



702 Navigating the Alphabet Soup of Export Compliance

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Faculty Biographies

Lynne M. Durbin

Lynne M. Durbin is general counsel, secretary, and vice president of human resources for Adhesives Research, Inc., in Glen Rock, Pennsylvania, a privately-held global manufacturer of specialty adhesives and films. She is responsible for all legal affairs, domestic and international, of the corporation, with primary focus on corporate, intellectual property, and regulatory issues. Ms. Durbin oversees a department of five human resource and training professionals. She also counsels two sister organizations, which are involved in printing and manufacturing conductive membranes.

Prior to joining Adhesives Research, Inc., Ms. Durbin served as division counsel and director of environment, health, and safety for the Grace Davison unit of W.R. Grace & Co. in Connecticut, an inorganic chemical manufacturer. She provided counsel on general corporate and commercial matters, environmental, health and safety issues, intellectual property matters, antitrust matters, and acquisitions. Prior to working in-house, Ms. Durbin was in private practice in the Baltimore area.

Ms. Durbin is immediate past president of ACC's Baltimore Chapter, president of Network 2000, Inc., and a director of the Girl Scouts of Central Maryland, and the Parks & People Foundation. Ms. Durbin was named to *The Daily Record's* list of Maryland's Top 100 Women in 2000, 2002, and 2005 and has been inducted into the circle of excellence.

Ms. Durbin received a B.A. from Yale University and a J.D. from the Boston University School of Law.

Gina Fantasia

General Counsel
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Bernie Kritzer

Bernie Kritzer is the director of the Office of National Security and Technology Transfer Controls (NSTTC). This office is the focal point within the Bureau of Industry and Security (BIS) for issues related to national security, including encryption, transfers of tangible and intangible technology, and foreign nationals. NSTTC implements multilateral export controls for national security reasons to comply with the Wassenaar Arrangement to control the spread of dual-use goods and related technologies.

Prior to his current position, Mr. Kritzer served as the director of BIS's Treaty Compliance Division where he was responsible for managing U.S. industry's compliance with the Chemical Weapons Convention. He also has served as director of the "Deemed Exports" Program; Manager of the Short Supply Program for Oil and Timber; and senior policy advisor within BIS. In addition to his work at Commerce, Mr. Kritzer worked for the Department of Energy. Prior to that, he worked for the Exxon Oil Corporation.

Mr. Kritzer holds a B.A. from The American University and an M.A. in International Relations and Russian Studies from the Columbia University. He also is a graduate of the Department of State's Executive Seminar.

Viet V. Le

Viet V. Le is the associate general counsel for Avnet, Inc., in Phoenix, a *Fortune* 500 company that is one of the world's largest distributors of electronic components and computer products. She oversees global litigation and compliance matters for the company and also serves as divisional counsel for the electronic marketing division.

Ms. Le brings to her current position litigation experience as an assistant attorney general with the Arizona Attorney General's Office and a commercial litigator at Meyer, Hendricks & Bivens, P.L.C. She provided legal advice to the Arizona State Banking Department and represented the department in numerous matters before the office of administrative hearings and state courts. Her private litigation practice covered a variety of areas, including medical malpractice, contract disputes, and employment law. Ms. Le also served as a judicial clerk for Judge Jefferson Lankford on Division One of the Arizona Court of Appeals.

Ms. Le has been involved in numerous professional and community organizations. She currently serves on the Asian Pacific Islander community advisory committee for the Maricopa County Colleges and the boards of the Arizona Asian American Bar Association (AAABA) and The Phoenix Symphony. She was a president and vice president of the AAABA and the co-chair of the programs committee for the National Asian Pacific American Bar Association's 2001 convention.

Ms. Le received a B.S. from the University of Pennsylvania and a J.D. from the University of Arizona, College of Law.



702 – Navigating the Alphabet Soup of Export Compliance

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ACC's 2005 Annual Meeting: Legal Underdog to Corporate
Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott
Wardman Park Hotel



AGENDA

- Introduction to Export Compliance
- Screening
- Product Classification
- License Determination
- Dual-Use Issues
- Deemed Exports
- Enforcement

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GLOBAL TECHNOLOGY BUSINESS

U.S. companies employ tens of thousands of foreign nationals for technical and professional jobs

- ❖ Employment of foreign nationals within the U.S.
- ❖ Outsourcing software development and other tasks to providers based abroad
- ❖ Creating development centers outside U.S.

U.S. companies diversify their supply sources to low cost markets throughout the world

Reduced barriers to market entry and increased international trade facilitation result in U.S. goods and technology being shipped abroad

THE GLOBAL TECHNOLOGY BUSINESS MODEL ALWAYS IMPLICATES EXPORT CONTROLS!



Why Care About Export Controls?

Compliance with export controls is a legal obligation

Penalties are severe!

❖ **For individuals, but not the Company**

- Imprisonment (up to 10 years)

❖ **For both individuals and the Company**

- Fines up to \$1 million per violation
- Loss of export privileges
- Debarment from Federal Government contracts/grants
- Damage to reputation



PURPOSES OF EXPORT CONTROLS

- Advance foreign policy goals
- Restrict exports of goods and technology that could contribute to the military potential of adversaries
- Prevent proliferation of weapons of mass destruction (nuclear, biological, chemical)
- Prevent terrorism
- Fulfill international obligations



Different Kinds of Export Controls

Dual-use Controls

- ❖ Regulated by the Department of Commerce, Bureau of Industry and Security ("BIS")
 - Export Administration Regulations ("EAR")
 - 15 C.F.R. Chapter VII

Defense Controls

- ❖ Regulated by the Department of State, Directorate of Defense Trade Controls ("DTC")
 - International Traffic in Arms Regulations ("ITAR")
 - 22 C.F.R. parts 120-130 and 22 U.S.C. 2778-2780

Embargoes and Sanctions

- ❖ Regulated by the Department of Treasury, Office of Foreign Asset Controls ("OFAC")
 - Foreign Asset Controls Regulations ("FACR")
 - 31 C.F.R. Chapter V



OTHER REGULATORY AGENCIES

- Nuclear Regulatory Commission - regulates nuclear material and equipment
- Office of Arms Controls and Nonproliferation - regulates nuclear technology and technical data for nuclear power and special nuclear materials
- Defense Threat Reduction Agency - regulates international transfers of defense-related technology and reviews dual-use matters referred by Commerce
- DEA - several units regulate controlled substances and chemicals used to produce them
- FDA - regulates drugs and medical devices



Other Regulations to Consider

- Foreign Corrupt Practices Act
- Anti-boycott Regulations
- NAFTA
- Environmental Regulations both in U.S. and abroad—TSCA, EINECS, etc.



WHO IS “EXPORTER?”

- U.S. principal party in interest is the exporter, except in certain routed transactions (EAR §758.3).
- Freight forwarders are not generally the principle party in interest.



EXPORTER'S RESPONSIBILITIES

Complying with all U.S. laws and regulations

- ❖ Determine the applicable licensing authority
- ❖ Conduct appropriate screening
- ❖ Classify products
- ❖ Obtain the appropriate license or other authorization



What Is An Export?

Any shipment or transfer of goods, software or technology that leaves the U.S., including

- ❖ No charge shipments
- ❖ Hand carries of goods
- ❖ Shipments to wholly owned subsidiaries outside the U.S.
- ❖ Releases of technology via faxes, e-mail, etc. to persons outside the U.S. or foreign nationals in the U.S.
- ❖ Posting technology on computer system accessible by persons outside the U.S. or foreign nationals in the U.S.

Re-export of U.S. origin items wherever located (including sales by subsidiaries or customers)



RE-EXPORTS

Exports from the U.S. are subject to U.S. export controls if re-exported

If export would require a license to export to a foreign country, the re-export from a third country would also require a license for its re-export

- ❖ Example: export from U.S. to PRC & re-export from Hong Kong to PRC



RE-EXPORTS

You do not need a re-export license if:

- ❖ Item is not subject to the EAR
- ❖ Item does not require license for export from the U.S.
- ❖ There is no (or small amount of) controlled U.S.-origin content
- ❖ The foreign product, plant, or plant equipment is not made from U.S. technology or software



NOT SUBJECT TO U.S. CONTROLS

- Publications that are artistic or non-technical in nature
- Publicly available technology & software, excluding encryption

EAR Part 734



PUBLICLY AVAILABLE SOFTWARE

- Non-encryption software
- General distribution
 - ❖ Accessible to the public (i.e., library, patent records, & conference)
 - ❖ No restrictions to anybody
 - ❖ No time restraints, e.g., time bombs
- Free or just cost of reproduction/distribution
- Fundamental Research
- Educational Information
 - ❖ Instruction in catalog courses of institutions
- Patent Applications



WHO MUST COMPLY WITH U.S. EXPORT CONTROLS?

- US persons
- Definitions vary by regulation and by sanction or embargo language



WHO IS A U.S. PERSON?

- U.S. citizens or permanent residents
- U.S. companies/branches
- Foreign subsidiaries & foreign nationals
 - ❖ Dealing in U.S.-origin products/ certain foreign-made products
- U.S. persons “controlling” or “facilitating” transaction



CONTROLS

- Customer/end-user based
- Destination based
- Part based



CUSTOMER-BASED CONTROLS

- Know your customer
- Know the end-use and end-user
- Know your products
- Remain alert for red flags



CUSTOMER-BASED CONTROLS

Screen all parties in transactions
against export restriction lists

- ❖ Bill to
- ❖ Ship to
- ❖ Directors/Officers (if known)
- ❖ End-users



PUBLISHED BAD GUYS

- Denied Persons List
- Entity List
- Debarred Parties List
- Specially Designated Nationals List
- Unverified List

<http://www.bis.doc.gov/ComplianceAndEnforcement/ListsToCheck.htm>



PROHIBITED END-USERS/END-USES

- Nuclear activities
- Missile activities
- Chemical/biological weapons
- Terrorist activities

EAR Part 744.2 – 744.



DIVERSION RISK SCREEN

- Be alert for Red Flags
- Prevent violation of General Prohibitions
 - No. 6: export to embargoed countries (EAR Part 746)
 - No. 7: support of proliferation activities
 - No. 10: proceeding with knowledge that violation has occurred or is about to occur

EAR Part 746



RED FLAGS

- Customer or address is similar to one of parties on restricted lists
- Customer is reluctant to disclose end-use information
- Willingness to pay higher prices than average, especially for hardware (no haggling). Cash!
- Product's capabilities do not fit customer's line of business
- Does not push for performance guarantees or maintenance contracts for hardware



RED FLAGS

- Customer is unfamiliar with the product's characteristics
- Item ordered is incompatible with the technical level of the destination country
- Customer has little or no business background
- Use of chains of brokers, distributors, freight forwarders; end user becomes convoluted
- Shipping via circuitous route
- "Innocent" requests for false labeling or packaging (avoid taxes or duties)
- When questioned, the buyer is evasive and especially unclear about whether the purchased product is for domestic use, for export, or for re-export



RED FLAGS - EXAMPLE

NUCLEAR PRODUCT – ALUMINUM TUBES

- New customer
- End use is for heat exchangers
- Wanted specific heavy duty material (1C202)
- Willing to pay extra for speedy delivery
- Delivery instructions: pick up at the dock

- Aluminum tubes can be used in making gas centrifuge for uranium enrichment
- 1C202 aluminum is controlled for nuclear proliferation reasons



DESTINATION BASED CONTROLS

U.S. COMPREHENSIVE EMBARGOES

- Cuba
- Iran
- Sudan
- Syria

- ❖ No direct or indirect exports without license
- ❖ Policy of denial



DESTINATION BASED CONTROLS

Limited Sanctions

- North Korea (DOC Jurisdiction)
- Iraq (DOC Jurisdiction)
- Libya (DOC jurisdiction)
- Burma (new investment prohibited)
- Zimbabwe (prohibits dealing with designated individuals)

<http://www.treas.gov/offices/enforcement/ofac/sanctions/>



DANGEROUS MYTHS ABOUT U.S. EXPORT CONTROL

- My product does not have a military use, so it's not subject to U.S. export controls
- My products are sold entirely over the Internet, so I have no concern about U.S. export controls
- My company uses a freight forwarder who handles all our exports, so my firm is not liable
- My company does not export products to "bad" countries, so there are no U.S. export controls for us to worry about



MORE DANGEROUS MYTHS

- My company only exports to a few distributors abroad. Who the distributors sell to is not my concern
- Once my company's products are outside the U.S., we are "off the hook" and have no concerns



PART-BASED CONTROLS

Step One

Determining Which Agency Controls



What Are You Exporting?

