

II. EXPORT JURISDICTION AND LICENSE DETERMINATION

There are a series of questions for any University community & employees to answer to determine which U.S. department/agency maintains [jurisdiction](#) over the export item, technology, article, or service. After License jurisdiction, a determination must be made regarding whether a [license](#) is required or not for the item, technology, article, or service. The decision-making process includes the main issue of determining whether the research is "Fundamental" in nature, or not. (See [section III.](#)) The University is often under the Fundamental Research Exception, however, there are many situations that are not covered or exempt from export control (or licensing) under the FRE. Often the process requires both the faculty/employee and ORA or the Office of Compliance for further information on how to proceed with their project. The Export Control decision trees in [Appendices 1](#) and [2](#) are helpful in analyzing these issues.

A. Agency Jurisdiction

The first step in the export review process is to identify the correct agency jurisdiction, which then identifies several regulations that apply to the situation or items at hand. Projects, research, conferences, etc., involving exports to [foreign nationals](#) (including [deemed exports](#)), whether for research, hiring, visiting scholars, or students will be reviewed with Office of Research Administration, Office of Compliance & Policy, and/or Office of Legal Services, as appropriate. The review process is initiated in several ways, such as, from the request of a Principal Investigator (PI) or Faculty member to one of the resource offices.

Since a PI is the expert on the item, research, or technology, s/he is in the best position to explain the technology involved in the export review. If this review involves research, the statement of work and other relevant information are reviewed to determine if the project is subject to export controls or not, and then determine the next steps. Mines relies on the PI or faculty member information and expertise in jointly determining whether the item, technology, research, etc. may fall within export controlled areas.

1. Export Control under U.S. Agencies.

The three (3) U.S. agencies that generally come into play on Export Control issues are the: 1) U.S. Department of Commerce, 2) U.S. Department of State, and 3) U.S. Department of the Treasury. Each agency has [statutory](#) basis for their power and they have promulgated and implemented regulations based on the statutory authority that are applicable to export controls and are discussed in this procedures document, in Table 1, "Regulations Agency and Oversight" below:

Regulations	Agency (Jurisdiction)	Oversight Areas
EAR: Export Administration Regulations	Department of Commerce Bureau of Business & Industry	Technologies: both commercial & military application, not those covered by ITAR
ITAR: International Traffic in Arms	Depart of State Directorate of Defense Trade Controls (DDTC)	Technologies, inherently military in properties
OFAC: Office of Foreign Assets Control	Department of Treasury, OFAC	Prohibits transactions of value with certain countries/persons

Table 1 Regulations Agency and Oversight

2. Additional oversight agencies.

The export or re-export of items or commodities may be controlled by/subject to oversight by the following agencies (as identified in the EAR, 15 CFR 734.3(b)(1)):

- [U.S. Nuclear Regulatory Commission](#) (commodities related to nuclear reactor vessels (10 CFR part 110, Export & Import of Nuclear Equipment & Materials);
- [U.S. Department of Energy](#) (technology related to the production of special nuclear materials and the transfer of unclassified nuclear technology & assistance (10 CFR part 810, Assistance to Foreign Atomic Energy activities under the Atomic Energy Act);
- [U.S. Patent & Trademark Office](#), (export to a foreign country of unclassified technology in the form of a patent application or an amendment, modification, or supplement thereto or division thereof (37 CFR part 5), with authority to BIS to address; and Exports and re-exports of such technology not approved under PTO regulations must comply with the EAR;
- Department of Defense (DoD) and [Department of State Foreign Military Sales](#) (FMS) Program (Items that are subject to the EAR that are sold, leased or loaned by the DoD to a foreign country or international organization under the FMS Program of the Arms Export Control Act pursuant to a Letter of Offer and Acceptance (LOA) authorizing such transfers are *not* “subject to the EAR,” but rather, are subject to the authority of the Arms Export Control Act.)

