

"Deemed Export" Questions and Answers

UPDATE (11/15/04): Point of clarification on the current policy regarding citizenship policy.

There is no change in the current policy regarding citizenship and permanent residents. The current policy still applies as outlined in questions 6-11 of the deemed export FAQ's.

The recently published Deemed Export license exceptions for both Microprocessors and High Performance Computers contains an error in the policy regarding citizenship and permanent residency. In the preamble under the heading "Deemed Export Revision" second to the last paragraph the last sentence reads, "Applications for foreign nationals with temporary or permanent residence status of a third country (i.e., non-U.S. and a temporary or permanent residence status other than a foreign national's country of origin) should be based on the foreign national's country of citizenship." This is not correctly stated, the policy in recognizing the most current citizenship and permanent residency still applies.

1. What is the "deemed export" rule?

An export of technology or source code (except encryption source code) is "deemed" to take place when it is released to a foreign national within the United States. See §734.2(b)(2)(ii) of the Export Administration Regulations (EAR). For brevity, these questions and answers refer only to "technology" but apply equally to source code.

2. What is a "release" of technology?

Technology is "released" for export when it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.); when technology is 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).

3. What is "technology"?

Per Part 772 of the Export Administration Regulations (EAR), "technology" is specific information necessary for the "development," "production," or "use" of a product. The General Technology Note states that the "export of technology is controlled according to the provisions of each Category." It further states that "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." Please note that the terms "required," "development," "production," "use," and "technology" are all defined in Part 772 of the EAR. Controlled technology is that which is listed on the Commerce Control List.

4. When do I need to apply for an export license for technology under the "deemed export" rule?

Assuming that a license is required because the technology does not qualify for treatment under EAR99 and no license exception is available, U.S. entities must apply for an export license under the "deemed export" rule when both of the following conditions are met: (1) they intend to transfer controlled technologies to foreign nationals in the United States; and (2) transfer of the same technology to the foreign national's home country would require an export license.

Foreign Nationals

5. How do I know if a foreign national would be subject to the "deemed export" rule?

Any foreign national is subject to the "deemed export" rule except a foreign national who (1) is granted permanent residence, as demonstrated by the issuance of a permanent resident visa (i.e., "Green Card"); or (2) is granted U.S. citizenship; or (3) is granted status as a "protected person" under 8 U.S.C. 1324b(a)(3). This includes all persons in the U.S. as tourists, students, businesspeople, scholars, researchers, technical experts, sailors, airline personnel, salespeople, military personnel, diplomats, etc. As noted, one exception to this general statement is a "protected person." "Protected persons" include political refugees and political asylum holders. Be aware that individuals seeking "protected person" status must satisfy all of the terms and conditions that are fully set forth in 8 U.S.C. 1324b(a)(3). It should be emphasized that although the deemed export rule may be triggered, this does not necessarily mean that a license is required. For example, the technology may be EAR99 or license exception eligible.

6. How are individuals handled who are permanent residents or citizens of countries other than those of their nationality?

As noted above in Question 5, if the individual is a naturalized citizen or permanent resident of the United States, the "deemed export" rule does not apply. In other words, he or she is not subject to the provisions of the "deemed export" regulation. For individuals who are citizens of more than one foreign country, or have citizenship in one foreign country and permanent residence in another, as a general policy, the last permanent resident status or citizenship obtained governs. Questions 7 through 11 provide examples of situations involving individuals who are citizens of more than one foreign country, or have citizenship in one foreign country and permanent residence in another. If, for some reason, the status of a foreign national is not certain, then you should ask the Bureau of Export Administration (BXA), to determine where the stronger ties lie, based on the facts of the specific case. For instance, the status of a foreign national could be uncertain in situations where information may indicate involvement with prohibited entities or activities, for example, missile or nuclear-related end-uses or end-users as identified in Part 744 of the EAR. In response to a request for the status of a foreign national, BXA will look at the foreign national's family, professional, financial, and employment ties.

7. What if the individual is a foreign national of one country, say India, but has obtained permanent residency in another, say the U.K.?

Release of controlled technology to that individual in the U.K. would be treated as if the shipment were being made to the U.K. and licensing requirements, if any, would be the same as for a British national in the U.K.

8. If this same Indian foreign national traveled to visit facilities in a third country, say Germany, do the licensing requirements change, or is the release still treated as a transfer to the U.K. for licensing purposes?

The Indian national's U.K. permanent residency status still drives the licensing requirements and releases of technology to him or her would be considered as transfers to the U.K.

9. What if that same Indian foreign national comes to the United States?

As long as the Indian foreign national maintains his or her permanent residency status in the U.K., transfers of technology to that individual would be deemed as transfers to the U.K.