- If purely a military or defense item, then go to Department of State DTC rules
- If dual use (commercial and military) item, go to Commerce decision tree (15 C.F.R. Chapter VII, part 732, supplement)
- If uncertain where your item falls, submit a commodity jurisdiction request to the DTC (See 22 CFR 120.3 and 120.4). DTC will consult with other agencies and provide a written determination by letter.

Step Two

Determining if a License is Required



Are You Subject to ITAR?

- If you have a defense related item (on the U.S. munitions List), you will be subject to the International Traffic in Arms Regulations (“ITAR”) administered by the DTC.
- You will definitely need a license.
- You will also need to be registered with the DTC.



Are You Subject to the Export Administration Regulations (EAR)?

- Determine if you are subject to these regulations by using the decision tree (copy reproduced in materials in book and on disc)
 - Tree questions include
 - Am I a U.S. person? (more on this later)
 - Am I involved in proliferation of chemical or biological weapons, etc.?
 - Is the item subject to the exclusive jurisdiction of another government agency?
 - Where is the recipient of the item located?
 - And many more!
- If you are not, no further work is required



Does the EAR Require a License?

- If you are subject to the EAR, you need to determine if a license is required by reviewing the next decision tree (copy reproduced in materials in book and on disc)



General Prohibitions

- First, review the 10 general prohibitions:
 - 1—Exports of controlled items to listed countries
 - 2—Reexport of foreign-made items with certain amounts of controlled U.S. content
 - 3—Reexport of foreign-produced product of U.S. technology
 - 4—Action prohibited by a denial order
 - 5—Export to a prohibited end-user
 - 6—Export to embargoed destination
 - 7—Support of proliferation activities
 - 8—In-transit shipments and items to be unladen from vessels and aircraft
 - 9—Violation of orders, terms and conditions of EAR
 - 10—Proceeding with knowledge that a violation has occurred or will occur



Commerce Control List

- If your item falls within General Prohibitions 1-3, examine the Commerce Control List (CCL) categories to see where your item falls:
 - 0—Nuclear materials, facilities and equipment
 - 1—Materials, chemicals, microorganisms and toxins
 - 2—Materials processing
 - 3—Electronics
 - 4—Computers
 - 5—Telecommunications and information security
 - 6—Sensors and lasers
 - 7—Navigations and avionics
 - 8—Marine
 - 9—Propulsion systems, space vehicles and related equipment



Does the Item Have an ECCN?

- Determine if your item has an Export Control Classification Number (ECCN)
 - Look at the CCL
 - Find the category into which your item falls
 - Determine the product group
 - Systems, equipment and components
 - Test, inspection and production equipment
 - Material
 - Software
 - Technology
 - Review the list below your product group to see if your item is included



General Prohibitions 4-10

- Your item will either have an ECCN or will fall into the EAR99 category (no specific listing of your item)
- If item in either category falls within Prohibitions 4-10, it will require a license
- If EAR99 item does not fall within Prohibitions 4-10, then no further work; ship no license required (NLR)
- If ECCN item does not fall within Prohibitions 4-10, then take additional steps to determine if license necessary



CCL and Country Chart

- Review your item against this chart to see if there is a reason for control identified for the country to which you are exporting
 - Control reasons include: anti-terrorism (AT), crime control (CC), chemical weapons convention (CW), national security (NT), among others
- If there is an “x” in the box, you need a license
- If box is blank, still need to determine if end-user or end use is of concern (denied persons, entity list, etc.)



Commerce Country Chart

Reason for Control

Countries	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Convention	Crime Control			Ant Terror
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1
Guyana	X	X		X		X	X	X	X	X	X	X		X	
Haiti	X	X		X		X	X	X	X	X	X	X		X	
Honduras	X	X		X		X	X	X	X	X	X	X		X	
Hong Kong	X	X		X		X		X	X	X		X		X	
Hungary	X					X	X	X	X						
Iceland	X			X		X	X	X	X						
India	X	X	X	X	X	X	X	X	X	X		X		X	
Indonesia	X	X		X		X	X	X	X	X		X		X	

Is There an Exception?

- If you meet the requirements of one or more of the exceptions under 15 C.F.R. Chapter VII, part 740, you may still avoid need for a license
- Exceptions include: limited value shipments, civil end-users, temporary imports or exports, service and replacement, baggage, aircraft and vessels, and others



What to Do If You Need a License

License from State under DTC

- First you must be registered with DTC as an entity involved in manufacturing, export or brokering of defense related items (\$1750 per year)
- Then you can apply for a license through
 - D-Trade—an all electronic application
 - ELLIE—a partially electronic/partially hard copy application
 - Hard copy application
- Time lines to obtain a license can be lengthy



License from Commerce under the EAR

- Apply for license to BIS
 - Can apply online with SNAP (simplified network application process)
 - Hard copy application
- If license approved, normally valid for two years
- Ship with appropriate shipper's declarations



Useful Websites

- Commerce—BIS-- www.bxa.doc.gov
- State—DTC -- www.pmdtc.org
- Treasury—OFAC -- www.treas.gov/ofac



What is the “Deemed Export Rule”:

- An export of technology is “deemed” to take place when the technology is
 - released
 - to a foreign national
 - within the United States.

(Section 734.2(b)(2)(ii) of the EAR)



When do you need a license for a Deemed Export?

- when you:
 - intend to transfer controlled technologies to foreign nationals in the United States; and
 - transfer of the same technology to the foreign national's home country would require an export license



What is technology?

- “Technology” is specific information necessary for the “development,” “production,” or “use” of a product. (Part 772 of EAR)
 - Controlled technology is that identified on the Commerce Control List (CCL)
 - Technology is controlled according to the provisions of each defined category in the CCL
 - Technology required for the development, production, or use of a controlled product remains controlled even when applicable to a product controlled at a lower level."



Is Software Technology?

- EAR definitions distinguish between software and technology.
- Software is one of the groups within each of the categories of items listed on the CCL.
- Software which is delineated on the CCL is controlled



When is technology “released”?

- When it is:
 - available to foreign nationals for visual inspection
 - For example, reading plans, blueprints, technical specifications, viewable on the white board in your conference room, etc.);
 - exchanged orally; or
 - when technology is made available by practice or application under the guidance of persons with knowledge of the technology.

See §734.2(b)(3) of the Export Administration Regulations (EAR)



Who is a “Foreign National” subject to the rule?

- Anyone not:
 - a U.S. citizen (born or naturalized)
 - a lawful permanent resident, or
 - a “protected person” (political refugee or asylum holder)



What if the person is a foreign national of one country, and is also a permanent resident of another country?

- The person's permanent residency status drives the licensing requirements.
- Transfers to that person are considered transfers of technology to the country of permanent residency.



What about cases of dual citizenship?

- As a general principle, the last citizenship obtained governs.



What's a "Deemed Re-Export"?

- Term used to indicate the transfer of controlled U.S. technology to a third-country national overseas
 - U.S exporter transfers its controlled proprietary technology to company in country A, and
 - Company in country A employs a person not a permanent resident of country A (or a U.S. citizen), then its
 - Considered a transfer to that employee's country of permanent residence, company in country A must obtain a deemed re-export license



Consequences for Violating the EAR

- Both criminal and administrative penalties for violation of EAR
- No intent requirement for most administrative violations



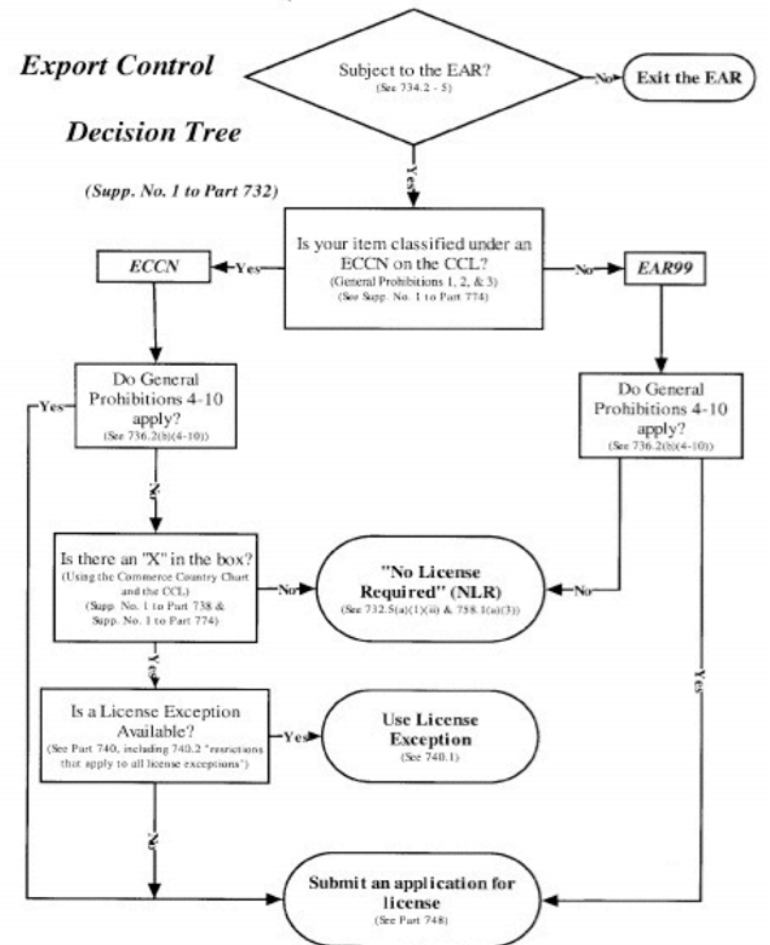
Range of penalties

- Up to \$1 million per violation in criminal cases; plus prisons time in some cases
- \$11,000 per violation in most administrative cases fines; plus denial of export privileges possible
- \$120,000 per violation in certain administrative cases involving national security issues.

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SUPPLEMENT NO. 1 TO PART 732 - EXPORT CONTROL DECISION TREE



SUPPLEMENT NO. 2 TO PART 732 - AM I SUBJECT TO THE EAR

PART 734

SCOPE OF THE EXPORT ADMINISTRATION REGULATIONS

Sec.