B. Export Administration Regulations (EAR)

U.S. Department of Commerce statutory authority over export issues comes from the Export Administration Act of 1979, as amended, (50 U.S.C. app. 2401-2420 (EAA)) and executive order(s). Commerce’s goal of the security of the US, including national defense and competitiveness of industry and healthy economy, resulting in the writing and adoption of the [EARs](#) that cover [Exports](#), [Re-exports](#), and certain activities found in Title 15, Commerce and Foreign Trade, addressing the Bureau of Industry & Security (BIS) (parts 700-799, Subchapter C, §§730-780). Note, the BIS regulations cover Chemical Weapons conventions and Nuclear Fuel activities. Generally, Export Administration Regulations cover “[Dual Use](#)” (civilian and/or military uses) commodities, software, and technology export and/or re-export (i.e., shipment, transmission, or release of a US item from one foreign country to another). The regulations specifically provide that:

“the EAR control any item warranting control that is not exclusively controlled for export, re-export, or transfer (in-country) by another agency of the U.S. Government or otherwise excluded from being subject to the EAR pursuant to §734.3(b) of the EAR. Thus, items subject to the EAR include purely civilian items, items with both civil and military, terrorism or potential WMD-related applications, and items that are exclusively used for military applications but that do not warrant control under the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 et seq.).” See 15 CFR §730.3.

1. Determine Licensing Requirements.

The following steps generally outline how Mines determines licensing requirements for items/activities under the EARs/regulations, including 3-steps:

- a. [Screen entities and individuals](#) against the most recent [Restricted](#) Parties lists using Visual Compliance Software to ensure that the individuals or entities to receive the technology or items to be exported are not on any of these lists;
- b. [Review restrictions](#) under the EAR for embargo information/restrictions to the particular country of destination; and
- c. [Determine jurisdiction](#) whether the commodity or activity is subject to the [EAR, Part 734 and on the Commerce Control List, or CCL](#).

- **Note:** If your item falls under the jurisdiction of the U.S. Department of Commerce and is not listed on the CCL, then the item is designated as “[EAR99](#).” The majority of commercial products are designated EAR99 and generally will not require a license to be exported or re-exported. **However,** if you plan to export an EAR99 item to an [embargoed or sanctioned country](#), to a [party of concern](#), or in support of a [prohibited end-use](#), you may be required to obtain a license.

If the commodity is subject to the EARs, Mines uses Compliance Software (available through ORA) to review entities, individuals, embargo information, commodity/activity along with locations and reviews the [Commerce Control List](#) (CCL) to identify items, technology, or materials that:

1) require a license for export; 2) if no license required (NLR); or 3) if the export cannot be made period.

2. Commerce Control List items & their Export Control Class Numbers (ECCN).

All commodities, technology, or software subject to the licensing authority of Commerce-BIS are included in the Commerce Control List (CCL), found in [EAR](#) (Title 15, [Part 774, Supplement No. 1](#)). Individual items on the CCL are identified by an [Export Control Classification Number](#), or [ECCN](#), made up of numbers and letters to identify the commodity or technology. An ECCN categorizes items based on the nature of the product (i.e. type of commodity, technology, or software) and its respective technical parameters. The CCL categories are in Table 2, and the five (5) CCL product groups (A-E) are in Table 3, on the following page:

Table 2 CCL Categories

0	Nuclear & Miscellaneous
1	Materials, Chemicals, Microorganisms and Toxins
2	Materials Processing
3	Electronics
4	Computers
5 Part 1	Telecommunications
5 Part 2	Information Security
6	Sensors and Lasers
7	Navigation and Avionics
8	Marine
9	Aerospace and Propulsion

Table 3: CCL Product Groups A-E

A	Systems, Equipment and Components
B	Test, Inspection and Production Equipment
C	Material
D	Software
E	Technology

(next page)

a. Identify ECCN. Many products/items purchased, produced, or manufactured already have an applicable ECCN (for the product or the parts making up the product). Ensure you inquire with the manufacturer or through Mines Purchasing/Procurement Services to identify items or parts that already have an ECCN assigned. For example, many computer manufacturers maintain a webpage listing many of the global trade compliance categories for their products. E.g., see Apple Export Control page @ <http://www.apple.com/legal/more-resources/gtc.html>; or see Dell Export Control page @ <https://software.dell.com/legal/export-control.aspx>. (Manufacturers will advise you to verify through your own counsel/export control office and Mines' agrees, though, these lists are a great place to start reviewing.)

