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In developing this note, the EAR outreach material on the U.S. Department of Commerce Bureau of Industry and Security (BIS) website was reviewed, and BIS was consulted on the EAR provisions referenced in this document. The Note was also reviewed by George Grammas, Partner Squire Patton Boggs. Footnotes are provided to enable readers to consult the legislation and BIS website guidance. If in doubt, consult BIS.

Using US-Derived Research Equipment in the UK

Procurement and Compliance Methodology

1. **Re-export¹ means**
 - a. An **actual shipment or transmission of technology** (or other item) subject to the EAR from one foreign (i.e. importing) country to another foreign country²; or
 - b. **transfers within the importing** country: “In country” which means a change in end use or end user within the same foreign (i.e. importing) country - physical transfer is not needed³.
2. **‘Deemed’ re-export⁴** refers to restrictions in respect of people - non-US nationals –release of technology contrary to restrictions is deemed to be an export to that person’s home country even if it does not go there physically or there is no physical transfer to the person and may require an authorisation under the EAR. Where dual nationality, the most recent citizenship or permanent residence governs for EAR⁵. For ITAR any citizenship permanent residency at any time in their life governs⁶. A transfer within the UK to a British national where the most recent citizenship or permanent residency of that person is the UK would not be a deemed reexport under the EAR. Deemed reexports focuses on the release to third country nationals, such as a “release” to a French national in the UK.
3. **Using equipment for academic research is not normally controlled. A licence will be needed in 3 distinct situations:**

¹ Re-export definition in 15 CFR 734.14; Transfer (in country) definition in 15 CFR 734.16

² Part 734.14 (a)(1)

³If you send a machine physically somewhere but there is no change in end use/user there is no re-export (e.g. sending a machine to another place in the UK of that university for maintenance; by contrast sending to another university or other end user would be a transfer (in-country) and may require an EAR authorisation depending on how the machine was originally received, e.g. as if the machine was received under a BIS license)

⁴ 15 CFR 734.14 (a)(2) and (3)(b)

⁵ 15 CFR 734.14(b)

⁶ This could be addressed through an enhanced security check – see the BIS guidance in 2013 and the US-UK Exchange of Notes. Alternatively, a self-compliance procedure can allow access through the importer monitoring the user’s contacts with the home country – if they go to or are engaged in transactions with the home country.

- a. End use or end user (General Prohibitions⁷) apply
- b. AT (anti-terrorism) controls (only) apply
- c. Other Commerce Control List (“CCL” - specific ECCN controls) apply.

ECCN basics:

- i. Specific controls are set out in Export Control Classification Numbers (ECCNs).⁸
 - ii. An ECCN is a designation that an item is controlled because of its specific performance characteristics, qualities, or designed-end use. The item can be a tangible or intangible (i.e., software or technology).
 - iii. ECCNs are very precisely defined and are focused on commodity, software and technology product groupings.
 - iv. An ECCN is a five-digit alphanumeric designation that categorizes items based on the nature of the product, i.e. type of commodity, software, or technology and its respective technical parameters. An example of an ECCN is 0A979, which corresponds to police helmets and shields.
 - v. Each ECCN lists important information that includes a general description of the controlled item(s), the reason(s) for control, available licence exceptions, and, when necessary, additional details on related controls, and more specific item definitions
4. Where restrictions apply they have to be observed unless BIS grant a licence or another EAR authorisation is available, e.g. an EAR license exception. In some cases (e.g. prohibited end users) there is a presumption of denial, so the licence is very likely to not be approved). For Russia and Belarus sanctions in parts 744 and 746 of the EAR, the license review policy is generally a policy of denial for the sanctions that have been added to the EAR to address Russia’s invasion of Ukraine.
5. The end-use and end user ‘General’ prohibitions **apply whether or not the item is specifically controlled by an ECCN. They apply in most cases even if the item has the designation EAR99** - a broad low-level classification that covers most commercial goods. They affect UK HE where an equipment user (collaborator, researcher or student)
- is from **North Korea, (Crimea region of Ukraine, the Donetsk People’s Republic, or Luhansk People’s Republic, but note that BIS uses the Country of Ukraine for determining the deemed**

⁷ The 10 General Prohibitions are set out in the Export Control Reform Act (ECRA). See also EAR Part 736. General Prohibitions 5 and 6. are implemented by the EAR part 744 and Part 746 respectively. (General Prohibition 7 is a U.S. person activity prohibition, so likely do not apply to the UK, unless there are U.S. persons working at your organization and the U.S. person has “knowledge” the activity they are involved with is prohibited under 15 CFR 744.6.)