734.1 Introduction

734.2 Important EAR terms and principles

734.3 Items subject to the EAR

734.4 *De minimis* U.S. Content

734.5 Activities of U.S. and foreign persons subject to the EAR

734.6 Assistance available from BIS for determining licensing and other requirements

734.7 Published information and software

734.8 Information resulting from fundamental research

734.9 Educational information

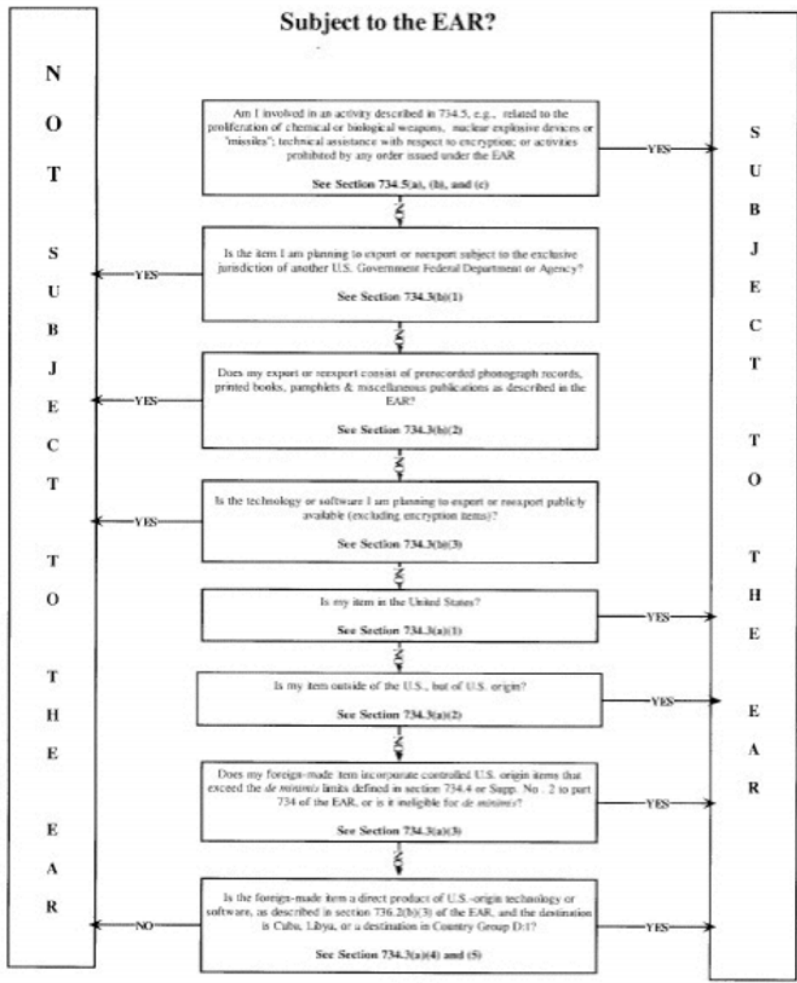
734.10 Patent applications

734.11 Government-sponsored research covered by contract controls

734.12 Effect on foreign laws and regulations

QUESTIONS AND ANSWERS - TECHNOLOGY AND SOFTWARE SUBJECT TO THE EAR SUPPLEMENT NO. 1

CALCULATION OF VALUES FOR *DE MINIMIS* RULES SUPPLEMENT NO. 2



Scope of the Export Administration Regulations

Part 734

§734.1

INTRODUCTION

(a) In this part, references to the Export Administration Regulations (EAR) are references to 15 CFR chapter VII, subchapter C. This part describes the scope of the Export Administration Regulations (EAR) and explains certain key terms and principles used in the EAR. This part provides the rules you need to use to determine whether items and activities are subject to the EAR. This part is the first step in determining your obligations under the EAR. If neither your item nor activity is subject to the EAR, then you do not have *any* obligations under the EAR and you do not need to review other parts of the EAR. If you already know that your item or activity is subject to the EAR, you do not need to review this part and you can go on to review other parts of the EAR to determine your obligations. This part also describes certain key terms and principles used in the EAR. Specifically, it includes the following terms: "subject to the EAR", "items subject to the EAR", "export", and "reexport". These and other terms are also included in part 772 of the EAR, Definitions of Terms, and you should consult part 772 of the EAR for the meaning of terms used in the EAR. Finally, this part makes clear that compliance with the EAR does not relieve any obligations imposed under foreign laws.

(b) This part does not address any of the provisions set forth in part 760 of the EAR, Restrictive Trade Practices or Boycotts.

(c) This part does not define the scope of legal authority to regulate exports, including reexports, or activities found in the Export Administration Act and other statutes. What this part does do is set forth the extent to which such legal authority has been exercised through the EAR.

Export Administration Regulations

§734.2

IMPORTANT EAR TERMS AND PRINCIPLES

(a) Subject to the EAR - Definition

(1) "Subject to the EAR" is a term used in the EAR to describe those items and activities over which BIS exercises regulatory jurisdiction under the EAR. Conversely, items and activities that are *not* subject to the EAR are outside the regulatory jurisdiction of the EAR and are not affected by these regulations. The items and activities subject to the EAR are described in §734.2 through §734.5 of this part. You should review the Commerce Control List (CCL) and any applicable parts of the EAR to determine whether an item or activity is subject to the EAR. However, if you need help in determining whether an item or activity is subject to the EAR, see §734.6 of this part. Publicly available technology and software not subject to the EAR are described in §734.7 through §734.11 and Supplement No. 1 to this part.

(2) Items and activities subject to the EAR may also be controlled under export-related programs administered by other agencies. Items and activities subject to the EAR are not necessarily exempted from the control programs of other agencies. Although BIS and other agencies that maintain controls for national security and foreign policy reasons try to minimize overlapping jurisdiction, you should be aware that in some instances you may have to comply with more than one regulatory program.

(3) The term "subject to the EAR" should not be confused with licensing or other requirements imposed in other parts of the EAR. Just because an item or activity is subject to the EAR does not mean that a license or other requirement automatically applies. A license or other requirement applies only in those cases where

December 9, 2004

Scope of the Export Administration Regulations

Part 734

other parts of the EAR impose a licensing or other requirement on such items or activities.

(b) Export and reexport

(1) **Definition of 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, as described in paragraph (b)(2)(ii) of this section. See paragraph (b)(9) of this section for the definition that applies to exports of encryption source code and object code software subject to the EAR.

(2) **Export of technology or software.** (See paragraph (b)(9) for provisions that apply to encryption source code and object code software.) "Export" of technology or software, excluding encryption software subject to "EI" controls, includes:

(i) Any release of technology or software subject to the EAR in a foreign country; or

(ii) Any release of technology or source code subject to the EAR to a foreign national. Such release is deemed to be an export to the home country or countries of the foreign national. 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)). Note that the release of any item to any party with knowledge a violation is about to occur is prohibited by §736.2(b)(10) of the EAR.

(3) **Definition of "release" of technology or software.** Technology or software is "released" for export through:

(i) Visual inspection by foreign nationals of U.S.-origin equipment and facilities;

(ii) Oral exchanges of information in the

Export Administration Regulations

United States or abroad; or

(iii) The application to situations abroad of personal knowledge or technical experience acquired in the United States.

(4) **Definition of reexport.** "Reexport" means an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country; or release of technology or software subject to the EAR to a foreign national outside the United States, as described in paragraph (b)(5) of this section.

(5) **Reexport of technology or software.** Any release of technology or source code subject to the EAR to a foreign national of another country is a deemed reexport to the home country or countries of the foreign national. However, this deemed reexport definition does not apply to persons lawfully admitted for permanent residence. The term "release" is defined in paragraph (b)(3) of this section. Note that the release of any item to any party with knowledge or reason to know a violation is about to occur is prohibited by §736.2(b)(10) of the EAR.

(6) For purposes of the EAR, the export or reexport of items subject to the EAR that will transit through a country or countries or be transshipped in a country or countries to a new country or are intended for reexport to the new country, are deemed to be exports to the new country.

(7) If a territory, possession, or department of a foreign country is not listed on the Country Chart in Supplement No. 1 to part 738 of the EAR, the export or reexport of items subject to the EAR to such destination is deemed under the EAR to be an export to the foreign country. For example, a shipment to the Cayman Islands, a dependent territory of the United Kingdom, is deemed to be a shipment to the United Kingdom.

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(8) Export or reexport of items subject to the EAR does *not* include shipments among any of the states of the United States, the Commonwealth of Puerto Rico, or the Commonwealth of the Northern Mariana Islands or any territory, dependency, or possession of the United States. These destinations are listed in Schedule C & E, Classification of Country and Territory Designations for U.S. Export Statistics, issued by the Bureau of the Census.

(9) Export of encryption source code and object code software.

(i) For purposes of the EAR, the export of encryption source code and object code software means:

(A) An actual shipment, transfer, or transmission out of the United States (see also paragraph (b)(9)(ii) of this section); or

(B) A transfer of such software in the United States to an embassy or affiliate of a foreign country.

(ii) The export of encryption source code and object code software controlled for "EI" reasons under ECCN 5D002 on the Commerce Control List (see Supplement No. 1 to part 774 of the EAR) includes downloading, or causing the downloading of, such software to locations (including electronic bulletin boards, Internet file transfer protocol, and World Wide Web sites) outside the U.S., or making such software available for transfer outside the United States, over wire, cable, radio, electromagnetic, photo optical, photoelectric or other comparable communications facilities accessible to persons outside the United States, including transfers from electronic bulletin boards, Internet file transfer protocol and World Wide Web sites, unless the person making the software available takes precautions adequate to prevent unauthorized transfer of such code. See §740.13(e) of the EAR for notification

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requirements for exports or reexports of encryption source code and object code software considered to be publicly available consistent with the provisions of §734.3(b)(3) of the EAR.

(iii) Subject to the General Prohibitions described in part 736 of the EAR, such precautions for Internet transfers of products eligible for export under §740.17 (b)(2) of the EAR (encryption software products, certain encryption source code and general purpose encryption toolkits) shall include such measures as:

(A) The access control system, either through automated means or human intervention, checks the address of every system outside of the U.S. or Canada requesting or receiving a transfer and verifies such systems do not have a domain name or Internet address of a foreign government end-user (e.g. ".gov," ".gouv," ".mil" or similar addresses);

(B) The access control system provides every requesting or receiving party with notice that the transfer includes or would include cryptographic software subject to export controls under the Export Administration Regulations, and anyone receiving such a transfer cannot export the software without a license or other authorization; and

(C) Every party requesting or receiving a transfer of such software must acknowledge affirmatively that the software is not intended for use by a government end-user, as defined in part 772, and he or she understands the cryptographic software is subject to export controls under the Export Administration Regulations and anyone receiving the transfer cannot export the software without a license or other authorization. BIS will consider acknowledgments in electronic form provided they are adequate to assure legal undertakings similar to written acknowledgments.

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§734.3

ITEMS SUBJECT TO THE EAR

(a) Except for items excluded in paragraph (b) of this section, the following items are subject to the EAR:

(1) All items in the United States, including in a U.S. Foreign Trade Zone or moving intransit through the United States from one foreign country to another;

(2) All U.S. origin items wherever located;

(3) U.S. origin parts, components, materials or other commodities integrated abroad into foreign-made products, U.S. origin software commingled with foreign software, and U.S. origin technology commingled with foreign technology:

(i) In any quantity, as described in section 734.4(a) of this part; or

(ii) In quantities exceeding *de minimis* levels as described in section 734.4(c) and Supplement No. 2 of this part;

(4) Certain foreign-made direct products of U.S. origin technology or software, as described in §736.2(b)(3) of the EAR. The term "direct product" means the immediate product (including processes and services) produced directly by the use of technology or software; and

(5) Certain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of U.S.-origin technology or software, as described in §736.2(b)(3) of the EAR.

(b) The following items are *not* subject to the EAR:

(1) Items that are exclusively controlled for

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export or reexport by the following departments and agencies of the U.S. Government which regulate exports or reexports for national security or foreign policy purposes:

(i) *Department of State.* The International Traffic in Arms Regulations (22 CFR part 121) administered by the Directorate of Defense Trade Controls relate to defense articles and defense services on the U.S. Munitions List. Section 38 of the Arms Export Control Act (22 U.S.C. 2778).

(ii) *Treasury Department, Office of Foreign Assets Control (OFAC).* Regulations administered by OFAC implement broad controls and embargo transactions with certain foreign countries. These regulations include controls on exports and reexports to certain countries (31 CFR chapter V). Trading with the Enemy Act (50 U.S.C. app. section 1 *et seq.*), and International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*)

(iii) *U.S. Nuclear Regulatory Commission (NRC).* Regulations administered by NRC control the export and reexport of commodities related to nuclear reactor vessels (10 CFR part 110). Atomic Energy Act of 1954, as amended (42 U.S.C. part 2011 *et seq.*)

(iv) *Department of Energy (DOE).* Regulations administered by DOE control the export and reexport of technology related to the production of special nuclear materials (10 CFR part 810). Atomic Energy Act of 1954, as amended (42 U.S.C. section 2011 *et seq.*)

(v) *Patent and Trademark Office (PTO).* Regulations administered by PTO provide for the export to a foreign country of unclassified technology in the form of a patent application or an amendment, modification, or supplement thereto or division thereof (37 CFR part 5). BIS has delegated authority under the Export Administration Act to the PTO to approve exports and reexports of such technology which is subject

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to the EAR. Exports and reexports of such technology not approved under PTO regulations must comply with the EAR.