b. Classify Commodity using CCL listing. Commodities or products may be identified using the CCL listing (10 CCL categories and the 5 product groups) to narrow down the item, product, or technology and help identify jurisdiction/license requirements. See Tables 2 & 3 above. If you cannot identify the commodity, or if you built the product in-house, please contact ORA for a method to request and/or obtain a classification from the appropriate agency.

c. Catch-all Category: EAR99. The EAR99 designation is a "catch-all" category assigned to items that are subject to the EAR, but that do not have a specific ECCN on the CCL. The majority of U.S. origin goods are classified as EAR99, and under most circumstances, do not require a license for export. EAR99 generally may be shipped under a "NLR" (No License Required) designation, unless the item is going to: 1) an embargoed/sanctioned country, 2) an "end-user" of concern, or 3) a prohibited end-use.

3. Deemed Exports

The Commerce-BIS and other federal agencies have focused more attention on "Deemed Export(s)" in the past few years. Typically, a Deemed Export occurs when there is a Release of technology or source code (subject to EAR) to a Foreign National outside of or within the US, and is "deemed" to be an export to the home country of the foreign national. All U.S. employers hiring foreign nationals (usually on H-1B visas) to work in the United States on export controlled technologies are under the rules. See EAR, 15 CFR §734.2(b)(2).

It is important for Mines/PI to determine if there is an export issue with research proposals/projects in which a foreign national will be assisting, collaborating, observing, or in situations where a software license agreement contains language indicating that the software is controlled in transfer to certain countries. However, as usual in this area of the law, the issue is not always clear. For example, in some cases, the supervised use of a controlled computer by a foreign national may not amount to a deemed export if the foreign national works under supervision of the U.S. faculty/PI, and if the foreign national does not access the operating system. There are nuances within the regulations regarding this area, and generally technology that is Publicly Available is not subject to the deemed export rule. However, that may also depend on whether the employee is a "Bona Fide" employee that is a permanent and regular employee or if the employee's home country is part of the listing of countries authorized to receive the code.

The deemed export rule would not apply to Fundamental Research within an appropriate structure, such as where any export controlled information or technology would not be released to foreign nationals on the project (e.g., where an approved TCP, or Technical Control Plan, is in place to control access).

4. Activities that are Not Exports, Re-exports, or Transfers under the EAR. See 15 CFR §734.18 The following activities are not exports, reexports, or transfers including:

- (1) Launching a spacecraft, launch vehicle, payload, or other item into space;
- (2) Transmitting or otherwise transferring “technology” or “software” to a person in the US who is not a foreign person from another person in the US;
- (3) Transmitting or otherwise making a transfer (in-country) within the same foreign country of “technology” or “software” between or among only persons who are not “foreign persons,” so long as the transmission or transfer does not result in a release to a foreign person or to a person prohibited from receiving the “technology” or “software”;
- (4) Shipping, moving, or transferring items between or among the US, District of Columbia, Commonwealths of Puerto Rico or Northern Mariana Islands, or any territory, dependency, or possession of the US, as issued by the US Bureau of the Census;
- (5) Sending, taking, or storing “technology” or “software” that is:
 - (i) Unclassified;
 - (ii) Secured using `end-to-end encryption;`
 - (iii) Secured using cryptographic modules (hardware or “software”) compliant with Federal Information Processing Standards Publication 140-2 (FIPS 140-2) or its successors, supplemented by “software” implementation, cryptographic key management and other procedures and controls that are in accordance with guidance provided in current U.S. NIST publications, or other equally or more effective cryptographic means; and
 - (iv) Not intentionally stored in a country listed in [Country Group D:5](#) (US Arms Embargoed Countries, *see* 15 CFR part 740, Supp. 1) or in the Russian Federation.

4. Commodity Jurisdiction (CJ) Request procedures

When it is difficult to make a determination regarding whether the particular product or service is civil, military, or [Dual-Use](#), Mines may request an opinion from either the Department of Commerce or the Department of State to help clarify the appropriate agency jurisdiction. This request to an agency is known as a Commodity Jurisdiction (“CJ”) request. The request will be made in conjunction with ORA and/or Office of Compliance.

