# **U.S.Export Controls**



# Bureau of Industry and Security U.S. Department of Commerce

## Office of Export Enforcement

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### The Office of Export Enforcement's Mission

OEE protects U.S. national security, homeland security, foreign policy, and economic interests through a law enforcement program.

### OEE accomplishes its mission through:

- Preventative and investigative enforcement activities
- Pursuing appropriate criminal and administrative sanctions against export violators



# OEE enforces US export laws that regulate dual-use technology.

Dual-use: Items that have both commercial and military or proliferation applications

#### **BIOLOGICAL WEAPONS**

Bacterial Strains
Coated Valves and Pumps
Fermenters
Presses

#### **NUCLEAR WEAPONS**

Centrifuge
High Speed Thermal Cameras
Mass Spectrometer
Vacuum Pumps

#### **CHEMICAL WEAPONS**

Precursor chemicals
Coolers/Heat Exchangers
Mixing Vessels

#### **MISSILES**

Composites
Machine Tools
Filament Winding Equip
Accelerometers
Vibration Test Equipment

# Investigations and Sanctions

#### Criminal & Administrative

#### Sanctions:

- Criminal Fines and Imprisonment "Willful Violations"
  - 20 years imprisonment
  - -\$250,000 fine (\$1,000,000 for corporations)
- Civil Fines and Penalties

\$250,000 or twice the value of the transaction,

Which ever is greater. Applies retroactively.

- Denial of Export Privileges / Revocation of Export Licenses
- Exclusion from practice

# HOW VIOLATIONS HAPPEN IN GOOD COMPANIES

New personnel using outdated go-by documentation

Overwhelmed by end of quarter orders and processing

Export manager on vacation (cross train back up personnel)

Lack of communication with sales staff and foreign distributors

Management commitment for Export Compliance Program needed



# Voluntary Self Disclosure

➤ Permitted under EAR Section 764.5

- ➤ Initiated by a company when a company identifies export violations
- ➤ Violations still investigated by OEE "Great Weight" Mitigating Factor



## Benefits of Submitting a VSD

- ➤ Great Weight Mitigation of 50%
- ➤ On average over 80% of VSD cases resulted in Warning Letter or no action

## Costs of not Disclosing Violations

- ➤ Risk of criminal investigation and associated costs
- Damage to Brand/Corporate Reputation
- Substantial Penalties

# **Technology Controls**

## Technology Definitions Under the EAR

■ **Technology:** Specific information for "development", "production", or "use" of a product. The information takes the form of "technical data" or "technical assistance".

#### ☐ Technical Assistance

May take forms such as instruction, skills training, working knowledge, consulting services.

#### ☐ Technical Data

May take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories.



# "Development"



■ "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"

Means all production stages, such as: product engineering, manufacture, integration, assembly (mounting), inspection, testing, quality assurance.





 Operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing.

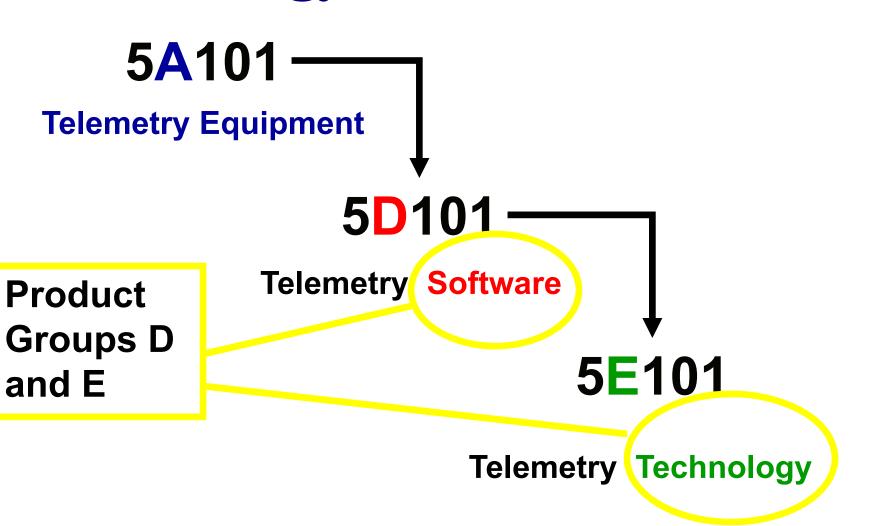
■ The use of export controlled equipment is

not "use" technology.