(2) Prerecorded phonograph records reproducing in whole or in part, the content of printed books, pamphlets, and miscellaneous publications, including newspapers and periodicals; printed books, pamphlets, and miscellaneous publications including bound 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; and advertising printed matter exclusively related thereto.

(3) Publicly available technology and software, except software controlled for "EF" reasons under ECCN 5D002 on the Commerce Control List and mass market encryption software with symmetric key length exceeding 64-bits controlled under ECCN 5D992, that:

(i) Are already published or will be published as described in §734.7 of this part;

(ii) Arise during, or result from, fundamental research, as described in §734.8 of this part;

(iii) Are educational, as described in §734.9 of this part;

(iv) Are included in certain patent applications, as described in §734.10 of this part.

Note to paragraphs (b)(2) and (b)(3) of this section: A printed book or other printed material setting forth encryption source code is not itself subject to the EAR (see §734.3(b)(2)). However, notwithstanding §734.3(b)(2), encryption source

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code in electronic form or media (e.g., computer diskette or CD ROM) remains subject to the EAR (see §734.3(b)(3)).

(4) Foreign made items that have less than the *de minimis* percentage of controlled U.S. content based on the principles described in §734.4 of this part.

(c) "Items subject to the EAR" consist of the items listed on the Commerce Control List (CCL) in part 774 of the EAR and all other items which meet the definition of that term. For ease of reference and classification purposes, items subject to the EAR which are *not* listed on the CCL are designated as "EAR99."

§734.4

DE MINIMIS U.S. CONTENT

(a) Items for which there is no de minimis level

(1) There is no de minimis level for the export from a foreign country of a foreign-made computer exceeding 190,000 MTOPS containing U.S.-origin controlled semiconductors (other than memory circuits) classified under ECCN 3A001 to Computer Tier 3; or exceeding 28,000 MTOPS containing U.S.-origin controlled semiconductors (other than memory circuits) classified under ECCN 3A001 or high speed interconnect devices (ECCN 4A994.j) to Computer Tier 4 countries described in §742.12 of the EAR.

•(2) Foreign produced encryption technology that incorporates U.S. origin encryption technology controlled by ECCN 5E002 is subject to the EAR regardless of the amount of U.S. origin content

(3) There is no *de minimis* level for foreign-made:

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(i) Commercial Standby Instrument Systems (CSIS) of the type described in ECCN 7A994 on the Commerce Control List (Supplement No. 1 to part 774 the EAR) when the CSISs integrate QRS11-00100-100/101 Micromachined Angular Rate Sensors; and

(ii) Aircraft of the type described in ECCN 9A991 when such aircraft incorporate a CSIS integrating a QRS11-00100-100/101 sensor.

Note to paragraph (a)(3): QRS11 Micromachined Angular Rate Sensors are subject to the export licensing jurisdiction of the U.S. Department of State, Directorate of Defense Trade Controls, except when the QRS11-00100-100/101 version of the sensor is integrated into and included as an integral part of a CSIS of the type described in ECCN 7A994 or aircraft of the type described in ECCN 9A991 that incorporates a CSIS that has such a sensor integrated, or is exported solely for integration into such a system.

•(b) Special requirements for certain encryption items.

Foreign made items that incorporate U.S. origin items that are listed in this paragraph are subject to the EAR unless they meet the *de minimis* level and destination requirements of paragraph (c) or (d) of this section and the requirements of this paragraph.

(1) The U.S. origin commodities or software, if controlled under ECCNs 5A002.a.1, .a.2, .a.5, or .a.6, or 5D002, must have been:

(i) Authorized for license exception TSU because of having met the notification requirements of §740.13(e) of the EAR (ECCN 5D002 only);

(ii) Authorized for License Exception ENC by BIS after a review pursuant to §740.17(b)(3)

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of the EAR; or

(iii) Authorized for License Exception ENC by BIS after a review pursuant to §740.17(b)(2), and the foreign made product will not be sent to any destination in Country Group E:1 in Supplement No. 1 to part 740 of the EAR.

(2) The U.S. origin encryption items, if controlled under ECCNs 5A992, 5D992, or 5E992 must:

(i) Have met the notification requirements of §742.15(b)(1) of the EAR; or

(ii) Have been determined by BIS to be "mass market" commodities or software after a review in accordance with §742.15(b)(2) of the EAR (ECCNs 5A992 and 5D992 only); or

(iii) Be an item described in §742.15(b)(3)(ii) or §742.15(b)(3)(iii) of the EAR.

Note to paragraph (b): See supplement No. 2 to this part for *de minimis* calculation procedures and reporting requirements.

•(c) Except as provided in paragraphs (a) and (b)(1)(iii) and subject to the provisions of paragraphs (b)(1)(i), (b)(1)(ii) and (b)(2) of this section, the following reexports are not subject to the EAR when made to a terrorist-supporting country listed in Country Group E:1 (see Supplement No. 1 to part 740 of the EAR).

(1) Reexports of a foreign-made commodity incorporating controlled U.S.-origin commodities valued at 10% or less of the total value of the foreign-made commodity;

(2) Reexports of foreign-made software incorporating controlled U.S.-origin software valued at 10% or less of the total value of the foreign-made software; or

(3) Reexports of foreign technology commin-

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gled with or drawn from controlled U.S.-origin technology valued at 10% or less of the total value of the foreign technology.

• *(d)* Except as provided in paragraph (a) of this section and subject to the provisions of paragraph (b) of this section, the following reexports are not subject to the EAR when made to countries other than those described in paragraph (c) of this section.

(1) Reexports of a foreign-made commodity incorporating controlled U.S.-origin commodities valued at 25% or less of the total value of the foreign-made commodity;

(2) Reexports of foreign-made software incorporating controlled U.S.-origin software valued at 25% or less of the total value of the foreign-made software; or

(3) Reexports of foreign technology commingled with or drawn from controlled U.S.-origin technology valued at 25% or less of the total value of the foreign technology.

(e) For purposes of determining *de minimis* levels, technology and source code used to design or produce foreign-made commodities or software are not considered to be incorporated into such foreign-made commodities or software. Commodities subject only to short supply controls are not included in calculating U.S. content.

(f) You are responsible for making the necessary calculations to determine whether the necessary provisions apply to your situation. See Supplement No. 2 to part 734 for guidance regarding calculation of U.S. controlled content.

(g) See §770.3 of the EAR for principles that apply to commingled U.S.-origin technology and software.

(h) Notwithstanding the provisions of paragraphs

(c) and (d) of this section, U.S.-origin technology controlled by ECCN 9E003a.1 through a.12, and .f, and related controls, and encryption software controlled for "EI" reasons under ECCN 5D002 or encryption technology controlled for "EI" reasons under ECCN 5E002 do not lose their U.S.-origin when redrawn, used, consulted, or otherwise commingled abroad in any respect with other software or technology of any other origin. Therefore, any subsequent or similar software or technology prepared or engineered abroad for the design, construction, operation, or maintenance of any plant or equipment, or part thereof, which is based on or uses any such U.S.-origin software or technology is subject to the EAR.

§734.5

ACTIVITIES OF U.S. AND FOREIGN PERSONS SUBJECT TO THE EAR

The following kinds of activities are subject to the EAR:

(a) Certain activities of U.S. persons related to the proliferation of nuclear explosive devices, chemical or biological weapons, missile technology as described in §744.6 of the EAR, and the proliferation of chemical weapons as described in part 745 of the EAR.

(b) Activities of U.S. or foreign persons prohibited by any order issued under the EAR, including a Denial Order issued pursuant to part 766 of the EAR.

(c) Technical assistance by U.S. persons with respect to encryption commodities or software as described in §744.9 of the EAR.

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§734.6

ASSISTANCE AVAILABLE FROM BIS FOR DETERMINING LICENSING AND OTHER REQUIREMENTS

(a) If you are not sure whether a commodity, software, technology, or activity is subject to the EAR, or is subject to licensing or other requirements under the EAR, you may ask BIS for an advisory opinion, classification, or a determination whether a particular item or activity is subject to the EAR. In many instances, including those where the item is specially designed, developed, configured, adapted, or modified for military application, the item may fall under the licensing jurisdiction of the Department of State and may be subject to the controls of the International Traffic in Arms Regulations (22 CFR parts 120 through 130) (ITAR). In order to determine if the Department of State has licensing jurisdiction over an item, you should submit a request for a commodity jurisdiction determination to the Department of State, Directorate of Defense Trade Controls. Exporters should note that in a very limited number of cases, the categories of items may be subject to both the ITAR and the EAR. The relevant departments are working to eliminate any *unnecessary* overlaps that may exist.

(b) As the agency responsible for administering the EAR, BIS is the only agency that has the responsibility for determining whether an item or activity is subject to the EAR and, if so, what licensing or other requirements apply under the EAR. Such a determination only affects EAR requirements, and does not affect the applicability of any other regulatory programs.

(c) If you need help in determining BIS licensing or other requirements, you may ask BIS for help by following the procedures described in §748.3 of the EAR.

§734.7

PUBLISHED INFORMATION AND SOFTWARE

(a) Information is "published" when it becomes generally accessible to the interested public 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 (See Supplement No. 1 to this part, Questions A(1) through A(6));

(2) Ready availability at libraries open to the public or at university libraries (See Supplement No. 1 to this part, Question A(6));

(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.

(i) 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 (not necessarily a recording) of the proceedings and presentations.

(ii) All technically qualified members of the public may be considered eligible to attend a conference or other gathering notwithstanding a registration fee reasonably related to cost and reflecting an intention that all interested and technically qualified persons be able to attend, or a limitation on actual attendance, as long as attendees either are the first who have applied or are selected on the basis of relevant scientific or technical competence, experience, or

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responsibility (See Supplement No. 1 to this part, Questions B(1) through B(6)).

(iii) "Publication" includes submission of papers to domestic or foreign editors or reviewers of journals, or to organizers of open conferences or other open gatherings, with the understanding that the papers will be made publicly available if favorably received. (See Supplement No. 1 to this part, Questions A(1) and A(3)).

(b) Software and information is published when it is available for general distribution either for free or at a price that does not exceed the cost of reproduction and distribution. See Supplement No. 1 to this part, Questions G(1) through G(3).

(c) Notwithstanding paragraphs (a) and (b) of this section, note that encryption software controlled under ECCN 5D002 for "EI" reasons on the Commerce Control List and mass market encryption software with symmetric key length exceeding 64-bits controlled under ECCN 5D992 remain subject to the EAR. See §740.13(e) of the EAR for certain exports and reexports under license exception.

§734.8

INFORMATION RESULTING FROM FUNDAMENTAL RESEARCH

(a) Fundamental research

Paragraphs (b) through (d) of this section and §734.11 of this part provide specific rules that will be used to determine whether research in particular institutional contexts qualifies as "fundamental research". The intent behind these rules is to identify as "fundamental research" 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

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industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary reasons or specific national security reasons as defined in §734.11(b) of this part. (See Supplement No. 1 to this part, Question D(8)). Note that the provisions of this section do not apply to encryption software controlled under ECCN 5D002 for "EI" reasons on the Commerce Control List (Supplement No. 1 to part 774 of the EAR) or to mass market encryption software with symmetric key length exceeding 64-bits controlled under ECCN 5D992. See §740.13(e) of the EAR for certain exports and reexports under license exception.

(b) University based research

(1) Research conducted by scientists, engineers, or students at a university normally will be considered fundamental research, as described in paragraphs (b)(2) through (6) of this section. ("University" means any accredited institution of higher education located in the United States.)