A Commodity Jurisdiction Request is submitted to the Department of State, Directorate of Defense Trade Controls (DDTC), in the form of a letter with supporting documents. Once received, a CJ request is assigned a case number and copies of the request are staffed to appropriate U.S. Government agencies for review. Mines will identify the letter as a “*Commodity Jurisdiction Request for [specific item or technology]*” e.g., with specific information, including manufacturer, model and/or part numbers, if any, and name of item. A CJ Request case normally takes 40-60 days to complete. *Note:* Mines does not have to be registered with the Department of State in order to make a CJ Request regarding the article or service and whether it is covered by the US Munitions List. See 22 CFR §120.4.

5. “China Rule” or Validating End Use(r)

Prior to an Export, Re-export, or transfer in country, Mines must check for military end-use activities in the People’s Republic of China, or for a 'Military end use' or 'Military end user' in Russia or Venezuela, either in part or in whole, to meet the compliance obligations (including related terms such as *use, development, production, operation, installation, maintenance, and deployment*). See 15 CFR 744.41. [End User](#) screening distinguishes between private company and government owned end-use, through obtaining information on how the end-user will use the item, at what location, and for what specific purpose or contract. This also allows for the differentiation between commercial and military use.

For quick triage, see the Decision Tree for Export Control in the Export Administration regulations regarding the scope, general prohibitions, license exceptions, etc.

C. International Traffic in Arms Regulations (ITAR)

The [International Traffic in Arms Regulations](#) (ITAR) are administered by the U.S. Department of State ([State](#)) and apply to the control(s) of the export of defense articles that are enumerated on the U.S. Munitions List (USML). The legal authority comes from the *Arms Export and Control Act* and *Executive Order 13637* and covers the export and temporary import of “[Defense Articles](#)” and/or “[Defense Services](#).” Designation as a [Defense Article](#) is principally based on whether the article is inherently military in character, and includes the actual item, models and technical information that may reveal technical details about the item. See 22 CFR§ 120.6.

1. Designate the item.

A specific *article* or *service* may be designated a Defense Article or Defense Service, if:

- The article or service meets the criteria on the US Munitions List or provides equivalent performance capabilities of a Defense Article on the USML;
- in the future, the article/service provides a critical military or intelligence advantage and it warrants control under this ITAR; or
- basically under a [Commodity Jurisdiction](#) determination, the article/service is covered under ITAR. See 22 CFR 120.3.

All U.S. Persons (including governmental entities) engaged in the manufacturing or exporting of Defense Articles, technical defense information, or Defense Services are required to register with the Office of Defense Trade Controls (ODTC), and then where necessary apply for and obtain licenses to work in this area. **Note: Mines is not registered** with ODTC, and thus would need to register through ORA prior to obtaining a license under ITAR. For informational purposes, if Mines decides to register in the future, the following steps would be reviewed.

2. Entities that register with ODTC.

In order to apply for licenses the entities register with ODTC through an “Empowered Official” with independent authority to enquire into any aspect of a proposed export or temporary import.” Thus, a PI or faculty member alone is not an Empowered Official for Mines. Should Mines register with ODTC, then the Office of Research Administration will maintain application direction and filing procedures.

3. Information and procedures regarding entities that apply for licenses.

Entities that have an Empowered Official and approve a license application follow the procedures including:

a. [Review countries](#) (including entities) for end-users that are denied licenses for the export of Defense Articles/Services or Technical Data under [Section 126.1 of ITAR](#). These may include statutorily debarred parties listed under DDTC website and DOD excluded parties, BIS denied party lists, and OFAC SDN list.

b. [Review commodity or services](#) on the US Munitions list, [ITAR Part 121](#), for a licensing determination, that includes at least the following:

- Describe item/use? Identify Source/developer?
- Specify item capabilities? Identify end user’s intended purpose?
- Additional applications beyond item intended use?
- Country (entity) of ultimate destination? Foreign availability for like items?
- Specific purpose for export?

c. Exporting entity/university determines the type of license/approval that will be needed for a particular circumstance based on regulations. Documentation, such as request letters, projects, etc. will be requested, including for example, the DSP-83 Form (application for authorization to export significant military equipment and classified equipment or data (22 CFR §§123.10(a), 124.10 and 125.7)) a non-transfer and use certificate for any item classified as Significant Military Equipment (SME), and the end use and foreign end-user; previous licenses to the same entity, etc.