⁸ “A key in determining whether a re-export license is needed from the Department of Commerce is knowing whether the item you intend to export has a specific Export Control Classification Number (ECCN). The ECCN is an alpha-numeric code, e.g., 3A001, that describes the item and indicates licensing requirements. All ECCNs are listed in the Commerce Control List (CCL) (Supplement No. 1 to Part 774 of the EAR” - <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl>.

reexport requirements for Ukrainian nationals, so a deemed reexport of EAR99 technology or source code would not require an EAR authorisation for a Ukrainian national, unless a part 744 end use or end user control was applicable)⁹

- is a **prohibited end user** <https://www.trade.gov/data-visualization/csl-search>¹⁰
- will be doing **military intelligence** research¹¹; or
- will be doing **missiles or chemical or bioweapons** research

⁹ Unless they have obtained US ‘protected person’ status e.g. political refugees and political asylum holders. Embargoed countries are often listed on end user declarations as Cuba, Iran, North Korea, and Syria, and the Crimea region of Ukraine. Why then do the deemed re-export restrictions for EAR99 technology only apply to N Korea?

1. the EAR destination-based licence requirements for deemed re-exports of EAR99 equipment subject to the part 744 end use and end-user checks, including the Entity List screening checks, do not extend to releases of technology or source code (see para 15 b above) to Iranian, Cuban, and Syrian nationals. However, if the equipment is not EAR99 and is controlled for Anti-Terrorism (AT) or any other ECCN controls then restrictions do apply to those nationals – see paragraph 6.

2. the embargo controls and so licence requirements remain in place for releases of technology or source code to nationals from North Korea (see § 746.4(a) of the EAR).

3. for the Crimea region of Ukraine, the Donetsk People’s Republic, and Luhansk People’s Republic, as noted above, BIS uses Ukraine as the country for determining these deemed export and reexport requirements. 15 CFR 746.6 of the EAR - Crimea Region of Ukraine and Covered Regions of Ukraine)

4. Russian and Belarus sanctions apply to items classified in any ECCN on the CCL under § 746.8 of the EAR. However whilst such license requirements specified on the Commerce Control List (CCL) in supplement no. 1 to part 774 of the EAR, say that *a license is required* to export, reexport, or transfer (in-country) to or within Russia or Belarus any item subject to the EAR and specified in any Export Control Classification Number (ECCN) on the CCL; this excludes deemed exports and deemed reexports, to export, reexport, or transfer (in-country) to or within Russia or Belarus any item subject to the EAR and specified in any Export Control Classification Number (ECCN) on the CCL. The EAR imposes additional license requirements on Russia and Belarus under §§ 746.5 and 746.10 of the EAR for items that would otherwise be EAR99, but § 746.5 of the EAR also includes an exclusion for deemed reexports and § 746.10 of the EAR does not currently include technology.

Therefore, in practice the deemed re-export controls for EAR99 technology or source code that require a license only apply to North Korea. For technology and source code, which are not EAR99 but are controlled for AT-Reasons (but not other controls) the deemed re-export restrictions also apply to Cuba, Iran, and Syria. An EAR authorisation is required for deemed re-exports in those circumstances – and of course for other countries where there are additional specific ECCN controls, e.g. for Missile Technology controlled technology or source code.

¹⁰ The Entity List includes various entities added because of WMD reasons. But there are even more entities on the list for other reasons that are of concern for other U.S. national security and foreign policy concerns, such as being involved in IED networks that have killed or injured U.S. and allied soldiers or being involved in human rights abuses.

¹¹ Use of a microprocessor for direct military use or by a military end user includes any person or entity whose actions or functions are intended to support ‘military end uses’; the restriction does not apply where use is for or on behalf of the official use by agencies of a cooperating government (i.e. a Wassenaar participating authority such as the UK) authorised by License Exception GOV pursuant to EAR 740.11.