(2) Prepublication review by a sponsor of university research solely to insure that the publication would not inadvertently divulge proprietary information that the sponsor has furnished to the researchers does not change the status of the research as fundamental research. However, release of information from a corporate sponsor to university researchers where the research results are subject to prepublication review, is subject to the EAR. (See Supplement No. 1 to this part, Questions D(7), D(9), and D(10)).

(3) Prepublication review by a sponsor of university research solely to ensure that publication would not compromise patent rights does not change the status of fundamental research, so long as the review causes no more than a temporary delay in publication of the research results.

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(4) 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. (See Supplement No. 1 to this part, Question D(2)).

(5) University based research is not considered "fundamental research" if the university or its researchers accept (at the request, for example, of an industrial sponsor) 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. (See Supplement No. 1 to this part, Question D(7) and D(9)).

(6) The provisions of §734.11 of this part will apply if a university or its researchers accept specific national security controls (as defined in §734.11 of this part) on a research project or activity sponsored by the U.S. Government. (See Supplement No. 1 to this part, Questions E(1) and E(2)).

(c) Research based at Federal agencies or FFRDCs

Research conducted by scientists or engineers working for a Federal agency or a Federally Funded Research and Development Center (FFRDC) may be designated as "fundamental research" within any appropriate system devised by the agency or the FFRDC to control the release of information by such scientists and engineers. (See Supplement No. 1 to this part, Questions D(8) and D(11)).

(d) Corporate research

(1) Research conducted by scientists or engineers working for a business entity will be considered "fundamental research" at such time and to the extent that the researchers are free to make

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scientific and technical information resulting from the research publicly available without restriction or delay based on proprietary concerns or specific national security controls as defined in §734.11(b) of this part.

(2) Prepublication review by the company solely to ensure that the publication would compromise no proprietary information provided by the company to the researchers is not considered to be a proprietary restriction under paragraph (d)(1) of this section. However, paragraph (d)(1) of this section does not authorize the release of information to university researchers where the research results are subject to prepublication review. (See Supplement No. 1 to this part, Questions D(8), D(9), and D(10)).

(3) Prepublication review by the company solely to ensure that publication would compromise no patent rights will not be considered a proprietary restriction for this purpose, so long as the review causes no more than a temporary delay in publication of the research results.

(4) However, the initial transfer of information from a business entity to researchers is not authorized under the "fundamental research" provision where the parties have agreed that the business entity may withhold from publication some or all of the information so provided.

(e) Research based elsewhere

Research conducted by scientists or engineers who are not working for any of the institutions described in paragraphs (b) through (d) of this section will be treated as corporate research, as described in paragraph (d) of this section. (See Supplement No. 1 to this part, Question D(8)).

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§734.9

EDUCATIONAL INFORMATION

“Educational information” referred to in §734.3(b)(3)(iii) of this part is not subject to the EAR if it is released by instruction in catalog courses and associated teaching laboratories of academic institutions. Dissertation research is discussed in §734.8(b) of this part. (Refer to Supplement No. 1 to this part, Question C(1) through C(6)). Note that the provisions of this section do not apply to encryption software controlled under ECCN 5D002 for “EI” reasons on the Commerce Control List or to mass market encryption software with symmetric key length exceeding 64-bits controlled under ECCN 5D992. See §740.13 (e) of the EAR for certain exports and reexports under license exception.

§734.10

PATENT APPLICATIONS

The information referred to in §734.3(b)(3)(iv) of this part is:

(a) Information contained in a patent application prepared wholly from foreign-origin technical data where the application is being sent to the foreign inventor to be executed and returned to the United States for subsequent filing in the U.S. Patent and Trademark Office;

(b) Information contained in a patent application, or an amendment, modification, supplement or division of an application, and authorized for filing in a foreign country in accordance with the regulations of the Patent and Trademark Office, 37 CFR part 5¹; or

¹ Regulations issued by the Patent and Trademark Office in 37 CFR part 5 provide for the export to a foreign country of unclassified technical data in the form of a patent application or an amendment, modifi-

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(c) Information contained in a patent application when sent to a foreign country before or within six months after the filing of a United States patent application for the purpose of obtaining the signature of an inventor who was in the United States when the invention was made or who is a co-inventor with a person residing in the United States.

§734.11

GOVERNMENT-SPONSORED RESEARCH COVERED BY CONTRACT CONTROLS

(a) If research is funded by the U.S. Government, and specific national security controls are agreed on to protect information resulting from the research, §734.3(b)(3) of this part will not apply

to any export or reexport of such information in violation of such controls. However, any export or reexport of information resulting from the research that is consistent with the specific controls may nonetheless be made under this provision.

(b) Examples of "specific national security controls" include requirements for prepublication review by the Government, with right to withhold permission for publication; restrictions on prepublication dissemination of information to non-U.S. citizens or other categories of persons; or restrictions on participation of non-U.S. citizens or other categories of persons in the research. A general reference to one or more export control laws or regulations or a general reminder that the Government retains the right to classify is not a "specific national security control". (See Supplement No. 1 to this part, Questions E(1) and E(2).)

 cation, or supplement thereto or division thereof.

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§734.12

EFFECT ON FOREIGN LAWS AND REGULATIONS

Any person who complies with any of the license or other requirements of the EAR is not relieved

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of the responsibility of complying with applicable foreign laws and regulations. Conversely, any person who complies with the license or other requirements of a foreign law or regulation is not relieved of the responsibility of complying with U.S. laws and regulations, including the EAR.

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Supplement No. 1 to Part 734

QUESTIONS AND ANSWERS - TECHNOLOGY AND SOFTWARE SUBJECT TO THE EAR

This Supplement No. 1 contains explanatory questions and answers relating to technology and software that is subject to the EAR. It is intended to give the public guidance in understanding how BIS interprets this part, but is only illustrative, not comprehensive. In addition, facts or circumstances that differ in any material way from those set forth in the questions or answers will be considered under the applicable provisions of the EAR. Exporters should note that the provisions of this supplement do not apply to encryption software (including source code) transferred from the U.S. Munitions List to the Commerce Control List consistent with E.O. 13026 of November 15, 1996 (61 FR 58767) and pursuant to the Presidential Memorandum of that date. See §742.15 of the EAR. This Supplement is divided into nine sections according to topic as follows:

Section A: Publication of technology and exports and reexports of technology that has been or will be published.

Section B: Release of technology at conferences.

Section C: Educational instruction.

Section D: Research, correspondence, and informal scientific exchanges.

Section E: Federal contract controls.

Section F: Commercial consulting.

Section G: Software.

Section H: Availability in a public library.

Section I: Miscellaneous.

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Supplement No. 1 to Part 734

Section A: Publication

Question A(1): I plan to publish in a foreign journal a scientific paper describing the results of my research, which is in an area listed in the EAR as requiring a license to all countries except Canada. Do I need a license to send a copy to my publisher abroad?

Answer: No. This export transaction is not subject to the EAR. The EAR do not cover technology that is already publicly available, as well as technology that is made public by the transaction in question (§§734.3 and 734.7 of this part). Your research results would be made public by the planned publication. You would not need a license.

Question A(2): Would the answer differ depending on where I work or where I performed the research?

Answer: No. Of course, the result would be different if your employer or another sponsor of your research imposed restrictions on its publication (§734.8 of this part).

Question A(3): Would I need a license to send the paper to the editors of a foreign journal for review to determine whether it will be accepted for publication?

Answer: No. This export transaction is not subject to the EAR because you are submitting the paper to the editors with the intention that the paper will be published if favorably received (§734.7(a)(4)(iii) of this part).

Question A(4): The research on which I will be reporting in my paper is supported by a grant from the Department of Energy (DOE). The grant requires prepublication clearance by DOE. Does that make any difference under the Export Administration Regulations?

Answer: No, the transaction is not subject to the EAR. But if you published in violation of any Department of Energy controls you have accepted in the grant, you may be subject to appropriate administrative, civil, or criminal sanctions under other laws.

Question A(5): We provide consulting services on the design, layout, and construction of integrated circuit plants and production lines. A major part of our business is the publication for sale to clients of detailed handbooks and reference manuals on key aspects on the design and manufacturing processes. A typical cost of publishing such a handbook and manual might be \$500; the typical sales price is about \$15,000. Is the publication and sale of such handbooks or manuals subject to the EAR?

Answer: Yes. The price is above the cost of reproduction and distribution (§734.7(a)(1) of this part). Thus, you would need to obtain a license or qualify for a License Exception before you could export or reexport any of these handbooks or manuals.

Question A(6): My Ph.D. thesis is on technology, listed in the EAR as requiring a license to all destinations except Canada, which has never been published for general distribution. However, the thesis is available at the institution from which I took the degree. Do I need a license to send another copy to a colleague overseas?

Answer: That may depend on where in the institution it is available. If it is not readily available in the university library (e.g., by filing in open stacks with a reference in the catalog), it is not "publicly available" and the export or reexport would be subject to the EAR on that ground. The export or reexport would not be subject to the EAR if your Ph.D. research qualified as "fundamental research" under §734.8 of this part. If not, however, you will

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need to obtain a license or qualify for a License Exception before you can send a copy out of the country.

Question A(7): We sell electronically recorded information, including software and databases, at wholesale and retail. Our products are available by mail order to any member of the public, though intended for specialists in various fields. They are priced to maximize sales to persons in those fields. Do we need a license to sell our products to foreign customers?

Answer: You would not need a license for otherwise controlled technology or software if the technology and software are made publicly available at a price that does not exceed the cost of production and distribution to the technical community. Even if priced at a higher level, the export or reexport of the technology or software source code in a library accessible to the public is not subject to the EAR (§734.7(a) of this part).

Section B: Conferences

Question B(1): I have been invited to give a paper at a prestigious international scientific conference on a subject listed as requiring a license under the EAR to all countries, except Canada. Scientists in the field are given an opportunity to submit applications to attend. Invitations are given to those judged to be the leading researchers in the field, and attendance is by invitation only. Attendees will be free to take notes, but not make electronic or verbatim recordings of the presentations or discussions. Some of the attendees will be foreigners. Do I need a license to give my paper?

Answer: No. Release of information at an open conference and information that has been released at an open conference is not subject to the EAR. The conference you describe fits the definition of an open conference (§734.7(a) of

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this part).

Question B(2): Would it make any difference if there were a prohibition on making any notes or other personal record of what transpires at the conference?

Answer: Yes. To qualify as an "open" conference, attendees must be permitted to take notes or otherwise make a personal record (although not necessarily a recording). If note taking or the making of personal records is altogether prohibited, the conference would not be considered "open".

Question B(3): Would it make any difference if there were also a registration fee?

Answer: That would depend on whether the fee is reasonably related to costs and reflects an intention that all interested and technically qualified persons should be able to attend (§734.7(a)(4)(ii) of this part).

Question B(4): Would it make any difference if the conference were to take place in another country?

Answer: No.

Question B(5): Must I have a license to send the paper I propose to present at such a foreign conference to the conference organizer for review?

Answer: No. A license is not required under the EAR to submit papers to foreign organizers of open conferences or other open gatherings with the intention that the papers will be delivered at the conference, and so made publicly available, if favorably received. The submission of the papers is not subject to the EAR (§734.7(a)(4)(iii) of this part).

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Question B(6): Would the answers to any of the foregoing questions be different if my work were supported by the Federal Government?

Answer: No. You may export and reexport the papers, even if the release of the paper violates any agreements you have made with your government sponsor. However, nothing in the EAR relieves you of responsibility for conforming to any controls you have agreed to in your Federal grant or contract.

Section C: Educational Instruction

Question C(1): I teach a university graduate course on design and manufacture of very high-speed integrated circuitry. Many of the students are foreigners. Do I need a license to teach this course?

Answer: No. Release of information by instruction in catalog courses and associated teaching laboratories of academic institutions is not subject to the EAR (§734.9 of this part).