4. **License to export approved.**

The License is valid for four (4) years from the date issued (or as provided on the documentation from the agency), and often has restrictions for the applying entity and faculty to follow (e.g., attaching license copy when shipping items.) There may be additional requirements/agreements when a License is approved by the agency, including, but not limited to, the following:

a. Technical Assistance Agreement (TAA): Required to be submitted and approved by ODTC before defense services or training (including technical data) may be provided to a foreign person either in the U.S. or in a foreign country. A TAA approval may require many months for approval or rejection, and is not official unless ODTC approves it.

b. Manufacturing License Agreement (MLA): Similar to TAAs, MLAs usually involve the export of technical data, the performance of defense services, and the export of defense articles necessary for the manufacturing or production of an ITAR controlled item.

c. Office of Defense Trade Controls (ODTC) Review Process if an entity submits a License Application or TAA, ODTC staffs out the case to various federal governmental agencies for review (such as DOD – DTSA). Factors considered include policies, region, country, technology, level of technology at destination vs. U.S. systems and countermeasures, end-user and end-use history, military operational impact, inter-operability requirements, foreign availability of like systems, and classified data transfers.

5. **ITAR Exemption.**

An exemption may be available if a US Government agency as “Sponsor” requests a Mines Researcher to perform work under an ITAR exemption. Mines **must** be notified at the earliest possible point to determine applicability of the exemption and assessment by the compliance/ORR offices. A license exemption will not be approved if all of the requirements of ITAR are not met. Further, any applicable shipping documentation must reference the exemption.

6. **Foreign National Employee may require license under ITAR.**

ITAR requirements for a foreign-national employee license are on the State Department’s website at www.pmdtc.state.gov. Mines’ compliance offices should be contacted to this review and guidelines for foreign national employment.

D. **Office of Foreign Assets Control (OFAC) [U.S. Dept. of Treasury]**

OFAC administers and enforces economic sanctions/programs primarily against countries and/or groups of individuals, such as terrorists and narcotics traffickers, restricting imports, exports and other transactions (e.g. monetary or financial). See Dept. of the Treasury, OFAC, @ 31 CFR Part 500. This function started during WWII to stop Germany from repatriating funds they commandeered or absorbed after invasions. Today OFAC maintains a “Specially Designated Nationals” and Blocked Persons listing (“SDN list”) that includes over 6,000 names of companies and individuals who are connected with the sanctions targeted, and these are continually updated. Multiple U.S. statutes and U.N. Resolutions also guide the OFAC

sanctions/prohibited transactions. See [OFAC Resource Center](#).

1. **Sanctions/Prohibited Transactions.** The sanctions can be either comprehensive or selective, using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals. **“Prohibited Transactions”** include trade or financial transactions and other dealings in which “U.S. persons” may not engage unless authorized by OFAC or expressly exempted by statute. U.S. persons include all branches, subsidiaries, and controlled affiliates of US organizations, wherever located. See OFAC [Faq's #3](#). Because each program is based on different foreign policy and national security goals, prohibitions may vary between programs. Sanctions may be against areas such as Crimea (Ukraine/Russia areas), Sudan/South Sudan, or sanctions may be topical, such as by Industry (e.g. cyber-related sanctions.)

