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## Export Control Regulatory Agencies

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The three primary agencies that regulate U.S. exports are:

- The U.S. Department of Commerce, The Bureau of Industry and Security (“BIS”), which oversees and administers the **Export Administration Regulations (“EAR”)**;
- The U.S. Department of State, The Directorate of Defense Trade Controls (“DDTC”), which oversees and administers the **International Traffic in Arms Regulations (ITAR)** and the Arms Export Control Act (“AECA”);
- The U.S. Department of Treasury, **The Office of Foreign Asset Control (“OFAC”)**, which administers economic sanctions and embargoes.

In addition, nuclear related export control regulations are administered by the Nuclear Regulatory Commission (“NRC”) and the U.S. Department of Energy (“DoE”).

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## Export Control Overview – What is an Export?

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### A. What is an Export under the EAR?

The EAR definition of “export” extends beyond the transportation of physical goods outside the U.S.

- An “**Export**” under the EAR means an actual shipment or transmission of items subject to the EAR out of the U.S., or the release of technology or software subject to the EAR in a foreign country or to a foreign national abroad.
- A “**Deemed export**” is the release of technology or source code to a foreign national in the U.S. The release is “deemed” to be an export to the last permanent residence status/citizenship of the foreign national. This can occur through demonstration, oral briefing, site visit, or through transmission of non-public data.
- A “**Re-export**” is an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country.

Releasing or otherwise transferring technology or source code subject to the EAR to a foreign national of a country other than the foreign country where the release or transfer takes place is called a “deemed re-export.”

Additional information and guidance regarding the EAR (15 C.F.R. § 734) are available on BIS’s [website](#).

### B. What is an Export under the ITAR?

The ITAR defines the term “export” broadly and it is important to understand that it is not restricted to physical goods nor is it restricted to transfers outside of the U.S. An export, as defined by the ITAR, means:

- Sending or taking of a defense article out of the U.S. in any manner, whether via shipment or hand-carry in your luggage;
- Disclosing or transferring technical data to a foreign national, whether in the U.S. or abroad;
- Performing a defense service on behalf of, or for the benefit of, a foreign national, whether in the U.S. or abroad. This includes, for example, teaching or training a foreign national on how to design, develop, engineer, etc. a defense article, whether such training is provided orally or by releasing technical data.

With very few exceptions, all exports of items contained on the U.S. Munitions List require an export license from the DDTC prior to its export or re-export. The ITAR includes a list of “[proscribed countries](#)” that are subject to U.S. arms embargoes. DDTC maintains a general policy of denying license applications for exports of ITAR-controlled items to the proscribed countries.

Additional information and guidance regarding the ITAR (22 C.F.R § 120-130) are available on DDTC’s [website](#).

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## What is not Subject to Export Control Regulations?

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### A. What is not subject to EAR?

**Fundamental Research.** “Technology” or “software” that arises during, or results from, fundamental research and is intended to be published is not subject to the EAR. Fundamental research means research in science, engineering, or mathematics, the results of which ordinarily are published and shared broadly within the research community, and for which the researchers have not accepted restrictions for proprietary or national security reasons

**Published.** Unclassified “technology” or “software” is “published,” and is thus not “technology” or “software” subject to the EAR, when it has been made available to the public without restrictions upon its further dissemination such as through any of the following:

- Subscriptions available without restriction to any individual who desires to obtain or purchase the published information;
- Libraries or other public collections that are open and available to the public, and from which the public can obtain tangible or intangible documents;
- Unlimited distribution at a conference, meeting, seminar, trade show, or exhibition, generally accessible to the interested public;

- Public dissemination (*i.e.*, unlimited distribution) in any form (*e.g.*, not necessarily in published form), including posting on the Internet on sites available to the public; or
- Submission of a written composition, manuscript, presentation, computer-readable dataset, formula, imagery, algorithms, or some other representation of knowledge with the intention that such information will be made publicly available if accepted for publication or presentation:

## **B. What is not subject to Export Controls under the ITAR?**

Information available in the **Public Domain**. Public domain means information which is published and which is 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;
- 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. Fundamental research is defined to mean 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. University<sup>1</sup> research will not be considered fundamental research if:
  - (i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or
  - (ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.