Question C(2): Would it make any difference if some of the students were from countries to which export licenses are required?

Answer: No.

Question C(3): Would it make any difference if I talk about recent and as yet unpublished results from my laboratory research?

Answer: No.

Question C(4): Even if that research is funded by the Government?

Answer: Even then, but you would not be released from any separate obligations you have accepted in your grant or contract.

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Question C(5): Would it make any difference if I were teaching at a foreign university?

Answer: No.

Question C(6): We teach proprietary courses on design and manufacture of high-performance machine tools. Is the instruction in our classes subject to the EAR?

Answer: Yes. That instruction would not qualify as "release of educational information" under §734.9 of this part because your proprietary business does not qualify as an "academic institution" within the meaning of §734.9 of this part. Conceivably, however, the instruction might qualify as "release at an open seminar, or other open gathering" under §734.7(a) of this part. The conditions for qualification of such a seminar or gathering as "open", including a fee "reasonably related to costs (of the conference, not of producing the data) and reflecting an intention that all interested and technically qualified persons be able to attend," would have to be satisfied.

Section D: Research, Correspondence, and Informal Scientific Exchanges

Question D(1): Do I need a license in order for a foreign graduate student to work in my laboratory?

Answer: Not if the research on which the foreign student is working qualifies as "fundamental research" under §734.8 of this part. In that case, the research is not subject to the EAR.

Question D(2): Our company has entered into a cooperative research arrangement with a research group at a university. One of the researchers in that group is a PRC national. We would like to share some of our proprietary information with

Scope of the Export Administration Regulations

the university research group. We have no way of guaranteeing that this information will not get into the hands of the PRC scientist. Do we need to obtain a license to protect against that possibility?

Answer: No. The EAR do not cover the disclosure of information to any scientists, engineers, or students at a U.S. university in the course of industry-university research collaboration under specific arrangements between the firm and the university, provided these arrangements do not permit the sponsor to withhold from publication any of the information that he provides to the researchers. However, if your company and the researchers have agreed to a prohibition on publication, then you must obtain a license or qualify for a License Exception before transferring the information to the university. It is important that you as the corporate sponsor and the university get together to discuss whether foreign nationals will have access to the information, so that you may obtain any necessary authorization prior to transferring the information to the research team.

Question D(3): My university will host a prominent scientist from the PRC who is an expert on research in engineered ceramics and composite materials. Do I require a license before telling our visitor about my latest, as yet unpublished, research results in those fields?

Answer: Probably not. If you performed your research at the university, and you were subject to no contract controls on release of the research, your research would qualify as "fundamental research" (§734.8(a) of this part). Information arising during or resulting from such research is not subject to the EAR (§734.3(b)(3) of this part).

You should probably assume, however, that your visitor will be debriefed later about

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anything of potential military value he learns from you. If you are concerned that giving such information to him, even though permitted, could jeopardize U.S. security interests, the Commerce Department can put you in touch with appropriate Government scientists who can advise you. Write to:

Department of Commerce
Bureau of Industry and Security
P.O. Box 273
Washington, DC 20044

Question D(4): Would it make any difference if I were proposing to talk with a PRC expert in China?

Answer: No, if the information in question arose during or resulted from the same "fundamental research."

Question D(5): Could I properly do some work with him in his research laboratory inside China?

Answer: Application abroad of personal knowledge or technical experience acquired in the United States constitutes an export of that knowledge and experience, and such an export may be subject to the EAR. If any of the knowledge or experience you export in this way requires a license under the EAR, you must obtain such a license or qualify for a License Exception.

Question D(6): I would like to correspond and share research results with an Iranian expert in my field, which deals with technology that requires a license to all destinations except Canada. Do I need a license to do so?

Answer: Not as long as we are still talking about information that arose during or resulted from research that qualifies as "fundamental" under the rules spelled out in §734.8(a) of this

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part.

Question D(7): Suppose the research in question were funded by a corporate sponsor and I had agreed to prepublication review of any paper arising from the research?

Answer: Whether your research would still qualify as "fundamental" would depend on the nature and purpose of the prepublication review. If the review is intended solely to ensure that your publications will neither compromise patent rights nor inadvertently divulge proprietary information that the sponsor has furnished to you, the research could still qualify as "fundamental." But if the sponsor will consider as part of its prepublication review whether it wants to hold your new research results as trade secrets or otherwise proprietary information (even if your voluntary cooperation would be needed for it to do so), your research would no longer qualify as "fundamental." As used in these regulations it is the actual and intended openness of research results that primarily determines whether the research counts as "fundamental" and so is not subject to the EAR.

Question D(8): In determining whether research is thus open and therefore counts as "fundamental," does it matter where or in what sort of institution the research is performed?

Answer: In principle, no. "Fundamental research" is performed in industry, Federal laboratories, or other types of institutions, as well as in universities. The regulations introduce some operational presumptions and procedures that can be used both by those subject to the regulations and by those who administer them to determine with some precision whether a particular research activity is covered. Recognizing that common and predictable norms operate in different types of institutions, the regulations use the institutional

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locus of the research as a starting point for these presumptions and procedures. Nonetheless, it remains the type of research, and particularly the intent and freedom to publish, that identifies "fundamental research," not the institutional locus (§734.8(a) of this part).

Question D(9): I am doing research on high-powered lasers in the central basic-research laboratory of an industrial corporation. I am required to submit the results of my research for prepublication review before I can publish them or otherwise make them public. I would like to compare research results with a scientific colleague from Vietnam and discuss the results of the research with her when she visits the United States. Do I need a license to do so?

Answer: You probably do need a license (§734.8(d) of this part). However, if the only restriction on your publishing any of that information is a prepublication review solely to ensure that publication would compromise no patent rights or proprietary information provided by the company to the researcher your research may be considered "fundamental research," in which case you may be able to share information because it is not subject to the EAR. Note that the information will be subject to the EAR if the prepublication review is intended to withhold the results of the research from publication.

Question D(10): Suppose I have already cleared my company's review process and am free to publish all the information I intend to share with my colleague, though I have not yet published?

Answer: If the clearance from your company means that you are free to make all the information publicly available without restriction or delay, the information is not subject to the EAR. (§734.8(d) of this part)

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Question D(11): I work as a researcher at a Government-owned, contractor-operated research center. May I share the results of my unpublished research with foreign nationals without concern for export controls under the EAR?

Answer: That is up to the sponsoring agency and the center's management. If your research is designated "fundamental research" within any appropriate system devised by them to control release of information by scientists and engineers at the center, it will be treated as such by the Commerce Department, and the research will not be subject to the EAR. Otherwise, you would need to obtain a license or qualify for a License Exception, except to publish or otherwise make the information public (§734.8(c) of this part).

Section E: Federal Contract Controls

Question E(1): In a contract for performance of research entered into with the Department of Defense (DOD), we have agreed to certain national security controls. DOD is to have ninety days to review any papers we proposed before they are published and must approve assignment of any foreign nationals to the project. The work in question would otherwise qualify as "fundamental research" section under §734.8 of this part. Is the information arising during or resulting from this sponsored research subject to the EAR?

Answer: Under §734.11 of this part, any export or reexport of information resulting from government-sponsored research that is inconsistent with contract controls you have agreed to will not qualify as "fundamental research" and any such export or reexport would be subject to the EAR. Any such export or reexport that is consistent with the controls will continue to be eligible for export and reexport under the "fundamental research" rule set forth in §734.8(a) of this part. Thus, if you

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abide by the specific controls you have agreed to, you need not be concerned about violating the EAR. If you violate those controls and export or reexport information as "fundamental research" under §734.8(a) of this part, you may subject yourself to the sanctions provided for under the EAR, including criminal sanctions, in addition to administrative and civil penalties for breach of contract under other law.

Question E(2): Do the Export Administration Regulations restrict my ability to publish the results of my research?

Answer: The Export Administration Regulations are not the means for enforcing the national security controls you have agreed to. If such a publication violates the contract, you would be subject to administrative, civil, and possible criminal penalties under other law.

Section F: Commercial Consulting

Question F(1): I am a professor at a U.S. university, with expertise in design and creation of submicron devices. I have been asked to be a consultant for a "third-world" company that wishes to manufacture such devices. Do I need a license to do so?

Answer: Quite possibly you do. Application abroad of personal knowledge or technical experience acquired in the United States constitutes an export of that knowledge and experience that is subject to the Export Administration Regulations. If any part of the knowledge or experience your export or reexport deals with technology that requires a license under the EAR, you will need to obtain a license or qualify for a License Exception.

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Section G: Software²

Question G(1): Is the export or reexport of software in machine readable code subject to the EAR when the source code for such software is publicly available?

Answer: If the source code of a software program is publicly available, then the machine readable code compiled from the source code is software that is publicly available and therefore not subject to the EAR.

Question G(2): Is the export or reexport of software sold at a price that does not exceed the cost of reproduction and distribution subject to the EAR?

Answer: Software in machine readable code is publicly available if it is available to a community at a price that does not exceed the cost of reproduction and distribution. Such reproduction and distribution costs may include variable and fixed allocations of overhead and normal profit for the reproduction and distribution functions either in your company or in a third party distribution system. In your company, such costs may not include recovery for development, design, or acquisition. In this case, the provider of the software does not receive a fee for the inherent value of the software.

Question G(3): Is the export or reexport of software subject to the EAR if it is sold at a price BIS concludes in a classification letter to be sufficiently low so as not to subject it to the EAR?

² Exporters should note that these provisions do not apply to software controlled under the International Traffic in Arms Regulations (e.g., certain encryption software).

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Answer: In response to classification requests, BIS may choose to classify certain software as not subject to the EAR even though it is sold at a price above the costs of reproduction and distribution as long as the price is nonetheless sufficiently low to qualify for such a classification in the judgment of BIS.

Section H: Available in a Public Library

Question H(1): Is the export or reexport of information subject to the EAR if it is available in a library and sold through an electronic or print service?

Answer: Electronic and print services for the distribution of information may be relatively expensive in the marketplace because of the value vendors add in retrieving and organizing information in a useful way. If such information is also available in a library -- itself accessible to the public -- or has been published in any way, that information is "publicly available" for those reasons, and the information itself continues not to be subject to the EAR even though you access the information through an electronic or print service for which you or your employer pay a substantial fee.

Question H(2): Is the export or reexport of information subject to the EAR if the information is available in an electronic form in a library at no charge to the library patron?

Answer: Information available in an electronic form at no charge to the library patron in a library accessible to the public is information publicly available even though the library pays a substantial subscription fee for the electronic retrieval service.

Question H(3): Is the export or reexport of information subject to the EAR if the information

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is available in a library and sold for more than the cost of reproduction and distribution?

Answer: Information from books, magazines, dissertations, papers, electronic data bases, and other information available in a library that is accessible to the public is not subject to the EAR. This is true even if you purchase such a book at more than the cost of reproduction and distribution. In other words, such information is "publicly available" even though the author makes a profit on your particular purchase for the inherent value of the information.

Section I: Miscellaneous

Question I(1): The manufacturing plant that I work at is planning to begin admitting groups of the general public to tour the plant facilities. We are concerned that a license might be required if the tour groups include foreign nationals. Would such a tour constitute an export? If so, is the export subject to the EAR?

Answer: The EAR define exports and reexports of technology to include release through visual inspection by foreign nationals of U.S.-origin equipment and facilities. Such an export or reexport qualifies under the "publicly available" provision and would not be subject to the EAR so long as the tour is truly open to all members of the public, including your competitors, and you do not charge a fee that is not reasonably related to the cost of conducting the tours. Otherwise, you will have to obtain a license, or qualify for a License Exception, prior to permitting foreign nationals to tour your facilities (§734.7 of this part).

Question I(2): Is the export or reexport of information subject to the EAR if the information is not in a library or published, but sold at a price that does not exceed the cost of reproduction and distribution?

