§ 734.9 Educational information.

“Educational information” referred to in §734.3(b)(3)(iii) of this part is not subject to the EAR if it is released by instruction in catalog courses and associated teaching laboratories of academic institutions. Dissertation research is discussed in §734.8(b) of this part. (Refer to Supplement No. 1 to this part, Question C(1) through C(6)).

Note that the provisions of this section do not apply to encryption software controlled under ECCN 5D002 for “EI” reasons on the Commerce Control List (refer to §§740.13(e) and 740.17(a)(5)(i) of the EAR for release under license exception).


§ 734.10 Patent applications.

The information referred to in §734.3(b)(3)(iv) of this part is:

(a) Information contained in a patent application prepared wholly from foreign-origin technical data where the application is being sent to the foreign inventor to be executed and returned to the United States for subsequent filing in the U.S. Patent and Trademark Office;

(b) Information contained in a patent application, or an amendment, modification, supplement or division of an application, and authorized for filing in a foreign country in accordance with the regulations of the Patent and Trademark Office, 37 CFR part 5; or

(c) Information contained in a patent application when sent to a foreign country before or within six months after the filing of a United States patent application for the purpose of obtaining the signature of an inventor who was in the United States when the invention was made or who is a co-inventor with a person residing in the United States.

§ 734.11 Government-sponsored research covered by contract controls.

(a) If research is funded by the U.S. Government, and specific national security controls are agreed on to protect information resulting from the research, §734.3(b)(3) of this part will not apply to any export or reexport of such information in violation of such controls. However, any export or reexport of information resulting from the research that is consistent with the specific controls may nonetheless be made under this provision.

(b) Examples of “specific national security controls” include requirements for prepublication review by the Government, with right to withhold permission for publication; restrictions on prepublication dissemination of information to non-U.S. citizens or other categories of persons; or restrictions on participation of non-U.S. citizens or other categories of persons in the research. A general reference to one or more export control laws or regulations or a general reminder that the Government retains the right to classify is not a “specific national security control”. (See Supplement No. 1 to this part, Questions E(1) and E(2).)

§ 734.12 Effect on foreign laws and regulations.

Any person who complies with any of the license or other requirements of the EAR is not relieved of the responsibility of complying with applicable foreign laws and regulations. Conversely, any person who complies with the license or other requirements of a foreign law or regulation is not relieved of the responsibility of complying with U.S. laws and regulations, including the EAR.

SUPPLEMENT NO. 1 TO PART 734—QUESTIONS AND ANSWERS—TECHNOLOGY AND SOFTWARE SUBJECT TO THE EAR

This Supplement No. 1 contains explanatory questions and answers relating to technology and software that is subject to the EAR. It is intended to give the public guidance in understanding how BXA interprets this part, but is only illustrative, not comprehensive. In addition, facts or circumstances that differ in any material way
from those set forth in the questions or answers will be considered under the applicable provisions of the EAR. Exporters should note that the provisions of this supplement do not apply to encryption software (including source code) transferred from the U. S. Munitions List to the Commerce Control List consistent with E. O. 13026 of November 15, 1996 (61 FR 58767) and pursuant to the Presidential Memorandum of that date. See § 742.15 of the EAR. This supplement is divided into nine sections according to topic as follows:

Section A: Publication of technology and exports and reexports of technology that has been or will be published.

Section B: Release of technology at conferences.

Section C: Educational instruction.

Section D: Research, correspondence, and informal scientific exchanges.

Section E: Federal contract controls.

Section F: Commercial consulting.

Section G: Software.

Section H: Availability in a public library.

Section I: Miscellaneous.

Section A: Publication

Question A(1): I plan to publish in a foreign journal a scientific paper describing the results of my research, which is in an area listed in the EAR as requiring a license to all countries except Canada. Do I need a license to send a copy to my publisher abroad?

Answer: No. This export transaction is not subject to the EAR. The EAR do not cover technology that is already publicly available, as well as technology that is made public by the transaction in question (§§ 734.3 and 734.7 of this part). Your research results would be made public by the planned publication. You would not need a license.

Question A(2): Would the answer differ depending on where I work or where I performed the research?