10. Now, what about changes in nationality? If a person was a citizen of India but subsequently became a citizen of the U.K., how is that person treated for export control purposes?

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

11. What if the Indian foreign national becomes a citizen of the U.K. but retains his or her Indian citizenship, as well? This is the situation of people who have dual-citizenship.

As a general principle, the last citizenship obtained governs. As is clear in response to Question 10 above, the individual's most recent citizenship is with the U.K. and releases of technology would be viewed as releases to the U.K.

12. I have read elsewhere on your web page the requirements for information that the Bureau of Export Administration (BXA) wants in order to process a "deemed export" license application. I see that you require a lot of personal data, including citizenship and country of origin. I understand that I cannot ask for such information from my employees under the Equal Employment Opportunities Commission (EEOC) rules. How do I get that information?

The information we normally request derives from a curriculum vitae/resume or from company background checks. The information that BXA may request as part of the license application process is requested in order to determine whether BXA should authorize the release of such controlled sensitive technology. The hiring of foreign nationals is not prohibited nor regulated by the Export Administration Regulations (EAR). The EAR does not regulate employment matters. The justification for the "deemed export" rule is that there is no more effective way of disclosing sensitive technical information (e.g., design know-how) than to work side-by-side in a laboratory or on the production floor of a company. Our web page [guidance\[PDF\]](#) is designed to assist you in pointing out the types of relevant information that BXA examines in connection with the license application review.

13. What is a "deemed re-export"?

The term "deemed re-export" is often used to indicate the transfer of controlled U.S. technology to a third-country national overseas. As an example, a U.S. exporter transfers its controlled proprietary technology to a firm in country A. The firm in country A, in turn, will employ an individual from country B who is not a permanent resident of country A, nor of the United States, and who will need the controlled proprietary technology to perform his or her assigned duties. If the U.S. exporter intends to transfer the controlled technology to the country B national who is

now an employee of the country A firm, the U.S. exporter is responsible for obtaining any required deemed export license, as if it were transferring the technology to country B. If the country A firm intends to transfer the controlled technology that it received from the United States to the country B national, then the country A firm is responsible for obtaining any required deemed re-export license from BXA. Please see §734.2(b)(4) of the Export Administration Regulations (EAR).

Technology

14. What technologies are subject to the Commerce Department controls?

Generally, technologies subject to the Export Administration Regulations (EAR) are those which are in the United States or of U.S. origin, in whole or in part. Most are proprietary. Technologies which tend to require licensing for transfer to foreign nationals are also dual-use (i.e., have both civil and military applications) and are subject to one or more control regimes, such as National Security, Nuclear Proliferation, Missile Technology, or Chemical and Biological Warfare.

Foreign technology with U.S.-origin technology commingled to a degree above a de minimis level is considered to be subject to the EAR. Technologies which may require an export license are those which are subject to the EAR and which are listed in the Commerce Control List, see Parts 734, 738, and 774 of the EAR.

Some technologies are under the exclusive jurisdiction of another agency of the U.S. government and are not subject to the EAR. These include defense services which are under the jurisdiction of the State Department and technology related to the production of special nuclear materials which is under the jurisdiction of the Energy Department.

Still other technologies do not require any authorization because they are already "publicly available." These include patent applications; publicly available technology and software (other than software and technology controlled as encryption items) that are already published or will be published; technology which arises during or as a result of fundamental research; or technology which is educational. See Part 734 of the EAR for details.

15. Is software considered "technology" and is it similarly controlled?

The Export Administration Regulations (EAR) definitions distinguish between software and technology. Software is one of the groups within each of the categories of items listed on the Commerce Control List (CCL). Software which is delineated on the CCL is controlled.

16. What technologies are considered "fundamental research"?

"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. It is distinguished from proprietary research and from industrial development, design, production, and product utilizations, the results of which ordinarily are restricted for proprietary and/or specific national security reasons. Normally, the results of "fundamental research" are published in scientific literature, thus making it publicly available. Research which is intended for publication, whether it is ever accepted by scientific journals or not, is considered to be "fundamental research." A large segment of academic research is considered "fundamental research." Because any information, technological or otherwise, that is publicly available is not subject to the Export Administration Regulations (EAR) (except for encryption object code and source code in electronic form or media) and thus does not require a license, "fundamental

research" is not subject to the EAR and does not require a license. Please see §734.8 for a full discussion.

17. Are cryptographic technology and software source code "deemed exports" handled the same way as other technology and software source code?

