



## EXPORT (EAR 734.2(B)(1) AND ITAR 120.17)

Export is defined as **an actual shipment or transmission of items out of the United States**. This includes standard physical movement of items across the border by truck, car, plane, rail, or hand-carry. Technology and software may be exported or reexported both physically or electronically, such as through meetings, engineering manuals, blueprints, plans, diagrams, formulae, email, telephone discussions, fax, posting on the internet, and a variety of other non-physical means.

## DEEMED-EXPORT (EAR 734.2(B)(2)(II) AND ITAR 120.17)

The release of “technology” or “software” to a foreign national in the United States is “deemed” to be an export, even though the release took place within the United States. In other words, an export of controlled “technology” or “software” can occur even if nothing ever leaves the research lab; the release can occur through, but is not limited to, a demonstration, oral briefing or provision of documents, for instance.

The term “deemed export” appears only in the EAR. The ITAR does not use this term, but rather includes a description in its “export” definition.

The ITAR “export” definition is very clear and very strict. Therefore, if you are working with any “defense” article, technology, software or if you are providing or receiving any “defense” service, we highly recommend that you contact the Export Controls team ([EChelp@pitt.edu](mailto:EChelp@pitt.edu)) with as much advance notice as possible, so we can assess your situation and advise you accordingly.

Institutions of higher learning work predominantly with “dual-use” items, technology and software. For this purpose, the content of this guidance document will focus on the EAR definition of “deemed-export”.

The EAR defines “deemed-export” as **“ANY RELEASE OF TECHNOLOGY OR SOURCE CODE SUBJECT TO THE EAR TO A FOREIGN NATIONAL.”**

### WHAT IS “TECHNOLOGY”?

**“Technology” is specific information necessary for the “development”, “production”, or “use” of a product.**

“Technology” can take the form of “technical data” (includes blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media devices such as disk, tape, read-only memories) and/or “technical assistance” (includes instructions, skill training, working knowledge, consulting services or the transfer of technical data).

Exemption - EAR 734.3(B) (3) TECHNOLOGY AND SOFTWARE PUBLICLY AVAILABLE: Publicly available information, technology and software are not subject to the EAR and, as such, may generally be shared with foreign persons without obtaining an export license or other authorization. More information can be found on our website at: <http://www.research.pitt.edu/exco-EAR>

### Definitions:

- **“Development”**: According to the EAR, “development” is related to “all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts”;
- **“Production”**: According to the EAR, “production” means “all production stages, such as: product engineering, manufacture, integration, assembly (mounting), inspection, testing, and quality assurance”;
- **“Use”**: According to the EAR, “use” is defined as **“operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing”**.

Note: “Use Technology” has not been released unless all 6 elements have been disclosed or transferred to another party.<sup>1</sup>

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<sup>1</sup> i.e., If the technology available to the foreign national does NOT meet all of these 6 attributes, then it is not “use” technology for deemed export licensing purposes. Conversely, if the technology at issue does meet ALL of these 6 attributes, then it constitutes “use” technology and a license may be required depending on the classification of the technology.

**Q&A:** Does this mean that my foreign national employee, researcher or student needs a deemed export license to operate export-controlled equipment? Not necessarily. Keep in mind that the deemed export rule does not regulate the operation of controlled equipment. Rather, it is a release to a foreign national of export-controlled “use” technology that may have deemed export licensing implications, and “use” technology includes all of the attributes of “use” as defined in the EAR Part 772 (i.e. operation, installation, maintenance, repair, refurbishing and overhaul).

If the foreign national has access only to the technology that is necessary to operate the export controlled equipment, a release of “use” technology has not occurred and no deemed export license requirement is triggered.

# Deemed-Export - Guidance

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Exception - EAR 600 series (ECCN nx6nn): The EAR 600 series includes items and information that were previously controlled under the ITAR but are now subject to the EAR (e.g., 3E611 Technology “required” for military electronics, as follows (see List of Items Controlled)). For technology classified as a 600 series, NOT all the 6 elements need to be disclosed or transferred to constitute “use” technology. If only 1 element is released, then there is a “use” technology and a license may be required. Contact the Export Controls team ([EChelp@pitt.edu](mailto:EChelp@pitt.edu)) when dealing with EAR 600 series items, technology or software.

## WHAT IS THE DEFINITION OF “FOREIGN NATIONAL”?

The regulations define a “foreign person” as anyone who is not a U.S. person (EAR part 772 and ITAR 120.15). Therefore, this includes:

- any individual who is not a U.S. citizen; or,
- any individual who is not a US permanent resident alien (“green card” holder); or,
- any individual who is not a protected individual (e.g., refugees, or have political asylum); or,
- any foreign corporation/business/organization/group not incorporated or organized under U.S. law; or,
- any foreign government and any agency or subdivision of foreign governments (e.g. diplomatic missions).

For more information: <http://www.research.pitt.edu/exco-us-person-vs-foreign-person>

## CONCLUSION

Per the EAR, an export license is not required, for access to and manipulation/operation of EAR controlled item by a foreign person located in the United States. However, per the definition of “deemed-export”, an export license may be required for the access, disclosure, transfer of “technology” or “software source-code” to a foreign national within the United States.

In summary, access to hardware does not constitute a deemed-export. However, access to “information”/“technical data”/“technical assistance” or “software source code” constitutes a “deemed-export” and may require an export license.

A license or other authorization is necessary for “deemed-export” when:

1. There is an access to controlled “technology” or “source code”;  
“Technology”: information released is necessary for the “development”, “production”, or “use” (i.e., all six elements of “use” will be released) of a product.
2. The “technology” or “source code” is not publicly available;
3. The individual to whom it will be released is a foreign person and a license is required to export the “technology” or “source code” to the individual’s home country.

DOCUMENT HISTORY AND VERSION CONTROLS		
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