Answer: No. Of course, the result would be different if your employer or another sponsor of your research imposed restrictions on its publication (§ 734.8 of this part).

Question A(3): Would I need a license to send the paper to the editors of a foreign journal for review to determine whether it will be accepted for publication?

Answer: No. This export transaction is not subject to the EAR because you are submitting the paper to the editors with the intention that the paper will be published if favorably received (§ 734.7(a)(1) of this part).

Question A(4): The research on which I will be reporting in my paper is supported by a grant from the Department of Energy (DOE). The grant requires prepublication clearance by DOE. Does that make any difference under the Export Administration Regulations?

Answer: No, the transaction is not subject to the EAR. But if you published in violation of any Department of Energy controls you have accepted in the grant, you may be subject to appropriate administrative, civil, or criminal sanctions under other laws.

Question A(5): We provide consulting services on the design, layout, and construction of integrated circuit plants and production lines. A major part of our business is the publication for sale to clients of detailed handbooks and reference manuals on key aspects of the design and manufacturing processes. A typical cost of publishing such a handbook and manual might be $500; the typical sales price is about $15,000. Is the publication and sale of such handbooks or manuals subject to the EAR?

Answer: Yes. The price is above the cost of reproduction and distribution (§ 734.7(a)(1) of this part). Thus, you would need to obtain a license or qualify for a License Exception before you could export or reexport any of these handbooks or manuals.

Question A(6): My Ph.D. thesis is on technology, listed in the EAR as requiring a license to all destinations except Canada, which has never been published for general distribution. However, the thesis is available at the institution from which I took the degree. Do I need a license to send another copy to a colleague overseas?

Answer: That may depend on where in the institution it is available. If it is not readily available in the university library (e.g., by filing in open stacks with a reference in the catalog), it is not “publicly available” and the export or reexport would be subject to the EAR on that ground. The export or reexport would not be subject to the EAR if your Ph.D. research qualified as “fundamental research” under § 734.8 of this part. If not, however, you will need to obtain a license or qualify for a License Exception before you can send a copy out of the country.

Question A(7): We sell electronically recorded information, including software and databases, at wholesale and retail. Our products are available by mail order to any member of the public, though intended for specialists in various fields. They are priced to maximize sales to persons in those fields. Do we need a license to sell our products to foreign customers?

Answer: You would not need a license for otherwise controlled technology or software if the technology and software are made publicly available at a price that does not exceed the cost of production and distribution to the technical community. Even if priced at a higher level, the export or reexport of the technology or software source code in a library accessible to the public is not subject to the EAR (§ 734.7(a) of this part).
Section B: Conferences

Question B(1): I have been invited to give a paper at a prestigious international scientific conference on a subject listed as requiring a license under the EAR to all countries, except Canada. Scientists in the field are given an opportunity to submit applications to attend. Invitations are given to those judged to be the leading researchers in the field, and attendance is by invitation only. Attendees will be free to take notes, but not make electronic or verbatim recordings of the presentations or discussions. Some of the attendees will be foreigners. Do I need a license to give my paper?
Answer: No. Release of information at an open conference and information that has been released at an open conference is not subject to the EAR. The conference you describe fits the definition of an open conference (§734.7(a) of this part).

Question B(2): Would it make any difference if there were a prohibition on making any notes or other personal record of what transpires at the conference?
Answer: Yes. To qualify as an “open” conference, attendees must be permitted to take notes or otherwise make a personal record (although not necessarily a recording). If note taking or the making of personal records is altogether prohibited, the conference would not be considered “open”.

Question B(3): Would it make any difference if there were also a registration fee?
Answer: That would depend on whether the fee is reasonably related to costs and reflects an intention that all interested and technically qualified persons should be able to attend (§734.7(a)(4)(ii) of this part).

Question B(4): Would it make any difference if the conference were to take place in another country?
Answer: No.

Question B(5): Must I have a license to send the paper I propose to present at such a foreign conference to the conference organizer for review?
Answer: No. A license is not required under the EAR to submit papers to foreign organizers of open conferences or other open gatherings with the intention that the papers will be delivered at the conference, and so made publicly available, if favorably received. The submission of the papers is not subject to the EAR (§734.7(a)(4)(iii) of this part).