No, they are not. The encryption regulation published on January 14, 2000, changed the deemed export rule for encryption technology. The authorization for encryption technology was updated to allow some encryption technology under License Exception ENC. ENC is now also allowed for foreign employees of U.S. companies coming to the United States to work. However, ENC would not cover employees of a Romanian firm, for example, working at a U.S. company. These foreign nationals are not "employees" of the U.S. company. As far as encryption source and object code are concerned, while in the United States, foreign nationals may use any type of encryption source code and object code. The only deemed export authorization required for encryption relates to encryption technology and when a U.S. person intends to provide technical assistance to foreign nationals using source code. (Please note that Export Administration Regulations (EAR) licensing requirements may apply for transfers of encryption software in the United States to an embassy or affiliate of a foreign country.) See our related [deemed export encryption chart](#) for more guidance.

More direct hypothetical situations

18. At our Canadian subsidiary, we develop semiconductor manufacturing technologies that are controlled by ECCN 3E001. If we transfer those technologies to a Chinese national in that facility, do we require U.S. authorization? What about transferring the same Canadian developed technologies to PRC nationals at our PRC facility?

You may require a license if the technologies are considered to be of U.S. origin. If the technologies developed in your Canadian facility are commingled with or drawn from controlled U.S.-origin technology, you must decide the extent of the mix to determine if U.S. re-export controls apply. Depending on the percentage of the controlled-U.S. technology component, a license may be required for the transfer of that technology to the Chinese national, whether he or she is at your Canadian or PRC facilities. Please see §734.4(c)(3), (d)(3), and (e) of the Export Administration Regulations (EAR). Also, the EAR (Supp. 2 to 734, (b)) requires that you file a one-time review of your technology before you can use the de minimis exclusion. We strongly suggest that you consult with BXA on this question.

19. We have several foreign national employees in our firm, which has several divisions and an administrative area. Two of the divisions, the Research and Development (R&D) division and the Advanced Manufacturing/Processing (ADMP) division, work with technical data for advanced materials used in electronic and jet engine manufacturing which is controlled under ECCNs 2E001, 3E001, and 9E003, and we have several foreign national engineers working there. None of the other divisions work with controlled technical data, and we have some foreign national employees in them as well. The divisions are not co-located. Do I need an export license for all of the foreign national employees?

Probably not. Your firm would likely need a license for those foreign national engineers and technical people who work in the R&D and ADMP divisions with the controlled technologies. Your firm would probably not need licenses for those individuals who do not normally come into contact with the controlled technologies, such as those in the administrative area. However, you should review the job descriptions of all your foreign national employees. For example, technical

managers and technical training personnel who are NOT at the sensitive divisions may need access to the controlled technologies in order to do their jobs, and so you may need to have deemed export licenses for technology transfer to them.

20. My company wants to employ an Indian foreign national who spent three years working for an Indian organization that is on the Entity List. May I do so? Do I require a license?

If he or she is properly documented for work in the United States, you may employ him or her. You must apply for an export license if you intend to release technology listed on the Commerce Control List which would require a license for export to India.

21. An Indian foreign national who is on sabbatical from an Indian organization that is on the Entity List wants to work with our firm in our executive training program where we will discuss proprietary technology which is not controlled to India. We have had an ongoing exchange of executives and scientists from this organization for years. Do I require a license?

Yes, you are required to apply for a deemed export license. Under the sanctions imposed by the U.S. Government, any export which includes transfers of technology to foreign nationals requires a license to organizations on the Entity List. Because the Indian foreign national is still employed by the organization that is on the Entity List, a technology transfer to him or her is considered a technology transfer to the employer organization. Note that the sanctions apply to any technology subject to the Export Administration Regulations (EAR).

22. Our university has several departments that are conducting research under contract with private corporations. Some of this research is controlled "development" technology. We often have researchers (visiting faculty, post-graduate fellows, and research assistants) who are foreign nationals working on controlled "development" technology research. Does the university need to apply for a deemed export license?

It depends. You need to look at the research and the contract terms for release of the results of the research. If there are no conditions placed on the research, and it is the intent of the research team to publish its findings in scientific literature, then it is considered "fundamental research," and no license is required. If the contract requires that the private corporation review the findings of the research team with the intent of controlling what results are to be released in open literature, then the research is considered proprietary, and a license is required.

23. Our university does research under U.S. government sponsorship. We may have foreign national researchers working on this. Is a deemed export license required?

Under the Export Administration Regulations (EAR), U.S. government sponsored research is handled very much like corporate sponsored research. It may be "fundamental research", or it may be proprietary (See Question 22). See §§ 734.8 and 734.11 of the EAR for details. In addition, some U.S. government data may be subject to separate restrictions on dissemination such as security classification.