

# Deemed Export Controls on Your Campus: Process and Procedures

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# Overview

- Relevant Agencies and Regulations
- Overview of Deemed Export Regime
- Penalties
- Form I-129
- Campus Procedures
- Consular Issues

# Relevant Agencies and Regulations

- Export Administration Regulations (EAR)
  - Controls and enforces exports of "dual-use" (i.e., commercial and military) articles, software, and technology
  - U.S. Department of Commerce – Bureau of Industry and Security (BIS)
- International Traffic in Arms Regulations (ITAR)
  - Controls defense articles, defense services and related technical data, including most space and satellite-related articles
  - U.S. Department of State – Directorate of Defense Trade Controls (DDTC)

# Background: Why?

- The U.S. export control system
  - In existence since the Cold War
  - Seeks to protect national security
  - Seeks to maintain the economic competitiveness of the United States
- To put it simply, U.S. export controls are designed to prevent the export of U.S.-origin products and technologies to:
  - Bad people
  - Bad places
  - Bad things

# Background: What?

- “Deemed” Export
  - Release of technology within the U.S. to a foreign national is an export to his home country, or a “deemed export.”
  - Exporting from the U.S. (including deemed exports) is a privilege, not a protected Constitutional right
    - Subject to export control laws and regulations
      - License required, like driving car or owning gun



# Background: Technology?

- Technology is the specific information necessary for the development, production, or use of a product.
  - Such information may take the form of technical data as presented in blueprints, drawings, photographs, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions or other documentation

# Background: How?

- Common means of release include:
  - Telephone and face-to-face discussions
  - E-mail and fax communications
  - Photographs
  - Technical specifications, blueprints or drawings
  - Computer disclosure
  - Training sessions
  - Tours that involve visual inspections
  - Collaboration with foreign persons
  - Access to databases that contain controlled technology

# Background: Where are the bad places?

- Under EAR (Export Administration Regulation)
  - Depends on how the technology/source code is classified for export and where it is going.
    - Export Control Classification Number (“ECCN”)
    - Destination Country (country of citizenship)
  - Embargoed/Terrorist Countries: Cuba, Iran, North Korea, Sudan, and Syria
- Under ITAR (International Trade in Arms Regulation)
  - If technology/information is on the United States Munitions List (USML), a license is required for its exports regardless of the destination country.
  - Prohibited countries for all technologies: Belarus, Burma, China, Cuba, Eritrea, Iran, Liberia, North Korea, Sudan, Syria, and Venezuela



# Background: Who?

- Foreign National
  - A person who is not a:
    - U.S. Citizen, or
    - “Protected Individual” under the Immigration and Nationality Act
      - E.g., permanent resident, refugee, asylee
  - *Note:* All persons with any type of nonimmigrant visa are “foreign nationals”

# Background: Who?

- Dual Citizenship

- EAR

- The Commerce Department's Bureau of Industry and Security (BIS) recognizes an individual's **most recent** country of citizenship or permanent residence as his or her home country for licensing requirements.

- ITAR

- Looks to current nationality, **all** prior nationalities, and place of birth as part of the licensing decision.

# Exemptions for Public Information

- Both the ITAR and EAR have a number of exemptions (i.e., not subject to export controls) for public information
  - EAR: “Publicly Available”
  - ITAR: “Public Domain”
- Both the EAR and ITAR have exemptions for information that is published, based on fundamental research, patents, etc.
- However, there are distinctions between the ITAR and EAR exemptions

# EAR – Publicly Available

- Technology that is already published or will be published.
- Technology that is included in certain patent applications.
- Technology that is educational information.
- Technology that is a result of fundamental research.

# EAR – Published Information

- Information is “published” when it becomes generally accessible to the interested public in any form either for free or at a price that does not exceed the cost of reproduction and distribution.
  - Note: Not always applicable to technology related to products/software that include or use encryption



# EAR – Included in Patent Applications

- 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.