Question B(6): Would the answers to any of the foregoing questions be different if my work were supported by the Federal Government?
Answer: No. You may export and reexport the papers, even if the release of the paper violates any agreements you have made with your government sponsor. However, nothing in the EAR relieves you of responsibility for conforming to any controls you have agreed to in your Federal grant or contract.

Section C: Educational Instruction

Question C(1): I teach a university graduate course on design and manufacture of very high-speed integrated circuitry. Many of the students are foreigners. Do I need a license to teach this course?
Answer: No. Release of information by instruction in catalog courses and associated teaching laboratories of academic institutions is not subject to the EAR (§734.9 of this part).

Question C(2): Would it make any difference if some of the students were from countries to which export licenses are required?
Answer: No.

Question C(3): Would it make any difference if I talk about recent and as yet unpublished results from my laboratory research?
Answer: No.

Question C(4): Even if that research is funded by the Government?
Answer: Even then, but you would not be released from any separate obligations you have accepted in your grant or contract.

Question C(5): Would it make any difference if I were teaching at a foreign university?
Answer: No.

Question C(6): We teach proprietary courses on design and manufacture of high-performance machine tools. In the instruction in our classes subject to the EAR?
Answer: Yes. That instruction would not qualify as “release of educational information” under §734.9 of this part because your proprietary business does not qualify as “an academic institution” within the meaning of §734.9 of this part. Conceivably, however, the instruction might qualify as “release at an open * * * seminar, * * * or other open gathering” under §734.7(a) of this part. The conditions for qualification of such a seminar or gathering as “open”, including a fee “reasonably related to costs (of the conference, not of producing the data) and reflecting an intention that all interested and technically qualified persons be able to attend” would have to be satisfied.

Section D: Research, Correspondence, and Informal Scientific Exchanges

Question D(1): Do I need a license in order for a foreign graduate student to work in my laboratory?
Answer: Not if the research on which the foreign student is working qualifies as “fundamental research” under §734.8 of this part. In that case, the research is not subject to the EAR.

Question D(2): Our company has entered into a cooperative research arrangement
with a research group at a university. One of
the researchers in that group is a PRC na-
tional. We would like to share some of our
proprietary information with the university
research group. We have no way of guaran-
teeing that this information will not get into
the hands of the PRC scientist. Do we need
to obtain a license to protect against that
possibility?

Answer: No. The EAR do not cover the
disclosure of information to any scientists, en-
gineers, or students at a U.S. university in
the course of industry-university research
Collaboration under specific arrangements
between the firm and the university, pro-
vided these arrangements do not permit the
sponsor to withhold from publication any of
the information that he provides to the re-
searchers. However, if your company and the
researchers have agreed to a prohibition on
publication, then you must obtain a license
or qualify for a License Exception before
transferring the information to the univer-
sity. It is important that you as the cor-
porate sponsor and the university get to-
gether to discuss whether foreign nationals
will have access to the information, so that
you may obtain any necessary authorization
prior to transferring the information to the
research team.

Question D(3): My university will host a
prominent scientist from the PRC who is an
expert on research in engineered ceramics
and composite materials. Do I require a li-
cense before telling our visitor about my lat-
est, as yet unpublished, research results in
these fields?

Answer: Probably not. If you performed
your research at the university, and you
were subject to no contract controls on re-
lease of the research, your research would
qualify as “fundamental research” (§734.8(a)
of this part). Information arising during or
resulting from such research is not subject
to the EAR (§734.3(b)(3) of this part).

You should probably assume, however,
that your visitor will be debriefed later
about anything of potential military value
he learns from you. If you are concerned that
giving such information to him, even though
permitted, could jeopardize U.S. security in-
terests, the Commerce Department can put
you in touch with appropriate Government
scientists who can advise you. Write to De-
partment of Commerce, Bureau of Export
Administration, P.O. Box 273, Washington,
DC 20044.

Question D(4): Would it make any dif-
fERENCE if I were proposing to talk with a
PRC expert in China?

Answer: No. If the information in question
began during or resulted from the same “fun-
damental research.”

Question D(5): Could I properly do some
work with him in his research laboratory in-
side China?

