

The Export Administration Regulations (EAR) regulate the export of items that have both commercial and defense applications. The term “export” covers more than an actual shipment of items. In addition, an item is considered exported, for example, through visual inspection by a foreign national of U.S. origin equipment and facilities, oral exchanges of information in the United States or abroad, or transfer or shipment to a foreign entity.

I. Export

As such, a license may be needed to discuss new technology invented in the U.S., which is deemed an export under the EAR, with a foreign national. The export rule does not apply to “protected individuals” as defined by 8 U.S.C. § 1324b(a)(3). Specifically, the export rule does not apply to individuals who are:

- a) U.S. citizens;
- b) Persons lawfully admitted for permanent residence in the US; or
- c) Protected individuals under the Immigration and Naturalization Act.

Protected individuals under the Immigration and Naturalization Act include (i) aliens lawfully admitted for temporary residence as special agricultural workers or entered the US before January 1, 1982, (ii) refugees, or (iii) aliens granted asylum.

Thus, Japanese employees, even if temporarily working and/or living in the U.S., may not discuss new technology invented in the U.S. if a license is required. However, if a license is not required, then such Japanese employees may discuss new technology invented in the U.S.

II. Export License

Restrictions that apply to technology that is exported from the U.S. primarily consider (1) the type of technology being exported and (2) the country to which the technology is being exported. Some technology is not restricted by EAR, and even if subject to EAR, many forms of technology may be exported to countries, such as Japan, without an export license. Otherwise, an export license may be required.

The general process of making a determination as to whether a particular technology to be exported requires an export license is as follows:

A. What is being exported?

The U.S. Bureau of Industry and Security (BIS) maintains what is called a Commerce Control List (CCL) (see EAR, C.F.R. § 774). The CCL is divided into various categories (each of which is further divided in great detail) as follows:

- Category 0 - Nuclear Materials, Facilities & Equipment (and Miscellaneous Items)
- Category 1 - Materials, Chemicals, Microorganisms, and Toxins
- Category 2 - Materials Processing
- Category 3 – Electronics

Category 4 - Computers
Category 5 (Part 1) – Telecommunications
Category 5 (Part 2) - Information Security
Category 6 - Sensors and Lasers
Category 7 - Navigation and Avionics
Category 8 - Marine
Category 9 – Aerospace and Propulsion

The first step in the analysis is to classify the relevant technology in the CCL and determine the appropriate Export Control Classification Number (ECCN). An ECCN is an alphanumeric designation used in the CCL to identify items for export control purposes. An ECCN categorizes items based on the nature of the product, i.e., type of commodity, technology or software and its respective technical parameters. This classification may be performed by the exporter, or a request may be submitted to the BIS to obtain an ECCN. It is important to obtain an accurate ECCN because the specific ECCN indicates the reason the technology is controlled (e.g., national security, missile technology, regional stability, firearms convention, anti-terrorism, etc.).

As a first example, the product is a vaccine. For a vaccine, “Category 1 - Materials, Chemicals, Microorganisms, and Toxins” appears to be the most relevant category. Then, one would review the items under Category 1 to classify the vaccine product. In this regard, Category 1 includes item C directed to “Materials.” This item is then further divided into groups wherein one group is 1C991 directed to vaccines. This section indicates that the reason for controlling items classified as 1C991 is due to “CB3” directed to Chemical and Biological Weapons and “AT1” directed to Anti-Terrorism. These categories are relevant when reviewing the Commerce Country Chart, discussed in more detail below.

As a second example, the product is a part specially designed for the James Webb Space Telescope operated by NASA. This product falls under “Category 9 – Aerospace and Propulsion.” A search of this category would determine that this product is classified under 9A004.v. This section indicates that the reason for controlling items classified as 9A004.v is due to “NS1” directed to National Security and “AT1” directed to Anti-Terrorism. As noted above, these categories are relevant when reviewing the Commerce Country Chart.

As a third example, most medicaments will not have an ECCN. If the information does not have an ECCN, it is designated as EAR99. See EAR, C.F.R. § 732.3(b)(3). EAR99 items typically relate to low-technology consumer goods but may nonetheless require a license if they are exported to a restricted destination, to an end-user that is of concern, or in support of an end-use that is prohibited.

B. Export Restrictions to the Receiving Country?

In addition to the CCL, the BIS maintains a Commerce Country Chart (see EAR, C.F.R. § 738, Supplement No. 1) with columns indicating different categories of export restrictions (e.g., chemical & biological weapons, nuclear nonproliferation, national security, missile technology, regional stability, firearms convention, crime control and anti-terrorism) and rows corresponding to each country. Countries are divided into different "groups," indicating the corresponding level of export control. For example, countries such as Cuba, Iran, North Korea, and Syria are designated

"Group E" countries, indicating a comprehensive embargo. The restrictions for a U.S. ally such as Japan (falling within "Group A") are far less restrictive. The country groupings can be found in EAR, C.F.R. § 740, Supplement No. 1.

Therefore, by comparing information derived from the ECCN to the relevant row/column of the Country Chart, it is possible to determine whether a license may be required to export the technology at issue to the receiving country.

To further illustrate this step, a portion of the Country Chart from the EAR is reproduced below.