## b/A

### **Technology and Software ECCNs**



### **Technology and Software ECCNs**

3B001

Semiconductor Manufacturing Equipment (SME)

Designed for epitaxial growth capable of producing a silicon layer, thickness uniform to less than +/- 2.5%, across a distance of 200mm or more

Production or development software is controlled

3D001

SME Software

Product Groups
D and E

3E001

SME Technology

Production or development technology is controlled

## Technology Not Subject to the EAR

**■ Publicly Available** (15 CFR § 734.7)

Generally accessible to the interested public:

- Published
- Libraries (university, public, etc.)
- Open patents available at patent offices
- Open conferences

### **■ Fundamental Research** (15 CFR § 734.8)

Basic and applied research where resulting information is ordinarily published and broadly shared within scientific community



## Technology Not Subject to the EAR

- **Educational Information** (15 CFR § 734.9)
  - Release by instruction in catalog courses
  - Release by teaching laboratories of academic institutions
- Patent Information (15 CFR § 734.10)
  - Public information available on patent application

# Deemed Exports

# **Deemed Exports**

- Release of technology or source code to a foreign national in the U.S.
  - Considered to be an export to that person's home country
  - **□** Does not apply to:
    - U.S. citizens
    - Individuals granted permanent resident status
    - Protected individuals



## **Deemed Export Concerns**

- Deemed export rule was established in 1994 to address national security issues relating to the transfer of sensitive technologies to certain foreign nationals working on controlled technology within the U.S.
- The deemed export program balances two opposing concerns:
  - The vital role of foreign nationals in U.S. industry and academia, contributing to the strength of our industrial base and our hightechnology advantage, and ultimately our national security.
  - Foreign countries seek to illegally acquire controlled U.S. technology that could be diverted to the development of weapons programs.



# Determining Whether Deemed Export License Is Required

- Classification of the technology or source code
- Home country of the foreign national
  - □ Under current deemed export licensing policy, a foreign national's <u>most recently</u> established citizenship or legal permanent residency is used to determine the licensing requirements (see attached slides).

# Distinguishing Between Deemed Export & Technology Export

A deemed export is a release of technology or source code subject to the EAR to a foreign national in the U.S.

 A technology export is the release of technology subject to the EAR in a foreign country

 Deemed export licensing authorization is based on a review of the individual foreign national's background, country of origin and level of technology

# Distinguishing Between Deemed Export & Technology Export

 Technology export licensing authorization is based on the ultimate consignee's country, the level of technology and the bonafides of the consignee

■ BIS does not license individual employees of consignees on a technology export license



# Distinguishing Between Deemed Reexport & Technology Reexport

- A deemed reexport is a release of technology or source code subject to the EAR to a foreign national of another country; this is deemed to be a reexport to the foreign national's home country.
- In many cases technology exported to the country home of that foreign national may be exported NLR or under License Exception (LE) not available for the foreign national's home country e.g., ECCN 5E001 technology may be exported to a company in Ireland under LE TSR.

A Russian foreign national employee of that company in Ireland requires a deemed reexport license to receive this technology

# M

# Distinguishing Between Deemed Reexport & Technology Reexport

 A technology reexport is the actual shipment or transmission of U.S. origin technology subject to the EAR from one foreign country to another foreign country

# Country of Origin (Permanent Residency)

Release of controlled technology to a foreign national of one country, say India, who has obtained permanent residency in another, say the U.K., is treated as if the technology transfer were being made to the U.K. and licensing requirements would be the same as for a British national in the U.K.





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

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# Home Country (Dual Citizenship)

As a general principle, a foreign national's most recently obtained citizenship governs the licensing requirement.





If an Indian foreign national becomes a citizen of the U.K. but retains Indian citizenship, the most recent citizenship is with the U.K. and releases of technology would be viewed as releases to the U.K.



### **Fundamental Research**

■ EAR 734.8- information that arises during or results from fundamental research is exempt from EAR licensing requirements:

"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."

