Complying with the New Deemed Export Certification for I-129 Forms

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What does it mean to EXPORT?

Email

SHIP to

FOREIGN COUNTRIES & NATIONALS

Transfer technology
What Laws Are We Addressing?

At UTMB, the majority of our exports are regulated by these 3 agencies:

**U.S. Department of Commerce (DOC)**
Export Administration Regulations (EAR)

**U.S. Department of State**
International Traffic in Arms Regulations (ITAR)

**U.S. Department of the Treasury**
Office of Foreign Assets Control (OFAC)
What do the Regulations Cover? (EAR and ITAR)

Export controls cover

• Any item in U.S. trade (goods, technology, information)
• U.S. items wherever located, even internationally
• “Deemed exports” (access to controlled technology and source code by a foreign national in the U.S.)
• Providing a defense service or ITAR technical data to a foreign national in the U.S. or abroad

Excludes

• Items in the public domain
• Artistic or non-technical publications (maps, children’s books, sheet music, calendars, film) and more..
Export Administration Regulations (EAR)

— Regulates dual use items or items that are designed for a commercial purpose but which can have military applications (e.g., computers, pathogens, civilian aircraft)

— Covers both the goods and the technology

— Balance foreign availability, commercial and research objectives with national security

— Each item has an export controls classification number (ECCN)
International Traffic in Arms Regulations

— Covers military items ("munitions" or "defense articles")

— Regulates goods and technology designed to kill people or defend against death in a military setting (e.g., tank, fighter aircraft, nerve agent defensive equipment)

— Includes most space-related technology because of application to missile technology

— Includes technical data related to defense articles and defense services (furnishing assistance including design, engineering, and use of defense articles)

— Purpose of regulations is to ensure U.S. security
OFAC

Office of Foreign Assets Control

- Places limitations on trade in certain areas of countries or with certain actors

- Prohibits payments to nationals and of sanctioned countries and to entities designated as terrorist-supporting

- Maintains “Specially Designated Nationals and Blocked Persons List”

- Sanctions focus on the end-user or country rather than the technology
Violations and Penalties

• Civil: Fines and forfeitures
• Criminal: Fines and incarceration
• Loss of export privileges
• Bad press

*Compliance efforts mitigate penalties*
Okay we understand exports

But

Let’s look deeper into

Deemed exports
What are “Deemed Exports?”

Deemed Export

- disclosure
- WITHIN the United States
- to foreign nationals*
- of specific information or specific types of service

This may include:

classes, lectures, conferences, meetings, informal visits, collaboration meetings, technology discussions, tours of laboratories
Foreign Nationals Exempted from this Rule

• Foreign nationals granted U.S. citizenship
• Permanent resident aliens
• Foreign nationals who have been granted asylum status
“Deemed Export” Concerns

The Deemed Export rules try to balance

2 concerns:

1) The vital role of foreign nationals in U.S. universities who contribute to the strength of our industrial base and our high-technology advantage, and ultimately our national security; and

2) Foreign countries seeking to illegally acquire controlled U.S. technology that could be diverted to the development of weapons programs.
If the technology is controlled and no exclusion/exemption applies, then a **license** must be obtained.

**All submissions to EAR and ITAR are made online, and generally 90% of all requests are granted a license.**
Most Commonly Used Exclusions

Publicly Available/Public Domain*

Fundamental Research Exclusion*

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Educational Instruction Exclusion

Exemption for Disclosures to Bona Fide Full-time Employees (ITAR only)
Fundamental Research Exclusion

*National Security Decision Directive 189

Fundamental Research defined:

“Basic and applied research in science and engineering, where the resulting information is ordinarily published and shared within the scientific community.”

Point: Fundamental research & fundamental data are EXCLUDED from export control regulations pertaining to “deemed exports!”

Reflected in the Major Export Control Regulations

ITAR = 22 CFR 120.10(5), 120.11(8)
EAR = 15 CFR 743.3(b), 734.8
The Fundamental Research Exclusion (FRE) can be lost if...

You accept restrictions on the publication of the results of the project:

• Pertains to many industry contracts and testing agreements
• EAR/ITAR have a carve-out for delay of publication for a pending patent application

If the PI has made a “side deal”

• Could take place via a Confidential Disclosure Agreement or acceptance of export-controlled information
Public Domain/Publicly Available Exclusion

Broadest Exclusion!

Includes information that is published and generally available to the public:

- Through sales at bookstands and stores
- Through subscriptions available without restrictions
- At libraries open or available to the public
- Through patents
- Through unlimited distribution at a conference, meeting seminar, trade show, generally accessible to the public in the U.S.
- Includes technology and software that are educational and released by instruction in catalog courses and associated labs and universities
What is Part 6, I-129 Export Control Certification?