# EAR – Educational Information

- Information released by instruction in catalog courses and associated teaching laboratories of academic institutions.
  - Note: Note: Not always applicable to technology related to products/software that include or use encryption

# EAR – Fundamental Research

Basic and applied research in science and engineering, where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls.

## ITAR--Public Domain Exception

- More restrictive than EAR.
- Only exempts information which is **published** and which is generally accessible or available to the public through fundamental research.



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# ITAR--Public Domain Exception

- No recognition of electronic information as being in the public domain. To be in the public domain the information must be generally accessible or available to the public:
  - Through sales at newsstands and bookstores;
  - Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;
  - Through second class mailing privileges granted by the U.S. Government;
  - At libraries open to the public or from which the public can obtain documents;



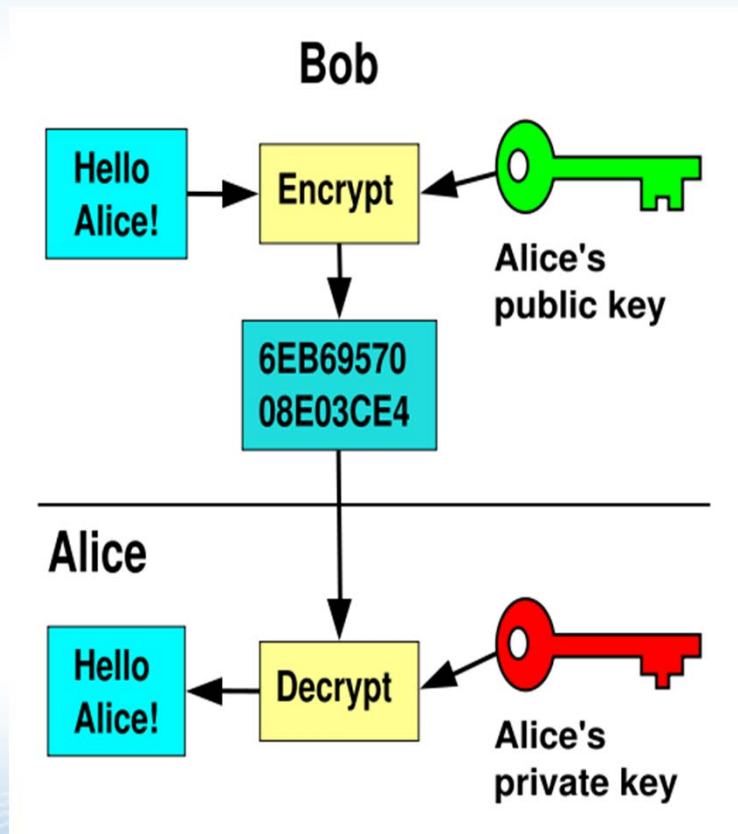
# ITAR--Public Domain Exception

- Through patents available at any patent office;
- Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States;
- Through public release ( *i.e.* , unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency;
- Through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community.

# License Application Requirements

- Information describing the foreign national
  - Name, address, nationality, passport number, date and place of birth, ties to home country, resume, list of publications, and job description
- Information describing the employer
  - Project location, type of technology, scope of technology, form in which technology will be employed, uses for which technology will be employed, technical scope, and foreign availability of comparable technology abroad

# EAR Example 1: Encryption



- Technology for the development, production or use of “information security” hardware and software

– ECCNs 5E002 and 5E992

- Export license required for foreign national employees from Cuba, Iran, North Korea, Sudan and Syria