Commerce Country Chart

Reason for Control

Countries	Reason for Control															
	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Convention	Crime Control			Anti-Terrorism	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1	AT 2
Iceland ³	X					X		X	X							
India ⁷	X			X		X		X	X							
Indonesia	X	X		X		X	X	X	X	X		X		X		
Iran ¹	See part 746 of the EAR to determine whether a license is required in order to export or reexport to this destination.															
Iraq ¹	X	X	X	X	X	X	X	X	X	X		X	X			
Ireland ^{3,4}	X					X		X	X			X		X		
Israel	X	X	X	X	X	X	X	X	X	X		X		X		
Italy ³	X					X		X	X							
Jamaica	X	X		X		X	X	X	X	X	X	X		X		
Japan ³	X					X		X	X							

In the first example above with respect to a vaccine classified as 1C991, the reason for controlling this item is due to "CB3" directed to Chemical and Biological Weapons and "AT1" directed to Anti-Terrorism. In the chart above, Japan (last row) does not have an "X" in either the CB3 column or the AT1 column. As such, a license is not required to export this item to Japan.

On the other hand, in the second example regarding a part specially designed for the James Webb Space Telescope operated by NASA classified under 9A004.v, the reason for controlling this item is due to "NS1" directed to National Security and "AT1" directed to Anti-Terrorism. In the chart above, Japan does not have an "X" in the AT1 column but does have an "X" in the NS1 column. As such, a license would be required to export this item to Japan.

As stated above, an EAR 99 designation does not strictly restrict exportation unless they are exported to a restricted destination, to an end-user that is of concern, or in support of an end-use that is prohibited.

C. Suggested Course of Action

To ensure that any exportation is done properly, filing an ECCN classification request with the BIS is generally recommended in order to permit the analysis outlined above. To do this, one must first apply for a personal identification number and a company identification number, which takes about 2 weeks, and then, one must submit the classification request. The BIS then takes approximately 4-6 weeks to provide an ECCN in reply to a classification request. One must explain the technology at issue in sufficient detail to allow proper classification. For example, the typical disclosure in a patent application would be an excessive amount of disclosure. A single paragraph that explains the scope of the technology (e.g., similar to an abstract or an independent claim in a patent application) is usually sufficient.

Once the ECCN for the type of technology at issue is obtained, it will be possible to confidently determine whether an export license is required.

An ECCN classification request to the BIS is not a mandatory obligation when an export from the United States is considered or has already proceeded. The BIS allows one to determine the classification without official classification from the BIS.

III. EAR Violations

According to Supplement No. 1 of Section 766 of the EAR, the types of responses to apparent violations include (i) no action when a finding that no violation of the EAR had occurred, (ii) a warning letter when a violation may have occurred but a civil penalty is not warranted, (iii) initiation of an administrative enforcement case to determine a civil monetary penalty or other administrative sanctions, (iv) a civil monetary penalty, (v) referral to the Department of Justice for criminal prosecution, or (vi) denial of export privileges (may extend to all export privileges or for specific items, destinations, and/or customers). As such, if a violation of EAR has possibly occurred, it is unlikely that a patent could be considered invalid or unenforceable due to such a violation. The most common resolutions are a determination that no violation has taken place or the issuance of a warning letter. The warning letter would convey the Office of Export Enforcement's concerns about the underlying conduct and/or the company's compliance policies, practices, and/or procedures. The warning letter will describe the apparent violation and urge compliance.

If a minor violation has occurred, a warning letter appears to be the likely penalty if a Voluntary Self-Disclosure is submitted. The U.S. Bureau of Industry and Security (BIS) website (<https://www.bis.doc.gov/index.php/enforcement/oe/voluntary-self-disclosure>) states:

BIS encourages the submission of Voluntary Self Disclosures (VSDs) by parties who believe they may have violated the Export Administration Regulations (EAR). VSDs are an excellent indicator of a party's intent to comply with U.S. export control requirements and may provide BIS important information on other ongoing violations. BIS carefully reviews VSDs received from disclosing parties to determine if violations of the EAR have occurred and to determine the appropriate corrective action when violations have taken place.

In instances in which BIS determines that the issuance of an administrative penalty is appropriate, the EAR may be enforced both civilly and criminally. For civil penalties, in non-egregious cases resulting from a VSD, the base penalty is one-half of the transaction value, capped at a maximum base penalty amount of \$125,000. In non-egregious cases without a VSD, the base penalty is taken from a schedule, capped at a maximum base penalty amount of \$250,000. In an egregious case resulting from a VSD, the base penalty is up to one-half of the statutory maximum penalty (i.e., \$125,000). In an egregious case without a VSD, the base penalty is up to the statutory maximum (i.e., \$250,000). The base penalty can then be reduced by other circumstances such as exceptional cooperation or a first violation. As shown by the penalty amounts, a VSD greatly reduces the monetary penalty. For criminal penalties, a willful violation may result in a fine of up to the greater of \$1 million or five times the value of the exports for the company and up to ten years in prison for the individual.

A finding of “no action” or a warning letter has traditionally been all or the vast majority of penalties issued for EAR violations. However, at the Society for International Affairs 2022 Spring Virtual Advanced Conference on Export Controls & International Politics on May 16, 2022, Matthew Axelrod, the Assistant Secretary for Export Enforcement at BIS, indicated that BIS is in the midst of a policy review to encourage export compliance over risking a violation. He indicated that BIS will aggressively recommend criminal prosecution when the facts warrant and may increase civil penalty amounts. See <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/2992-2022-05-16-remarks-as-axelrod-to-sia/file>. As such, ensuring export compliance is becoming increasingly important.