2. **Travel to embargoed countries** (Cuba¹, Iran, North Korea, Syria and Sudan) related to one’s position or activities at Mines.

a. **Professional Conferences:** special note should be taken regarding speaking, lecturing, or sharing information at professional conferences if the conference occurs in sanctioned or embargoed areas, or if the conference will have attendees from an embargoed country. Generally, speaking at professional conferences in embargoed countries requires the prior approval of Office of Foreign Assets Control (OFAC) in the form of applying for and obtaining a license for sharing of the information.

b. **Advance Application for License.** OFAC licenses must be requested at least three (3) months in advance of travel, due to the time required to process the requests. Travel may not occur without an OFAC license in hand, where required.

c. **Physical items.** Other export licenses (e.g., BIS) may be required in addition to an OFAC license for any physical items (e.g., laptops, cameras, GPS, equipment on CCL, etc.) that will be (hand) carried to an embargoed country. (e.g., [TMP](#) or BAG)

3. **Personal travel** that is not associated with one’s position at Mines (i.e. family vacation) usually will not require a license. However, prior to travel consider anything you are taking or sharing while abroad, that may require a license.

E. Data or Information Policy

The Mines’ Data Classification Policy provides that Export Controlled Data will be treated at least as “Confidential” information under the Mines’ policies and procedures.

F. Potential Penalties and Sanctions

The penalties for unlawful export of items or information can be severe. Table 5 below represents the main penalties or sanctions available from the three main agencies described in this manual in the event of a violation (including, civil penalties, administrative penalties and criminal penalties)²:

¹ Even though Cuba and Iran have amended status, there are still embargoes in place. The requirements are constantly being updated by country or region. Please check with ORA or Office of Compliance regarding travel to any embargoed country or a country that you are unsure of regarding status.

² [81 FR 36791 June 08, 2016, Civil Monetary Penalties will increase with inflation starting august 1, 2016, 81 FR 36791 based on the 2015 passage of the Federal Civil Penalties Inflation Adjustment Act \(updating the 1990 Act of the same name\)](#). Some violations may reach over US\$1M per violation.

Regulations	Possible Penalty (Civil/Administrative)	Possible Penalty (Criminal)
EAR (Dept. of Commerce)	\$10K to Civil penalties may be assessed; administrative monetary penalties can reach \$12,000 per violation, and \$120,000 per violation in cases involving items controlled for national security reasons denial of export privileges and/or exclusion from practice or forfeiture of goods	\$1 million or 5 times value of export, whichever is greater/ violation to university; \$250K or imprisonment up to 10 years, or both for individual; 20 years imprisonment and \$1M/violation
ITAR (Dept. of State)	Up to \$500K/violation to University; up to \$500K/individual; Civil penalty can be in addition to or in lieu of other penalty Denial of privilege or forfeiture of goods possible	Up to \$1M/violation to University; Up to 10 years imprisonment/violation and possibly \$250K/individual
OFAC (Dept. of Treasury)	\$55K for each violation to University and/or to individual; International Emergency Economic Powers Act violation up to \$250,000 or twice the amount of the underlying transaction for each violation; Foreign Narcotics Kingpin Designation Act violations can range up to \$1,075,000/each violation	Up to \$20 million depending on violation to University; Up to \$1M, or 20 years imprisonment, or both to individual

Table 4 Regulations & Possible Penalties

F. Other Agencies

As mentioned in the section above on [Additional Agencies](#), several other agencies may have jurisdiction when nuclear items, equipment, or technology are involved (e.g., [\(NRC, DOE, USPTO\)](#)). Please consult with ORA and/or Office of Compliance to determine appropriate agency jurisdiction. For example, the DOE National Nuclear Security Administration (NNSA) Office of Non-Proliferation and Arms Control issued a [guidance](#) document in 2015 that provides information for anyone interested in transferring peaceful nuclear technology, data, or assistance to a foreign person or entity/destination. But it is complicated, so please contact the ORA or Office of Compliance for more information and determination of whether or not the item, equipment, technology, software requires a License, including general or specific authorization. There are also potential requirements in meeting international requirements or safety conventions.

G. Continuing Projects

For continuing projects involving export controls, Mines will work with the PI/faculty/employee on obtaining any necessary license renewals for the project and employees or personnel working on the project. The PI/faculty/employee will need to contact ORA to inform them of the continuation and tracking of licensing that may be required. This includes changes such as, but not limited to: adding or removing employee or personnel names to projects, adding entities/personnel that require screening, adding new equipment to a project that may have ECCN or other tracking numbers and requirements, etc.

[\[End of Section\]](#)