- New I-129 Effective February 20, 2011, the addition of Part 6, I-129 Export Control Certification must be completed on the US Customs and Immigration visa application for foreign nationals whom we would like to employ.

- No Change in existing Deemed Export Rules; only makes employers responsible for verifying their compliance to the government when they hire foreign nationals.
SAMPLE: Part 6, I-129 form

Part 6. Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States

(For H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions only. This section of the form is not required for all other classifications. See Page 3 of the Instructions before completing this section.)

Check Box 1 or Box 2 as appropriate:

With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

1. A license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or

2. A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.
UTMB’s Response to the New Rule!

The best measure to ensure compliance and accurate verifications is for employers to implement effective immigration and export control programs and policies for processing the new I-129 Form.

UTMB has implemented the **Deemed Export Questionnaire** that can be used by International Affair’s (IA) managers and In-house counsel to complete Part 6 of the I-129 Forms. The questionnaire will also provide support for UTMB in case of an USCIS audit.
Overview of UTMB’s Process

First step: Department (Supervisor/Chair) completes the questionnaire, signs and sends to International Affairs (IA) office.

Second step: IA sends to In-house counsel for review.

Third step: Based on the information provided in the questionnaire, In-house counsel sends recommendation to IA.


Fifth step: IA sends a copy to the department and if a license is required, the department is responsible for obtaining the license before the beneficiary is exposed to the controlled technology.
Who Should Complete the Questionnaire?

The departmental faculty/supervisor who will be directing the work of our foreign national employee(s) are in the best position to describe the tangible and intangible items/technology with which the foreign national employee(s) will work.
Purpose of the Deemed Export Questionnaire

Several universities send their faculty links to the EAR and ITAR rules and require the faculty to certify whether a deemed export license is necessary.

The rules, though not grossly complicated, are hundreds of pages long, and to ensure compliance, UTMB devised the questionnaire which is based off the actual rules and regulations. UTMB still requires the Supervisor/Chair to review the rules.

Each section corresponds to either a rule or an exclusion to the rule.

It is on this questionnaire that a decision can be based.
NOW, LET’S REVIEW THE QUESTIONNAIRE!!
Section 1 & 2: Beneficiary ID and Nature of Employment

Purpose: We need to know more information about the Beneficiary and who is responsible for his/her employment. Will they work on NASA, DOD, DHS contracts?

Based On the Answers:

We run the names through Visual Compliance.

We also look at the funding source.
Section 3: Scope of Employment Research

Purpose: We need to know what are the job duties of the Beneficiary. Will he/she work with viruses??

Based On the Answers:

We check the items and particular key words involving the technology that the beneficiary will use through Visual Compliance Database.

Remember, an exclusion to a foreign national having technology that could be controlled is if the information is ________?
Section 4. Overview of Specific Technology Necessary for the Position

**Purpose:** We need to know whether the Beneficiary will be dealing with specific technologies that are readily identifiable on the CCL and USML.

Each of these categories correspond to an ECCN.

- Chemical Mixture– ECCN 1C350
- Human or zoonotic pathogens- ECCN 1C351

**Based On the Answers:**

We run the technologies/items through Visual Compliance and check for hits.
Section 5: Scope of Research
Exposure, Access

“Are these redundant questions???”…NO!

HYPOTHETICAL:

Two researchers, A and B, share a lab space. A, U.S. Citizen, is working on an export controlled defense contract that involves finding vaccines to combat Monkey Pox Virus. B, foreign national from Iran, sits directly beside A and can view the work and can obtain A’s lab notebooks which details the research. Even though B is not working on the project, he still has ACCESS to the restricted research. Thus, a deemed export can occur.

The questions in this section are designed to catch these inadvertent exports.
-Look Closely at this Picture-
Can you identify the potential Deemed Export?
Section 6. Contractual Issues

**Purpose:** To ensure that we have not lost our Fundamental Research Exclusion.

*Results must be published or freely publishable.*

We can not have Confidential Disclosure Agreements with Sponsors stating that OUR research is not publishable.

Also, National Security Agreements generally request some sort of preapproval before publishing. We need to review if such approvals exist!
Section 7: Deemed Export Affirmation

Purpose: We need the Supervisor/Chair affirmation that he/she has taken this matter seriously and that he/she has read the questionnaire and attachments.

We are relying on these answers!

“Help Us Help You!”

Take the time to read the information and provide us with the information that we need.
### Questions or Concerns

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<th>Deemed Exports and Export Control Regulations</th>
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Conclusion: Let’s Work Together!

U.S. Export Authorities Expect All Involved (Including University PI’s and Administration) to Understand Export Control Requirements and Take Responsibility for Compliance!
Q & A