Answer: Application abroad of personal
knowledge or technical experience acquired
in the United States constitutes an export of
that knowledge and experience, and such an
export may be subject to the EAR. If any of
the knowledge or experience you export in
this way requires a license under the EAR,
you must obtain such a license or qualify for
a License Exception.

Question D(6): I would like to corres-
dend and share research results with an Iranian
expert in my field, which deals with tech-
nology that requires a license to all destina-
tions except Canada. Do I need a license to
do so?

Answer: Not as long as we are still talking
about information that arose during or re-
sulted from research that qualifies as “fund-
damental” under the rules spelled out in
§734.8(a) of this part.

Question D(7): Suppose the research in
question were funded by a corporate sponsor
and I had agreed to prepublication review of
any paper arising from the research?

Answer: Whether your research would still
qualify as “fundamental” would depend on
the nature and purpose of the prepublication
review. If the review is intended solely to en-
sure that your publications will neither com-
promise patent rights nor inadvertently di-

vulse proprietary information that the spon-
sor has furnished to you, the research could
still qualify as “fundamental.” But if the
sponsor will consider as part of its pre-
publication review whether it wants to hold
your new research results as trade secrets or
otherwise proprietary information (even if
your voluntary cooperation would be needed
for it to do so), your research would no
longer qualify as “fundamental.” As used in
these regulations it is the actual and in-
tended openness of research results that pri-
marily determines whether the research
counts as “fundamental” and so is not sub-
ject to the EAR.

Question D(8): In determining whether re-
search is thus open and therefore counts as
“fundamental,” does it matter where or in
what sort of institution the research is per-
formed?

Answer: In principle, no. “Fundamental re-
search” is performed in industry, Federal
laboratories, or other types of institutions,
as well as in universities. The regulations in-
troduce some operational presumptions and
procedures that can be used both by those
subject to the regulations and by those who
administer them to determine with some
precision whether a particular research ac-
tivity is covered. Recognizing that common
and predictable norms operate in different
types of institutions, the regulations use the
institutional locus of the research as a start-
ing point for these presumptions and proce-
dures. Nonetheless, it remains the type of re-
search, and particularly the intent and free-
dom to publish, that identifies “fundamental
research,” not the institutional locus (§734.8(a) of this part).

**Question D(9):** I am doing research on high-powered lasers in the central basic-research laboratory of an industrial corporation. I am required to submit the results of my research for prepublication review before I can publish them or otherwise make them public. I would like to compare research results with a scientific colleague from Vietnam and discuss the results of the research with her when she visits the United States. Do I need a license to do so?

**Answer:** You probably do need a license (§734.8(d) of this part). However, if the only restriction on your publishing any of that information is a prepublication review solely to ensure that publication would compromise no patent rights or proprietary information provided by the company to the researcher your research may be considered “fundamental research,” in which case you may be able to share information because it is not subject to the EAR. Note that the information will be subject to the EAR if the prepublication review is intended to withhold the results of the research from publication.

**Question D(10):** Suppose I have already cleared my company’s review process and am free to publish all the information I intend to share with my colleague, though I have not yet published.

**Answer:** If the clearance from your company means that you are free to make all the information publicly available without restriction or delay, the information is not subject to the EAR. (§734.8(d) of this part)

**Question D(11):** I work as a researcher at a Government-owned, contractor-operated research center. May I share the results of my unpublished research with foreign nationals without concern for export controls under the EAR?

**Answer:** That is up to the sponsoring agency and the center’s management. If your research is designated “fundamental research” within any appropriate system devised by them to control release of information by scientists and engineers at the center, it will be treated as such by the Commerce Department, and the research will not be subject to the EAR. Otherwise, you would need to obtain a license or qualify for a License Exception, except to publish or otherwise make the information public (§734.8(c) of this part).

**Section E: Federal Contract Controls**

**Question E(1):** In a contract for performance of research entered into with the Department of Defense (DOD), we have agreed to certain national security controls. DOD is to have ninety days to review any papers we propose before they are published and must approve assignment of any foreign nationals to the project. The work in question would otherwise qualify as “fundamental research” section under §734.8 of this part. Is the information arising during or resulting from this sponsored research subject to the EAR?