# EAR Example 2: Graphics Processors



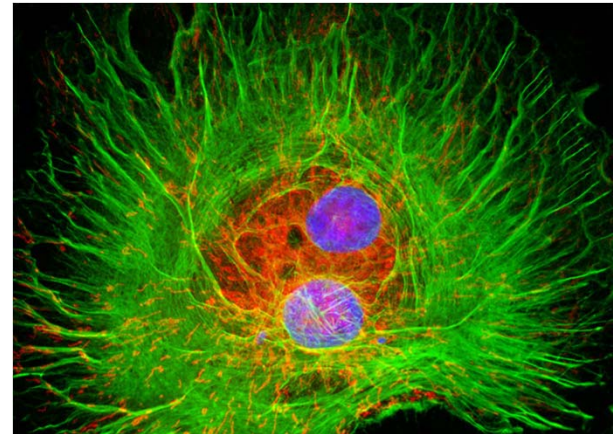
- Technology for the development or production of graphics accelerators
  - EAR99
    - Need an export license for Foreign National employees from Cuba (not an asylee, refuge)





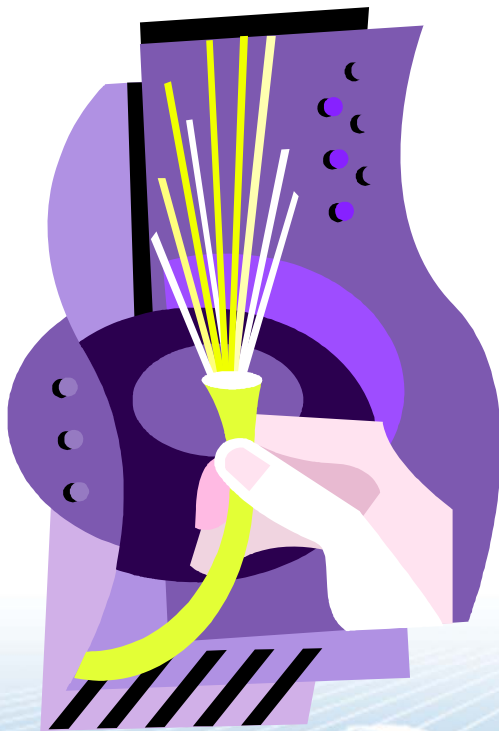
# EAR Example 3: Biotech/Pharma

- Technology for the development or production of the Japanese encephalitis virus
  - ECCN 1E001
    - No license required for foreign national employee from Canada
    - A License Exception available for foreign national employees from certain countries, e.g., India
    - An Export License is required for foreign national employees from certain countries, e.g., Russia





# EAR Example 4: Optical Switching



- Technology for the development or production of equipment employing “optical switching” and having a switching time less than 1 ms

– ECCN 5E001.c.3

- Need an export license for foreign national employees from Armenia, Azerbaijan, Belarus, Burma, Cambodia, Cuba, Georgia, Iran, Iraq, Kazakhstan, Kyrgyzstan, Laos, Libya, Macau, Moldova, Mongolia, North Korea, People's Republic of China, Russia, Sudan, Syria, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, Vietnam

# EAR Penalties

- Civil Penalties
  - Fines of up to \$250,000 per violation or
  - 2x the amount of the transaction and
  - The possible denial of export privileges
- Criminal Penalties
  - Fines of up to \$1 million and
  - Up to 20 years imprisonment

# ITAR Penalties

- Criminal Penalties
  - University: A fine of up to \$1,000,000 for each violation.
  - Individual: A fine of up to \$1,000,000 or up to ten years in prison, or both, for each violation.
- Civil Penalties
  - University: A fine of up to \$500,000 for each violation.
  - Individual: A fine of up to \$500,000 for each violation.
- Also could face denial of export privileges and/or seizure/forfeiture of goods.