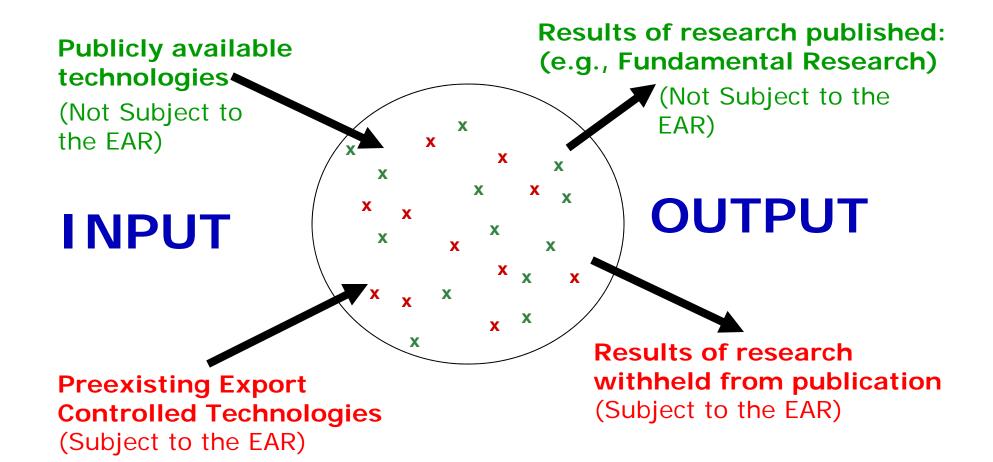


### **Fundamental Research**

- The fundamental research exemption only applies to information that "arises during or results from" the research.
- There is no "blanket exemption" for all information that is transferred in the context of such research.



## The Universe of Research



### Part 6 of Form I-129

- Took effect February 23, 2011
- Must be executed by all petitioners filing for all H, O, and L nonimmigrants.
- Doesn't require petitioner to acquire a license prior to filing, just attestation that deemed export rules will not be violated prior to getting a license if one is needed.
- Answer question as things exist at the time of filing.
  - No need to amend petition if, at a future time, circumstances change and alien's work then requires a license.
  - Remember, while no amendment is necessary, petitioner still must comply with export laws, i.e., get a license!

# Part 6 of Form I-129: Export Certification Requirement

#### 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.)

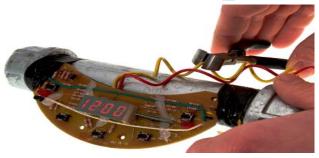
#### Check Box 1 or Box 2 as appropriate:

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:

- 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.

## re.

### Deemed Exports: What is being targeted?



#### **Nationally**

- Biotechnology
- Pharmaceuticals
- Nanotechnology
- Quantum Computing
- Advanced Materials
- Communications & Encryption Technology
- Weapons Systems yet unclassified



# Methods Used to Target Technology

- Unsolicited emails
- Front companies
- Liaisons with universities that have ties to defense contractors
- Recruitment by foreign intelligence services
- National laboratories
- Compromise of laptop while traveling overseas

- Attending/Hosting conferences
- Relocating R&D facilities overseas
- Circumventing export control laws
- Visiting scientific & research delegations
- Hacking
- Downloading information from your network

### **Deemed Export Enforcement Facts**

- Since 2004, Export Enforcement has closed over 120 investigations, involving a deemed export. Many of these investigations resulted in action being taken or the issuance of a warning letter.
- Since 2004, BIS has issued 19 final orders in 17 investigations involving deemed export violations. This has resulted in over \$2 million in fines.
- Approximately one-half of the cases involved Voluntary Self-Disclosures (VSDs) and both commodity and technology exports.
- Eight cases involved deemed export violations alone.
- Most violations involved unauthorized transfers of Category 3 (Electronics) and Category 5 (telecommunications).



## **Key Compliance Issues**

- Since 2004, a central theme in over 120 investigations of deemed exports has been the poor communications or disconnect between the key compliance personnel:
  - 1) Export Compliance Personnel
  - 2) Human Resources
  - 3) Hiring Managers
- There were also issues surrounding foreign visitors and the need for enhanced compliance training.
- This is significant for high technology companies because the investigations identified the fact that many companies maintained effective programs for commodities but that it did not carry over in the area of technology.



## **Technology Control Plan (TCP)**

- The key to technology export compliance is an effective Technology Control Plan.
- A TCP should contain the following essential elements:
  - Management commitment to export compliance
  - Physical security plan
  - Information security plan
  - Personnel screening procedures
  - Training and awareness program
  - Self-evaluation program
- Meaningful compliance is "win-win". It protects national security, allows a company to protect its proprietary technical data essential to R&D and brings new products to market timely.



# Contact BIS WE ARE HERE TO HELP!

- ➤ If you have questions about product classification, call BIS Exporter Services
- ➤ If you have questions about Red Flags or other potential enforcement problems, call BIS Office of Export Enforcement
- ➤ Check the BIS Website for current information about regulations, denied parties and listed entities.

  The website is <a href="www.bis.doc.gov">www.bis.doc.gov</a>
- ➤ Have questions call the Export Counseling Division 202-482-4811 Wash. D.C. / 949-660-0144 California