**Answer:** Under §734.11 of this part, any export or reexport of information resulting from government-sponsored research that is inconsistent with contract controls you have agreed to will not qualify as “fundamental research” and any such export or reexport would be subject to the EAR. Any such export or reexport that is consistent with the controls will continue to be eligible for export and reexport under the “fundamental research” rule set forth in §734.8(a) of this part. Thus, if you abide by the specific controls you have agreed to, you need not be concerned about violating the EAR. If you violate those controls and export or reexport information as “fundamental research” under §734.8(a) of this part, you may subject yourself to the sanctions provided for under the EAR, including criminal sanctions, in addition to administrative and civil penalties for breach of contract under other law.

**Question E(2):** Do the Export Administration Regulations restrict my ability to publish the results of my research?

**Answer:** The Export Administration Regulations are not the means for enforcing the national security controls you have agreed to. If such a publication violates the contract, you would be subject to administrative, civil, and possible criminal penalties under other law.

**Section F: Commercial Consulting**

**Question F(1):** I am a professor at a U.S. university, with expertise in design and creation of submicron devices. I have been asked to be a consultant for a “third-world” company that wishes to manufacture such devices. Do I need a license to do so?

**Answer:** Quite possibly you do. Application abroad of personal knowledge or technical experience acquired in the United States constitutes an export of that knowledge and experience that is subject to the Export Administration Regulations. If any part of the knowledge or experience your export or reexport deals with technology that requires a license under the EAR, you will need to obtain a license or qualify for a License Exception.

**Section G: Software**

**Question G(1):** Is the export or reexport of software in machine readable code subject to the EAR when the source code for such software is publicly available?

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2 Exporters should note that these provisions do not apply to software controlled under the International Traffic in Arms Regulations (e.g., certain encryption software).
Section H: Available in a Public Library

**Question H(1):** Is the export or reexport of information subject to the EAR if it is available in a library and sold through an electronic or print service?  
**Answer:** Electronic and print services for the distribution of information may be relatively expensive in the marketplace because of the value vendors add in retrieving and organizing information in a useful way. If such information is also available in a library—accessible to the public—or has been published in any way, that information is “publicly available” for those reasons, and the information itself continues to be subject to the EAR even though you access the information through an electronic or print service for which you or your employer pay a substantial fee.

**Question H(2):** Is the export or reexport of electronic or print services for information subject to the EAR if the information is publicly available in an electronic form in a library at no charge to the library patron?  
**Answer:** Information available in an electronic form in a library accessible to the public is information publicly available even though the library pays a substantial subscription fee for the electronic retrieval service.

**Question H(3):** Is the export or reexport of information subject to the EAR if the information is available in a library and sold for more than the cost of reproduction and distribution?  
**Answer:** Information from books, magazines, dissertations, papers, electronic databases, and other information available in a library that is accessible to the public is not subject to the EAR. This is true even if you purchase such a book at more than the cost of reproduction and distribution. In other words, such information is “publicly available” even though the author makes a profit on your particular purchase for the inherent value of the information.

Section I: Miscellaneous

**Question I(1):** The manufacturing plant that I work at is planning to begin admitting groups of the general public to tour the plant facilities. We are concerned that a license might be required if the tour groups include foreign nationals. Would such a tour constitute an export? If so, is the export subject to the EAR?  
**Answer:** The EAR define exports and reexports of technology to include release through visual inspection by foreign nationals of U.S.-origin equipment and facilities. Such an export or reexport qualifies under the “publicly available” provision and would not be subject to the EAR so long as the tour is truly open to all members of the public, including your competitors, and you do not charge a fee that is not reasonably related to the cost of conducting the tours. Otherwise, you will have to obtain a license, or qualify for a License Exception, prior to permitting foreign nationals to tour your facilities (§734.7 of this part).