# EAR Penalty Example

- Lattice Semiconductor Corporation
- Civil Penalty \$560K (September 2004)
  - BIS alleged:
    - Unlawfully exported certain semi-conductor microchips and related technical data to China
    - Released related technical data to Chinese national employees in the United States

# EAR Penalty Example

- SunTek Microwave
- Criminal Penalty - \$339K (July 2005)
  - Company pled guilty in the Northern District of California to violating the EAR in exporting detector video log amplifiers to China and having Chinese nationals work at SunTek on manufacturing technology of the amplifiers with a license.
  - Charlie Kuan, former President, sentenced to 12 months and one day imprisonment and two years' supervised release
    - First criminal conviction in a deemed export case



# EAR Penalty Example

- New Focus, Inc.
- Civil Penalty \$200K (April 2004)
  - BIS alleged:
    - New Focus failed to obtain export licenses under the deemed export provision of the EAR for two Iranian and one Chinese national who in the course of their employment in the U.S. were exposed to manufacturing technology of amplifiers and telecommunication components that was controlled by the EAR.

# ITAR Civil Penalty Example

- Civil Penalty \$20M (November 2004)
  - Export of defense-related technical data to foreign nationals employees via network access
  - General Motors - \$10 million civil fine as well as being required to pay \$5 million in order to correct its internal export compliance program.
  - General Dynamics had acquired parts of GM's defense business several years back
    - fined for successor liability and required to spend \$5 million to correct its internal export compliance program.



# ITAR Criminal Penalty Example

- Sentenced to 4 Years in Prison
  - Former University of Tennessee Professor J. Reece Roth (age 72 in 2011)
    - Convicted of conspiracy, fraud and violating the Arms Export Control Act for permitting foreign graduate students to have access to information relating to an Air Force project on the use of plasma technologies for unmanned aerial vehicles.



# U.S. Export Control Laws and USCIS





# Part 6 of Form I-129: Export Certification Requirement

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## Part 6. Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States

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(For H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions only. This section of the form is not required for all other classifications. See Page 3 of the Instructions before completing this section.)

Check Box 1 or Box 2 as appropriate:

With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

- 1. A license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or
- 2. A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.



# Part 6 of Form I-129

- Took effect February 23, 2011
- Must be executed by all petitioners filing for all H, O, and L nonimmigrants.
- Doesn't require petitioner to acquire a license prior to filing, just attest that deemed export rules will not be violated prior to getting a license if one is needed.
- Answer question as things exist at the time of filing.
  - No need to amend petition if, at a future time, circumstances change and alien's work then requires a license.
  - Remember, while no amendment is necessary, petitioner still must comply with export laws, i.e., get a license!

# H-1B Preparation

- Deemed Export Control issues relate to form I-129 only
- Does not affect information reported on or process of completing ETA 9141 (prevailing wage request) or ETA 9035 (labor condition application)

# Best Practices on Campuses

- A primary motive to add deemed export to Form I-129 was to spur petitioners to reevaluate their compliance with export control regulations
- The addition of Part 6 forces I-129 signers to seek out responsible stake holder on campus, and establish a shared responsibility relationship

# Best Practices on Campuses

Simple rules:

- Establish specific responsibilities among institutions stake holders
- Have a process.
- Make it uniform.
- Make it fast.
- Document it consistently each time.
- Perform periodic reviews

# Best Practices on Campuses

- Who should be involved?
  - An institutional representative with legal knowledge/responsibilities of export controls.
    - The university's export control analyst
  - The H-1B preparing office
  - A person within the employment unit with an awareness of any technology or technical data to which the beneficiary will have access.
    - The beneficiary's supervisor.
  - The Department Chair and/or College Dean/ Legal Council of the institution
- Make sure all parties are comfortable with their respective liabilities.



# Best Practices on Campuses

How will the information flow?

- Questionnaire
  - Must be complete enough to make the export control office comfortable with the integrity of the screening process, but simple enough that it can be understood and enhance efficiency, not hinder it.
- Certification
  - The certification signed by all parties involved will allow the H-1B preparing office to execute Part 6 with the knowledge that its attestation in Part 6 is true and correct to the best of his/her knowledge.
- Capturing and transmitting information in this manner also serves the important purpose of documenting the process.

