) under laws relating to the control of certain exports, reexports, and activities related to dual use items on the Commerce Control List.

EAR99: If your item falls under U.S. Department of Commerce jurisdiction and is not listed on the CCL, it is designated as EAR99. EAR99 items generally consist of low-technology consumer goods and do not require a license in many situations. However, if your proposed export of an
EAR99 item is to an embargoed country, to an end-user of concern, or in support of a prohibited end-use, you may be required to obtain a license.

**Embargo:** A government-mandated sanction that restricts trade with a foreign country; a government prohibition against the shipment of certain products to a particular country for economic or political reasons.

**Employment Exclusion:** No license is required to share controlled technical information with a foreign person who is a full-time, bona fide university employee and has a permanent address in the US while employed, provided that the person is not a national of certain countries; and is advised in writing not to share controlled information with other foreign persons.

An ITAR license is not required for universities to share information in the U.S. with Foreign Persons who are Regular and Full Time Employees of U.S. Institutions of Higher Education.

They are eligible to receive, without a license, controlled data if:
1. the employee’s permanent abode throughout the period of employment is in the U.S.; and
2. the employee is not a national of a country to which exports are prohibited; and
3. the institution informs the employee that the data may not be further disclosed to another foreign national without the prior written approval of the State Department.

Note that most graduate students would not be considered full time employees. This exemption will apply mostly to foreign nationals in H-1B status.

**Export Controls:** US laws and regulations that restrict the flow (shipment, transmission or transfer) of certain materials, devices and technical information related to such materials and devices outside the United States or to foreign persons in the United States. They apply to all activities, including internally and externally funded. Do not assume that unsponsored activities are exempt.

**Foreign Entity:** Business or other entity not incorporated in the U.S., and foreign governments.

**Foreign Person:** Anyone who is not a US citizen. A foreign person also means any foreign corporation, business association, partnership or any other entity or group that is not incorporated to do business in the US. Foreign persons may include international organizations, foreign governments and any agency or subdivision of foreign governments such as consulates.

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**Fundamental Research:** 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. (National Security Decision Directive 189)

**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 applies only to the dissemination of research data and information, not to the transmission of material goods.

In order to be considered in the public domain, the information or non-encrypted software must have been generated in the course of research performed within the United States.

Information and software resulting from fundamental research outside of the U.S. is not treated by export control law as having entered into the public domain, and is subject to export control, unless it qualifies under other public domain criteria.

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

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 polices 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.

**KEY MESSAGE:** Research that is subject to access, dissemination, or participation restrictions does not qualify as fundamental research!
**Informational Materials Exclusion:** Informational materials are excluded from US export controls, including deemed export controls as follows:

- Information in the public domain;
- Basic marketing information on function or purpose; or
- General system descriptions of defense articles.
- All other informational materials are excluded from export controls if they fall within any of the following categories:

  - Publicly available information
  - Prerecorded phonograph records reproducing in whole or in part, the content of printed books, pamphlets, and miscellaneous publications, including newspapers and periodicals;
  - Children’s picture and painting books;
  - Newspaper and periodicals, unbound, excluding waste;
  - Music books;
  - Sheet music;
  - Calendars and Calendar blocks, paper
  - Maps, hydrographical charts, atlases, gazetteers, globe covers and globes (terrestrial and celestial);
  - Exposed and developed microfilm reproducing, in whole or in part, the content of any of the above;
  - Exposed and developed motion picture film and soundtrack; or
  - Advertising printed matter exclusively related thereto.

**Items:** Refers to any tangible things, equipment or hardware.

**Information:** can include technical data such as models, formulae, engineering designs and specifications, or technical assistance such as training or instruction.

**ITAR:** International Traffic in Arms Regulations are issued by the Department of State, which has responsibility for the control of the permanent and temporary export and temporary import of defense articles and services.

**OFAC Regulations:** The Office of Foreign Assets Control regulations are issued by the US Department of the Treasury, which administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction.

**Publicly Available or Public Domain:** The terms “publicly available” and “public domain” are not synonymous. “Publicly available” is the term used in the Export Administration Regulation (EAR) and “public domain” is the term used in the International Traffic in Arms Regulations (ITAR). Information (such as technology) or software that is publicly available or that is in the public domain is generally excluded from US export controls, including deemed export controls. Information resulting from fundamental research is considered to be both publicly available and in the public domain.
Note: Even if a transaction involves only information or software that is publicly available or in the public domain, it would, nevertheless, be subject to US export controls if it involved the provision of a defense service.