*It is imperative that Laboratory personnel understand that signing a Non-Disclosure Agreement or Confidentiality Agreement related to research, or allowing a sponsor to pre-approve or otherwise dictate which results can and cannot be published would subject the research to be export controlled. Additionally, tangible research deliverables and non-open sourced software resulting from research is subject to export controls.*

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<sup>1</sup> In the context of this section, the Laboratory would be considered a “University” as the Laboratory is managed and operated by The Regents of the University of California and, therefore, operates under the University of California’s Openness in Research Policy.

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## What Does an Export Control Review Entail?

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**An export control review requires the exporter to know “Who,” “What,” “Where,” and “Why” related to the export. The key compliance activities to achieve this objective include transaction screening, export classification, and export licensing.**

**A. Transaction Screening** ensures that Divisions do not engage in any activity that involves a prohibited destination, prohibited end-use, or prohibited end-user, and that Divisions screen for red flag indicators.

Key considerations:

1. Is the export to a comprehensive embargoed destination (Cuba, Iran, N. Korea, Syria or Sudan)?

“U.S. Persons<sup>2</sup>” are prohibited from engaging in activities with these destinations in the absence of an export authorization from the applicable U.S. Government agencies.

2. Is there a restricted individual or entity involved?

The Laboratory uses [Descartes Visual Compliance](#) software to perform restricted party screening.

3. Are there military end use and/or end user controls related to China, Russia and Venezuela?

These controls are intended to combat efforts by entities in these countries to use certain U.S. technologies obtained through civilian supply chains or under civilian-use pretenses to develop weapons, military aircraft, and surveillance technology contrary to U.S. national security interests. List of items covered by military end use and/or end user license requirements are found [here](#).

4. Are there any red flag indicators? “[Know Your Collaborator/Customer](#)” and watch out for red flag indicators.

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<sup>2</sup> “U.S. person” means a person (as defined in §120.14 of this part) who is a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is a protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any corporation, business association, partnership, society, trust, or any other entity, organization or group that is incorporated to do business in the United States. It also includes any governmental (federal, state or local) entity. It does not include any foreign person as defined in §120.16 of this part.

- Is the export to a Chinese University or research institution? If so, conduct additional due diligence using the [China Defence Universities Tracker](#)<sup>3</sup>. This tool is endorsed by the U.S. Department of State.

5. Is the activity in question called out in the [10 General Prohibitions](#)?

6. Is the technology listed in the DOE Science and Technology (“S&T”) Matrix? If so, follow up with the Divisional Subject Matter Expert. S&T Matrix considerations are limited to China, Russia, N. Korea and Iran. This is a DOE mandate and not an export control requirement.

*Note: Additional export restrictions may apply. The above listing provides a high-level overview of transaction screening.*

**B. Export Classification:** Ensuring Divisions export classify commodities, software, information, technology and services in accordance with the applicable U.S. export control classification laws. The classification assigned to items informs, which export control requirements may apply to those items (e.g., whether an export license is required in connection with the item’s destination or shipping route).

Key considerations:

1. Is the item under the jurisdiction of the BIS? The BIS has jurisdiction over dual use items. Dual use items have both a commercial and military application. These items are listed on the [Commerce Control List](#) (“CCL”).

2. Is the item under the jurisdiction of the DDTC? The DDTC has jurisdiction over items that have a military application. These items are listed on the [U.S. Munitions List](#) (“USML”).

**C. Export Licensing:** Ensuring Divisions obtain an export license in advance of any export of controlled commodities or release or transfer of controlled software, information, technology and services, to the extent that such a license is required under the applicable U.S. export control law.

Key considerations:

1. Is a BIS license exception or export license required?

2. Is a DDTC license exemption or export license require?

3. Is an OFAC general or specific export license required? The OFAC maintains various sanction programs and each program is unique. [Sanctions Programs and Country Information](#).

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<sup>3</sup> China Defence Universities Tracker was funded by the U.S. Department of State, See link: <https://unitracker.aspi.org.au/about/>. Additionally, a link to the China Defence Universities Tracker can be found on the U.S. Department of State website: See bottom of link: <https://www.state.gov/military-civil-fusion/>

*Note: Nuclear related exports are regulated by the Department of Energy and the Nuclear Regulatory Commission and require case by case review.*