# Deemed Exports: Consular Issues

- In addition to the issue of deemed exports arising in the nonimmigrant petitioning process, it also may arise in the context of visa issuance at a U.S. Embassy/Consulate abroad.
- We are accustomed to questions for nonimmigrants in technical areas: description of research, copies of papers and so on.
- However, specific export control questions seem to have emerged recently.

# Deemed Exports: Consular Issues

- Members have reported cases also affecting F's and J's, not just those subject to Part 6 of Form I-129.
- A typical example seems to be that of Embassy Beijing re a J researcher, requesting a letter from the sponsor which:
  - Describes, if any, export-controlled technology and/or information that will be shared with, or be exposed to applicant;
  - States if applicant will participate in or have access to U.S. government projects, even on an extra-curricular basis; and
  - States explicitly whether such project or research to be performed is open to non-U.S. citizens.

# Deemed Exports: Consular Issues

- How to comply?
  - Universities may wish to prepare all nonimmigrant visa applicants in technical areas
    - Check consular webpage usembassy.state.gov. Requirements are very specific.
    - Alert all such visa applicants of the typical “export control” questions via a questionnaire or other materials.
    - Prepare a letter in advance responding to those questions for presentation to the consulate, in consultation with export control officer/attorney.
    - For a questionnaire example, see:  
<http://www.vanderbilt.edu/visit/travel/TechnicalQuestionnaire.pdf>
    - Prepare applicant for other typical questions:  
Description of research, copies of papers, and so on.



# Consular Webpage--Delhi

## NONIMMIGRANT VISAS

### **Visa Applicants Planning to Engage in Technology-Related Business or Study While in the United States:**

If you are involved in technical or scientific fields, your visa application may require administrative processing of approximately four to eight weeks. If you think this requirement will affect you, **apply for your visa as early as possible**, prepare for your visa interview well in advance and bring to your visa interview the following documents:

**Invitation:** An invitation letter from the sponsoring organization in the U.S. For graduate students, workers and exchange visitors, this letter should include your supervisor or advisor and details about your work.

**Resume:** A detailed resume/CV, including your professional and academic background, and a list of all your publications.

**Itinerary:** An itinerary of all locations you will visit in the U.S, including contact names, organizations, addresses, and telephone numbers.





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**Equipment:** A complete description of any equipment you plan to purchase or examine, including the equipment's use and users.

**Export License:** An export license issued by the U.S. Government for the equipment you plan to purchase.

**Research:** A complete and detailed description of your current and past research, and any research you intend to conduct in the U.S, including a description of the practical applications of your research or study.

**Purpose:** A detailed statement of the purpose of your visit to the U.S.

**Funding:** Information on who is funding your trip.

**Travelers:** A list of all the travelers who will accompany you, including family members and colleagues.

**Position:** Your current job title and a full description of your work.



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# Consular Webpage--Delhi

## Further Instructions & Information:

- All documentation must be in English
- You should be ready to answer specific questions during the visa interview about your research plans in the U.S.
- If you do not bring complete information to your visa interview, for example, an invitation letter, your resume and research summary, you may have your application delayed even further, or may be refused a visa and be required to apply again.
- Processing of your application cannot begin until you have provided all the documentation requested at the time of the interview.
- You can [check the status of your case online here](#).

# Addendum: Export Analysis

- Determine jurisdiction of the products/technology (ITAR or EAR)
  - Does an exemption or license exception for publicly available technology, “educational information,” or “fundamental research” apply? If so, license not required.
- If subject to ITAR, determine USML [US Munitions List] category and licensing requirements
- If subject to EAR, determine ECCN [Export Control Classification Number]
  - Identify the Reasons for Control on CCL [Commerce Control List]
  - Depending on destination/nationality, cross-reference controls against the Commerce Country Chart
  - Determine License Requirements or License Exception Eligibility

# QUESTIONS?

¿Preguntas?

Câu hỏi?

Domande?

Fragen?

Qüestiós?

Kum tum?

Vragen?

Perguntas?

**dwa**

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