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Answer: Information that is not in a library accessible to the public and that has not been published in any way, may nonetheless become "publicly available" if you make it both available to a community of persons and if you sell it at no more than the cost of reproduction and distribution. Such reproduction and distribution costs may include variable and fixed cost allocations of overhead and normal profit for the reproduction and distribution functions either in your company or in a third party distribution system. In your company, such costs may not include recovery for development, design, or acquisition costs of the technology or software. The reason for this conclusion is that the provider of the information receives nothing for the inherent value of the information.

Question I(3): Is the export or reexport of information contributed to an electronic bulletin board subject to the EAR?

Answer: Assume each of the following:

1. Information is uploaded to an electronic bulletin board by a person that is the owner or originator of the information;
2. That person does not charge a fee to the bulletin board administrator or the subscribers of the bulletin board; and
3. The bulletin board is available for subscription to any subscriber in a given community regardless of the cost of subscription.

Such information is "publicly available" and therefore not subject to the EAR even if it is not elsewhere published and is not in a library. The reason for this conclusion is that the bulletin board subscription charges or line charges are for distribution exclusively, and the provider of

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the information receives nothing for the inherent value of the information.

Question I(4): Is the export or reexport of patented information fully disclosed on the public record subject to the EAR?

Answer: Information to the extent it is disclosed on the patent record open to the public is not subject to the EAR even though you may use such information only after paying

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a fee in excess of the costs of reproduction and distribution. In this case the seller does receive a fee for the inherent value of the technical data; however, the export or reexport of the information is nonetheless not subject to the EAR because any person can obtain the technology from the public record and further disclose or publish the information. For that reason, it is impossible to impose export controls that deny access to the information.

CALCULATION OF VALUES FOR *DE MINIMIS* RULES

(a) Use the following guidelines in determining values for establishing exemptions or for submission of a request for authorization:

(1) U.S. content value.

(i) U.S. content value is the delivered cost to the foreign manufacturer of the U.S. origin parts, components, or materials. (When affiliated firms have special arrangements that result in lower than normal pricing, the cost should reflect "fair market" prices that would normally be charged to similar, unaffiliated customers.)

(ii) In calculating the U.S. content value, do not include parts, components, or materials that could be exported from the United States to the new country of destination without a license (designated as "NLR") or under License Exception GBS (see part 740 of the EAR) or under NLR for items classified as EAR99.

(2) The foreign-made product value is the normal selling price f.o.b. factory (excluding value added taxes or excise taxes).

(3) To determine the value of the U.S.-origin controlled content, you should classify the U.S.-origin content on the Commerce Control List, determine those items that would require a license from BIS for reexport to the ultimate destination of the foreign-made product if such parts, components, or materials were reexported to that destination in the form received, and divide the total value of the controlled U.S. parts, components, and materials incorporated into the foreign-made item by the sale price of the foreign-made item.

(4) If no U.S. parts, components or materials are incorporated or if the incorporated U.S. parts,

components, and materials are below the *de minimis* level, then the foreign-made item is not subject to the EAR by reason of §734.4 of this part, the classification of a foreign-made item is irrelevant in determining the scope of the EAR, and you should skip Step 4 in §732.2(d) and go on to consider Step 6 in §732.2(f) of the EAR regarding the foreign-produced direct product rule.

Note to paragraph (a) - U.S. origin peripheral or accessory devices that are merely rack mounted with or cable connected into foreign equipment are not deemed to be incorporated components even though intended for use with products made abroad. Rather, such items are treated as U.S. items that retain their identity and remain subject to the EAR.

(b) One-time report prior to reliance upon the *de minimis* exclusion.

(1) **Report requirement.** Before you may rely upon the *de minimis* exclusion for foreign software and technology commingled with U.S. software or technology, you must file a one-time report for the foreign software or technology. The report must include the percentage of U.S.-content by value and a description of your calculations including relevant values, assumptions, and the basis or methodologies for making the percentage calculation. The three criteria important to BIS in its review of your report will be the export price of the U.S.-content, the assumption regarding future sales of software, and the choice of the scope of foreign technology. Your methodologies must be based upon the accounting standards used in the operation of your business, and you must specify that standard in your report. Regardless of the accounting systems, standard, or conventions you use in the operation of your business, you may not

depreciate the fair market values reported or otherwise reduce the fair market values by other accounting conventions such as depreciation. You may rely upon the *de minimis* exclusion from the commingled rule only to the extent you have reported the relevant calculations, values, assumptions, and the basis or methodologies for the calculations. These values may be historic or projected. You may rely on projected values only to the extent that and for so long as they remain consistent with your report or future values reduce the U.S.-content under your reported assumptions, basis, and methodologies. You are not required to file the above report if you do not choose to take advantage of the *de minimis* exclusion from the commingled rule.

(2) **Export price.** The report must include a description of the U.S.-content including its classification on the Commerce Control List, its performance characteristics and features, and the method of calculating its fair market value. The fair market value shall be the arms-length transaction price, if it is available. If an arms-length transaction price is unavailable, then the report will describe the valuation method chosen to calculate or derive the fair market value. Such methods may include comparable market prices or costs of production and distribution. This rule does not require calculations based upon any one accounting system or U.S. accounting standards. However, you must specify the accepted accounting standards you have chosen, and cost-based methods of valuation must be based upon records you maintain in the normal course of business. You should also indicate whether reported values are actual arms-length market prices or derived from comparable transactions or costs of production, overhead, and profit. For example, if you chose to make calculations under the transfer pricing rules of the United States Internal Revenue Code at section 482, your report should indicate that this is the source for your methodology, and you should also indicate which of the several methodologies in these transfer pricing rules you have chosen.

(3) **Future software sales.** For calculations of U.S.-content in foreign software, you shall include your estimate of future software sales in units and value along with the rationale and basis for those estimates in the report. Unlike parts incorporated into commodities, the cost of U.S. software code will be attributed or allocated to the future sales of foreign-made software incorporating the U.S. code, to determine the percentage of U.S. controlled content. In making this calculation for foreign-made software, you must make an estimate of future software sales of that foreign software if it is commingled with or incorporated with the U.S. code. The value of the U.S. code commingled with or incorporated into the foreign made software shall be divided by the total selling price of all foreign-made software units already sold, plus the total selling price of all foreign-made software units estimated for future sales.

(4) **Foreign technology and software.** For calculations of U.S.-content in foreign technology and software, you shall include in the report a description of the foreign technology or software and a description of its fair market value along with the rationale and basis for the selection and valuation of such foreign software or technology. The report does not require information regarding destinations and end users for reexport. The purpose of the report is solely to permit the U.S. Government to evaluate the reasonableness of U.S.-content calculations.

(5) **Report and wait.** If you have not been contacted by BIS concerning your report within thirty days after filing the report with BIS, you may rely upon the calculations in your report and the *de minimis* exclusions for software and technology for so long as you are not contacted by BIS. BIS may contact you concerning your report to inquire of you further or to indicate that BIS does not accept the assumptions or rationale for your calculations. If you receive such a contact or communication from BIS, you may not

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rely upon the *de minimis* exclusions for software and technology in §734.4 of this part until BIS has indicated whether or not you may do so in the future. You must include in your report the name,

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title, address, telephone number, and facsimile number of the person BIS may contact concerning your report.

**Department of Commerce
Bureau of Industry and Security**

**Overview of the Export Administration
Regulations and Deemed Exports for:**



October 18, 2005



Today's Agenda

- Authority for Export Controls
 - How are control lists created?
 - What are Deemed Exports?
 - Sequence of Analysis:
 - Identifying and classifying export controlled commodities and technologies
 - Key Issues for Export Control Community – IG Report:
 - “Use”
 - Scope of Fundamental Research
 - Country of Origin



Authority for Export Controls

- Export Administration Act (EAA) of 1979, as amended
- International Emergency Economic Powers Act, as amended





Export Administration Regulations (EAR)



- Implement the Export Administration Act
- Apply to “dual-use” items
 - Civil as well as military use
 - Not primarily for weapons or military related use
- Broad jurisdiction but narrow controls



Export Control Regimes



- Wassenaar Arrangement
 - Supplement 1 to Part 743
- Missile Technology Control Regime (MTCR)
 - Supplement 1 to Part 740 (A:2)
- Australia Group (AG)
 - Supplement 1 to Part 740 (A:3)
- Nuclear Suppliers Group (NSG)
 - Supplement 1 to Part 740 (A:4)



Identify and Classify the Technology:

Ten Categories (part 738.2(a)):

- 0-Nuclear
- 1-Materials, Chemical, "Microorganisms" and Toxins
- 2-Materials Processing (e.g. machine tools)
- 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 (e.g. aerospace)



Classify the Technology:

Five Groups (part 738.2(b)):

- A - Equipment, Assemblies and Components
- B - Test, Inspection and Production Equipment
- C - Materials
- D - Software
- E - Technology



Numbering System

- 001-099 National Security
- 100-199 Missile Technology
- 200-299 Nuclear Nonproliferation
- 300-399 Chemical & Biological
- 900-999 Foreign Policy
- 980-989 Short Supply/Crime Control
- 990-999 Anti-Terrorism/United Nations



Reasons for Control

- | | |
|---------------------------------------|------------------------------------|
| AT = Anti-Terrorism | NS = National Security |
| CB = Chemical &
Biological Weapons | RS = Regional Stability |
| CC = Crime Control | SI = Significant Items |
| EI = Encryption Items | SS = Short Supply |
| FC = Firearms Convention | UN = United Nations |
| MT = Missile Technology | XP = High Performance
Computers |
| NP = Nuclear
Nonproliferation | |





Country Chart Structure

Supplement 1 to Part 738



Is an Export License Required?



Commerce Control List Overview and the Country Chart Supplement No. 1 to Part 738—page 1

Commerce Country Chart

Reason for Control

Countries	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Conventio		Crime Control			Anti-Terrorism	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1	AT 2	
Alghanistan	X	X	X	X		X	X	X	X	X				X	X		
Albania	X	X		X		X	X	X	X	X				X	X		
Algeria	X	X		X		X	X	X	X	X				X	X		
Andorra	X	X		X		X	X	X	X	X				X	X		
Angola ¹	X	X		X		X	X	X	X	X				X	X		
Antigua & Barbuda	X	X		X		X	X	X	X	X	X			X	X		
Argentina	X					X	X	X	X	X	X			X	X		
Armenia	X	X	X	X		X	X	X	X	X				X	X		
Australia	X					X		X	X								
Austria	X					X		X	X	X				X	X		
Azerbaijan	X	X	X	X		X	X	X	X	X				X	X		
Bahamas, The	X	X		X		X	X	X	X	X	X			X	X		
Bahrain	X	X	X	X		X	X	X	X	X				X	X		

- X in the box
 - License
 - License Exception
- No X in the box
 - NLR - No License Required
- Must check General Prohibitions 4 - 10



EAR99

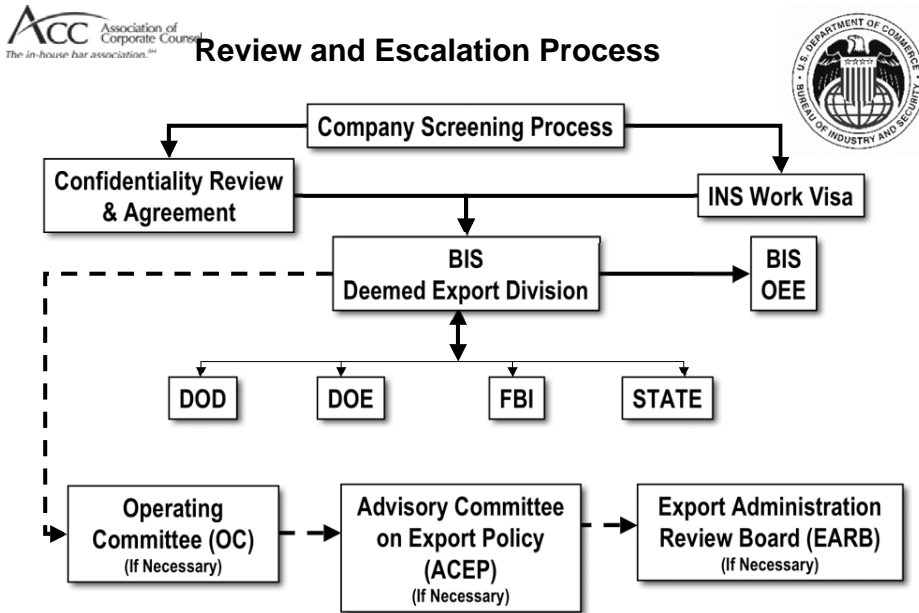
If an item subject to the EAR does not fall within a specific ECCN, it is designated as EAR99.