Part 744 does impose licence requirements and other restrictions for certain specified military end uses and/or military end users, **but these do not include EAR99 designated items except for certain military-intelligence end uses or end users and Russian and Belarusian military end uses and end users.**

Allowing a UK defence contractor to use an EAR99 designated piece of equipment would be unlikely to trigger any part 744 end use or end user controls. Due diligence is needed but part 744 of the EAR controls are unlikely to apply. (Military End Use applies to Supp. No. 2 items, which includes many AT items; therefore, this restriction applies to items controlled for AT-reasons that are identified in § 744.21 of the EAR. Note that Russia and Belarus military end use will also apply to EAR99 items. This is reflected in the Standard Prohibited End Uses list. The military end use prohibition that applies to EAR99 is captured in item 5. The military end use prohibition that would additionally apply to certain AT controlled items (or other non-EAR99 items) is described in Item 6.

- any other standard prohibited end use

Research in relation to *nuclear fuel cycle activities* is controlled under the EAR but the controls *do not* apply to activity in the UK - Supplement No. 3 to part 744 provides that this section (§ 744.2(a) of the EAR) does not apply to exports, re-exports, or transfers (in-country) to or within UK.

6. Where the equipment or technology is not EAR99 and is controlled for AT-reasons only, access to the technology may not be given to nationals of Cuba, Iran, or Syria unless authorised under a BIS license or license exception. Where controlled for reasons other than AT, a licence will be required if the restrictions cannot be observed.¹²
7. Do not ship US-derived equipment out of the UK without checking the ECCNs. Do not ship US-derived equipment within the UK without checking if there is to be a change in end use or end user; if so check whether a BIS licence is needed.
8. Do not transmit ('release') technology or source code to non-UK nationals without considering the end use and end user General Prohibitions and any other CCL controls which apply. Release¹³ of EAR-controlled technology or software source code to students, researchers or visitors who are not UK nationals ("deemed re-export") is controlled. So, when is there a 'release of technology or software' for which a licence is needed?
 - a. There are some exceptions - release in the course of academic lab instruction, published proprietary material. These are *not subject to the EAR at all* – they are not deemed reexport exceptions¹⁴.
 - b. The *mere operation* of a piece of equipment does not normally qualify as "release" of "technology" as defined in the EAR. *Technology in this sense does not refer to the physical manifestation which users operate.*
 - c. The definition of technology is: information required for the "development," "production," "use" operation, installation, maintenance, repair, overhaul, or refurbishing - See full definition at <https://www.bis.doc.gov/index.php/documents/regulations-docs/2258-part-772-definitions-of-terms-1>.

¹² EAR §§ 746.7 and 746.2 - Deemed re-exports to Syrian, Cuban foreign nationals involving technology or source code subject CCL do not require a license if EAR99. If not EAR99 but controlled for AT or any other CCL control, e.g. controlled for National Security, then the restrictions apply.

¹³ See above, footnote 5

¹⁴ See EAR § 734.3. Examples of activities that are not deemed re-exports are in § 734.20 of the EAR)

- d. 'Release' is defined in EAR § 734.15 – providing visual or other inspection of items or oral or written exchanges that reveal “technology” or source code, including release of access information (i.e. provision of software keys) ¹⁵.
 - e. Mere operation, including training to use equipment does not amount to “use”.
 - f. Academics rarely ‘use’ equipment in all the 6 aspects. Academics typically operate - and even perhaps also maintain and maybe repair – but those are only 3 of the 6 aspects of use. So that kind of limited use is not controlled, when the ECCN control attaches to ‘use’, that is the ECCN control parameter uses the term “use”.
 - g. Note however that an ECCN may specifically control one of the 6 aspects of use. This is usually in the case of 500- (space), 600- (munitions) series, and 0x5zz (firearms) ECCNs. If the control was on maintenance, being able to maintain would be sufficient to trigger the control.
 - h. ECCNs impose controls by reference to country, and the ECCN control parameters may also reference the use of the item. ECCN restrictions may apply to the equipment *and* to the underlying technology. Therefore, it is important to check the Commerce Control List (CCL) ECCNs separately for the equipment, and also for the technology and software. Many of the equipment ECCNs will include a Related Controls section that will reference where the related technology and software is controlled on the CCL to assist re-exporters.
9. Compliance, both actual and documented, could be achieved when buying equipment, using a set of forms such as the attached *US Export Controls - UK End User Compliance Process (User Instructions & Templates)*.

¹⁵ 'Release' is defined in § 734.15 of the EAR – providing visual or other inspection of items or oral or written exchanges that reveal “technology” or source code, including release of access information (i.e. provision of software keys)