Publicly Available: Information that falls within any one of the following categories:

- Information or software that is or will be “published”;
- Information that arises during or results from fundamental research;
- Educational information; or
- Information in certain patent applications such as a patent application being sent to a foreign country to obtain the signature of an inventor who is a co-inventor with a person residing in the United States.

- EAR, 15 CFR 734.3(b)(3), 734.7 to 734.11 and pt 734, Supp. No. 1

Public Domain: Information that is published and that is generally accessible or available to the public through:

- sales at newsstands and bookstores;
- subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;
- second class mailing privileges granted by the US government;
- at libraries open to the public or from which the public can obtain documents;
- patents available at any patent office;
- unlimited distribution at a conference, meeting, seminar, trade show, or exhibition, generally accessible to the public, in the United States;
- public release (i.e., unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant US government department or agency; and
- fundamental research in science and engineering at accredited institutions of higher learning in the US where the resulting information is ordinarily published and shared broadly in the scientific community.

ITAR; 22 CFR § 120.11

Public Domain Exclusion: The Public Domain Exclusion applies to information and research results already published and actually available through:

- Libraries, bookstores, newsstands;
- Trade shows, meetings, and/or seminars open to the public;
- Websites open to the public; or
- Courses listed in the university catalog of a general nature.

The exclusion applies to a project:
• That does not involve equipment, encrypted software, listed-controlled chemicals or bioagents or toxins, and
• In which there is no reason to believe that any information or non-encrypted software being released will be used for a weapon of mass destruction, and
• For which any information or software involved in the project is already published.

Published means that it must be in one (or more) of the following:

• Libraries open to the public or unrestricted subscriptions, news-stands, book stores for a cost not exceeding reproduction/distribution cost (including a reasonable profit)
• Published patents
• Conferences, meetings or seminars in the U.S. that are generally accessible to the public for a fee reasonably related to the cost, and where attendees may take notes
• Websites which are accessible to all members of the public, free of charge, and where the research institution does not have knowledge or control of who visits the site or download the software/information
• General science, math or engineering commonly taught at, and offered in course catalogues of, a university

Dissertation research must meet the standards for "fundamental research" to qualify as "publicly available".

If the research falls under the Public Domain Exclusion, there would be no further concerns about the need for an export license.

**Published**: Information is published when it becomes generally accessible to the interested public in any form, including when it is:

• released at an open conference, seminar or meeting that all technically qualified members of the public are eligible to attend and at which attendees are permitted to take notes or otherwise make a personal record of the proceedings and presentations; readily available at a public or university library;
• or in a patent or open patent application available at any patent office.

**Sanctions**: Coercive measures, such as boycotts and trade embargoes, taken by one or more nations against another guilty of violating international law.

**Sanctioned Country**: Countries designated by OFAC as having limited or comprehensive trade sanctions imposed by the United States for reasons of anti-terrorism, non-proliferation, narcotics trafficking, or other reasons. See [OFAC website](https://www.treasury.gov/ofac/downloads/sdn.pdf).

**Software**: refers to a collection of one or more computer programs or microprograms in either source code (programming statements) or object code (machine-readable instructions).

**Specially Designated Nationals and Blocked Persons List**: A list of individuals and entities, maintained by OFAC, identified as terrorists, international narcotics traffickers, and those
engaged in activities related to the proliferation of weapons of mass destruction. This list has more than 13,000 entries. See OFAC website.

Select Agent: Select agents and toxins are high consequence agents that pose a severe threat to public health and safety as determined by the Centers for Disease Control and the United States Department of Agriculture.

Technical Data or Technology: Information which is 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. Technical data includes classified information relating to defense articles and defense services, and some software may be considered technical data. This definition does not include the controlled equipment/commodity itself, nor educational materials, basic marketing information on function, purpose or general system descriptions of defense articles contained in publicly available user manuals. The "deemed export" rules apply to the transfer of such technical information to foreign nationals inside the U.S.

“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.)

US person: is a citizen of United States, a lawful permanent resident alien of the US, (a "Green Card" holder), a refugee or someone here as a protected political asylee or under amnesty. US persons also include organizations and entities, such as universities, incorporated in the US. The general rule is that only US persons are eligible to receive controlled items, software or information without first obtaining an export license from the appropriate agency unless a license exception or exclusion is available.

United States Munitions List (USML): Articles, services and related technical data designated as defense articles and defense services pursuant to the Arms Export Control Act (including satellites and spacecraft).