No License Required NLR

- Items not listed on the CCL but falling under the scope of the EAR and no General Prohibitions apply to the export.
- Items listed on the CCL not requiring a license to intended destination and no General Prohibitions apply to the export.





What are “Deemed Exports”

The Export Administration Regulations (EAR) define a deemed export as the release of technology or source code subject to the EAR to a foreign national in the United States. Part 734.2(b)(2)(ii).

Such release is “deemed” to be an export to the home country of the foreign national.

Situations that can involve release of U.S technology or software include:

- Tours of laboratories
- Foreign national employees involved in certain research, development, and manufacturing activities
- Foreign students or scholars conducting research
- Hosting of foreign scientist



Exempted from the Rule Part 734.2(b)(2)(ii)



- Any foreign national is subject to the deemed export rule except:
 - A foreign national granted U.S. citizenship;
 - A foreign national granted permanent residence status (i.e., “Green Card” holders);
 - A foreign national granted status as a “protected individual” under 8 U.S.C. 1324b(a)(3). Protected individuals include political refugees and political asylum holders.



“Deemed Export” Policy Concerns



- Deemed exports are an important part of the overall mission of BIS to control exports and reexports of sensitive U.S. technology to countries of concern.
- The current deemed export rule was established in 1994 to address national security issues relating to the transfer of sensitive technologies to certain foreign nationals working on controlled technology within the U.S.
- At the same time, foreign nationals play a vital role in U.S. industry and academia, contributing to the strength of our industrial base and our high-technology advantage, and ultimately our national security.
- Foreign countries seek to illegally acquire controlled U.S. technology that could be diverted to the development of weapons programs.

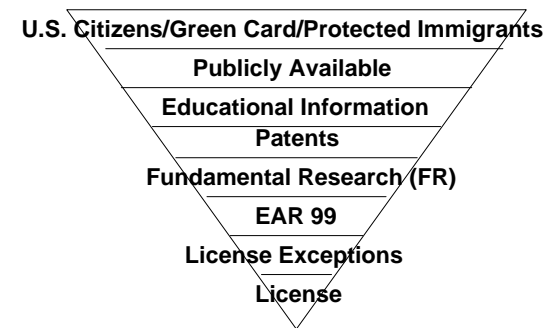


The Existing Deemed Export Program

- Based on these concerns, since 1994 BIS has developed an export control program that licenses approximately 1,000 foreign nationals annually and conducts significant outreach (116 activities during FY2004) to the affected communities.
- Industry, academia, and Federal labs are required to comply with the existing rules, which have been in place for a decade.



Sequence of Analysis





Other Licensing Exemptions



- Publicly available (EAR 734.7)
 - Generally accessible to the interested public
 - Periodicals, books, print, electronic other media forms
 - Libraries (university, public etc)
 - Open patents
 - Open conferences
- Fundamental Research (EAR 734.8)
 - Basic and applied research where resulting information is ordinarily published and broadly shared within scientific community
- Educational information (EAR 734.9)
 - Released by instruction in catalog courses
 - Associated teaching laboratories of academic institutions
- Patent information (EAR 734.10)
 - Public information available on patent application



Classify the Technology:



- Most technology is not controlled (EAR99)
- Sensitive technologies are controlled, based on specific Export Control Classification Numbers (ECCNs) in the Commerce Control List.
- Controlled technologies may require licensing based on the foreign national's country of origin.



3A292 Deemed Export ECCNs

Digital Oscilloscope

Analog-digital conversion, greater than 1 giga-sample per second, 8 bits or greater resolution, stores 256 or more samples

3D292
Oscilloscope Software

3E292
Oscilloscope Technology

The deemed export rule primarily affects technology and software.

Production, development or use technology is controlled



Telemetry Equipment Deemed Export ECCNs

5A101

Designed or modified for UAVs or rocket systems

5D101
Telemetry Software

5E101
Telemetry Technology

The deemed export rule primarily affects technology and software.

Production, development or use technology is controlled



**Semiconductor Manufacturing Equipment
3B001 (SME)**

Deemed Export ECCNs

Designed for epitaxial growth capable of producing a silicon layer, thickness uniform to less than +/- 2.5%, across a distance of 200mm or more

3D001

SME Software

3E001

SME Technology

Production or development technology is controlled

The deemed export rule primarily affects technology and software.



**Acoustics
6A001**

Deemed Export ECCNs

Object detection systems having any of the following: 1) Transmit frequency below 10kHz; 2) SPL greater than 224 dB for equipment that operate 10kHz-24kHz inclusive; 3) SPL greater than 235 dB for equipment that operate between 24kHz and 30 kHz; 4) Form beams less than 1 degree on any axis operating less than 100kHz; 5) Unambiguous display range exceeding 5120m; or, 6) Withstand pressure at depths exceeding 1000m.

6D001

Acoustics Software

6E001/2

Acoustics Technology

Development and production technology is controlled

The deemed export rule primarily affects technology and software.



Deemed Export Evaluation Factors

- Personal background, including visa status
- Technology and purpose of the release
- Applicant's Technology Control Plan (TCP)
- Projected outcome of employment (becoming U.S. citizen)
- Permanent employee
- Applications are easier to approve if they include details such as:
 - Any strong ties to the U.S. (e.g., family here)
 - No ties to home country (no bank account, immediate family, etc.)
 - Any special benefits or expertise the foreign national brings to the applicant (i.e., why the foreign national brings more to the company than he or she will take away)



Essential Elements of a Technology Control Plan (TCP)

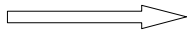
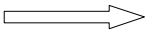

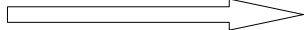
- Corporate commitment to export compliance
- Physical security plan
- Information security plan
- Personnel screening procedures
- Training and awareness program
- Self evaluation program



BIS Deemed Export Security Evaluation

- Deemed export licenses receive a thorough and security intensive review.

Security Review:

- State Department  { Consular Affairs
Embargo Countries
- Export Enforcement  Pre-license Checks (if required)
- Federal Bureau of Investigation  Law enforcement
- WINPAC  Intelligence check



March 2004 IG Report: Key Issues for Academic and Research Communities

- Use of controlled equipment versus controlled 'use' technology
- Scope of Fundamental Research
- Country of Origin



Clarification of “Use” technology

- The use of export controlled equipment is not a deemed export. Deemed exports occur only if controlled technology is transferred.
- The regulatory definition of “use” is technology for “operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing.”
- The term “technology” as used in the EAR refers to specific information “required” for the “development,” “production,” or “use” of specific product (e.g. computer, fermenter, machine tool, etc.).
- Refers only to that portion of technology which is peculiarly responsible for achieving or exceeding controlled performance levels, characteristics or functions.



Clarification of “Use” technology

IG Recommendation:

- The IG Report recommended that BIS revise the definition of “use” technology and replace the word “and” with the word “or” to clarify that controlled “use” technology does not have to be related to all of the listed activities.



Fundamental Research

- EAR 734.8- information resulting from fundamental research is exempt from EAR licensing requirements:
 “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.”



Fundamental Research

- The fundamental research exemption only applies to information that “arises during or results from” the research.
- There is no “blanket exemption” for all information that is transferred in the context of such research.

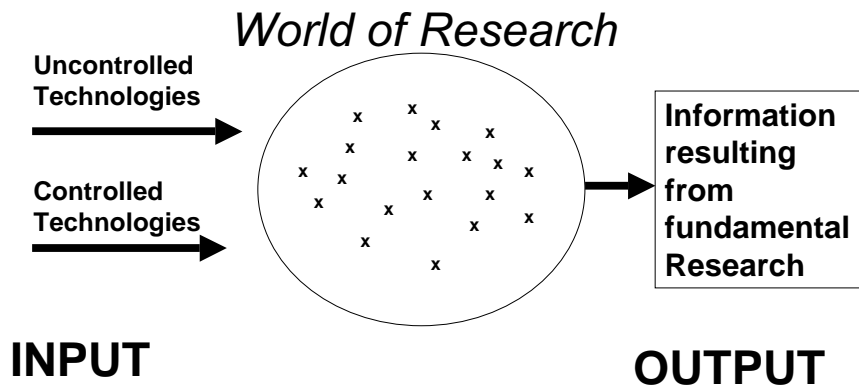




Fundamental Research



Fundamental Research



IG Recommendation:

- The IG recommended BIS inform the U.S. academic community, industry, and Federal agencies of the deemed export controls associated with the technology for the use of EAR controlled equipment by foreign nationals (in the conduct of fundamental research).



Country of Origin

- Under current export licensing policy a foreign national's recently established citizenship or residency is used to determine the licensing requirements.



Country of Origin (Permanent Residency)

Release of controlled technology to a foreign national of one country, say India, who has obtained permanent residency in another, say the U.K., is treated as if the technology transfer were being made to the U.K. and licensing requirements would be the same as for a British national in the U.K.

If the former Indian national becomes a British citizen, transfers of technology would be viewed as transfers to the U.K.





Home Country (Dual Citizenship)

As a general principle, a foreign national's most recently obtained citizenship governs the licensing requirement.

If an Indian foreign national becomes a citizen of the U.K. but retains Indian citizenship, the most recent citizenship is with the U.K. and releases of technology would be viewed as releases to the U.K.



Country of Origin

IG Recommendation:

- The IG recommended modifying the current policy of recognizing the foreign national's most recent country of permanent residency (non-U.S.) and citizenship (non-U.S.) for purposes of determining deemed export licensing requirements.
- This recommendation does **not apply** to naturalized U.S. citizens or foreign nationals that have achieved permanent resident status in the U.S. These citizens remain protected and exempt.





Commerce Response to the March 2004 Inspector General Report



- BIS increased outreach with the government laboratories and research universities that were the subject of the IG's report.
- The Bureau will conduct over 100 deemed export outreach activities during FY2005. Since last fall, BIS conducted approximately 40 outreach activities to the academic community and government laboratories to explain the deemed export rule.
- BIS has partnered with the American Association of Universities (AAU) to create a task force to address specific issues raised by the academic community. The team is conducting site visits with universities.
- BIS is participating in a number of task forces including the Ad Hoc Interagency Group organized by the Office of Science and Technology Policy (OSTP) and the Government-University-Industry Research Roundtable (GUIRR) task force organized by the National Academies



Federal Register Notice



- BIS published Advanced Notice of Proposed Rulemaking on March 28, 2005
(http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html#70fr15607)
- Requested public comment on three recommendations of the March 2004 IG Report:
 - Definition of "use" technology
 - Licensing policy for third country nationals based on country of birth.
 - Revision to Questions and Answers in Export Administration Regulations on fundamental research and government research
- Public comment period ended on June 26, 2005



Federal Register Notice



- Over 300 comments received

<http://www.bis.doc.gov/FreedomForInformation/FINAL%20deemed%20doc%20without%20respective%20comments%20revised.pdf>

- Review of comments is still in progress



Summary



- The deemed export program is an important mechanism to prevent the diversion of sensitive dual use technologies to countries and end users of concern
- In FY2005, the Bureau approved 89%, returned without taking action approximately 10%, and denied 1% of the total of 707 deemed export license applications.
- Most licenses are processed in about 43 days, under an Executive Order.



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