EXPORT CONTROLS

Key Terms

EXPORT

- Under EAR:
  - Actual shipment or transmission of items subject to EAR
  - Release of technology or software subject to EAR to a foreign national
  - Transmission via email, fax, design and verbal communication/correspondence
- Under ITAR:
  - Sending or taking defense article out of US in any manner
  - Disclosing (oral or visual) or transferring technical data to a foreign person, in US or abroad
  - Performing a defense service on behalf of a foreign person

“DEEMED” EXPORTS

- Under EAR:
  - Transfer of source code or ‘technology’ to a foreign person is export to home country
- Under ITAR:
  - Transfer of source code or ‘technology’ or ‘technical data’ to a foreign person is export to home country
- Exceptions:
  - Persons lawfully admitted for permanent residence in US
  - Protected individuals under the Immigration and Naturalization Act

FOREIGN NATIONAL

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

TECHNOLOGY or TECHNICAL DATA

- Does mean:
  - Technical information beyond general & basic marketing materials about a controlled commodity, i.e., specific information necessary for development, production, or use of a commodity, and often takes form of blueprints, drawings, photographs, plans, diagrams, models, formulae, tables, engineering specifications, and documentation
  - Deemed export rule applies to transfer of technical information to foreign national in US
- Does NOT mean:
  - Controlled equipment/commodity itself, or to type of information contained in publicly available user manual

DEFENSE SERVICE

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

TECHNOLOGY CONTROL PLAN (TCP)

- Plan that outlines procedures to secure controlled technology, technical data, information, materials software or hardware from use and observation by unlicensed non-US citizens

“USE” TECHNOLOGIES

- Routine ‘use’ of controlled equipment by foreign nationals does not require license (using in ordinary way specified in user manual, using in such a way that does not disclose technical information about equipment beyond what is publicly available)
License required if foreign national ‘using’ equipment in such a way to access technical information beyond what is publicly available (accessing source code of software or modifying a piece of equipment in such a way as to gain non-publicly available technical information about design)

**“PUBLISHED” INFORMATION**

Information is ‘published’ and not subject to EC when it becomes generally accessible to the interested public in any form, including:

- Publication in periodicals, books, print, electronic, or other media available for general distribution (including websites that provide free uncontrolled access) or to a community of persons interested in the subject matter, such as those in a scientific or engineering discipline, either free or at a price that does not exceed the cost of reproduction and distribution;
- Readily available at libraries open to the public or at university libraries;
- Patents and published patent applications available at any patent office; and
- Release at open conference, meeting, seminary, trade show, or other open gathering held in the US (ITAR) or anywhere (EAR). [conference or gathering is ‘open’ if all technically qualified members of the public are eligible to attend and attendees are permitted to take notes or otherwise make a personal record of the proceedings and presentations. A conference is considered open notwithstanding a registration fee reasonably related to cost, and there may be a limit on actual attendance as long as the selection is either ‘first come’ or selection based on relevant scientific or technical competence]

**FUNDAMENTAL RESEARCH EXCLUSION (FRE)**

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

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

University based research is not considered “fundamental research” if the university or its researchers accept (at the request, for example of an industrial sponsor) restriction on publication of scientific and technical information resulting from the project.

**“EDUCATIONAL” INFORMATION**

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

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