**Question I(2):** Is the export or reexport of information subject to the EAR if the information is not in a library or published, but sold at a price that does not exceed the cost of reproduction and distribution?  
**Answer:** Information that is not in a library accessible to the public and that has not been published in any way, may nonetheless become “publicly available” if you make it both available to a community of persons and if you sell it at no more than the cost of reproduction and distribution. Such reproduction and distribution costs may include variable and fixed cost allocations of overhead and normal profit for the reproduction and distribution functions either in your company or in a third party distribution system. In your company, such costs may not include recovery for development, design, or acquisition costs of the technology or software. The reason for this conclusion is that the provider of the information receives nothing for the inherent value of the information.
Question (3): Is the export or reexport of information contributed to an electronic bulletin board subject to the EAR?  
Answer: Assume each of the following:  
1. Information is uploaded to an electronic bulletin board by a person that is the owner or originator of the information;  
2. That person does not charge a fee to the bulletin board administrator or the subscribers of the bulletin board; and  
3. The bulletin board is available for subscription to any subscriber in a given community regardless of the cost of subscription.  

Such information is “publicly available” and therefore not subject to the EAR even if it is not elsewhere published and is not in a library. The reason for this conclusion is that the bulletin board subscription charges or line charges are for distribution exclusively on a wholesale basis.  

Question (4): Is the export or reexport of patented information fully disclosed on the public record subject to the EAR?  
Answer: Information to the extent it is disclosed on the patent record open to the public is not subject to the EAR even though you may use such information only after paying a fee in excess of the costs of reproduction and distribution. In this case the seller does receive a fee for the inherent value of the technical data; however, the export or reexport of the information is nonetheless not subject to the EAR because any person can obtain the technology from the public record and further disclose or publish the information. For that reason, it is impossible to impose export controls that deny access to the information.  

§732.2(f) of the EAR regarding the de minimis exclusion.

Answer: Assume each of the following:  
1. Information is uploaded to an electronic bulletin board by a person that is the owner or originator of the information;  
2. That person does not charge a fee to the bulletin board administrator or the subscribers of the bulletin board; and  
3. The bulletin board is available for subscription to any subscriber in a given community regardless of the cost of subscription.  

Such information is “publicly available” and therefore not subject to the EAR even if it is not elsewhere published and is not in a library. The reason for this conclusion is that the bulletin board subscription charges or line charges are for distribution exclusively on a wholesale basis.  

Question (4): Is the export or reexport of patented information fully disclosed on the public record subject to the EAR?  
Answer: Information to the extent it is disclosed on the patent record open to the public is not subject to the EAR even though you may use such information only after paying a fee in excess of the costs of reproduction and distribution. In this case the seller does receive a fee for the inherent value of the technical data; however, the export or reexport of the information is nonetheless not subject to the EAR because any person can obtain the technology from the public record and further disclose or publish the information. For that reason, it is impossible to impose export controls that deny access to the information.  

§732.2(f) of the EAR regarding the de minimis exclusion.

Answer: Assume each of the following:  
1. Information is uploaded to an electronic bulletin board by a person that is the owner or originator of the information;  
2. That person does not charge a fee to the bulletin board administrator or the subscribers of the bulletin board; and  
3. The bulletin board is available for subscription to any subscriber in a given community regardless of the cost of subscription.  

Such information is “publicly available” and therefore not subject to the EAR even if it is not elsewhere published and is not in a library. The reason for this conclusion is that the bulletin board subscription charges or line charges are for distribution exclusively on a wholesale basis.  

Question (4): Is the export or reexport of patented information fully disclosed on the public record subject to the EAR?  
Answer: Information to the extent it is disclosed on the patent record open to the public is not subject to the EAR even though you may use such information only after paying a fee in excess of the costs of reproduction and distribution. In this case the seller does receive a fee for the inherent value of the technical data; however, the export or reexport of the information is nonetheless not subject to the EAR because any person can obtain the technology from the public record and further disclose or publish the information. For that reason, it is impossible to impose export controls that deny access to the information.  

§732.2(f) of the EAR regarding the de minimis exclusion.

Note to paragraph (a)—U.S. origin peripheral or accessory devices that are merely rack mounted with or cable connected into foreign equipment are not deemed to be incorporated components even though intended for use with products made abroad. Rather, such items are treated as foreign items that retain their identity and remain subject to the EAR.  

(b) One-time report prior to reliance upon the de minimis exclusion. Report requirement.  
Before you may rely upon the de minimis exclusion for foreign software and technology commingled with U.S. software or technology, you must file a one-time report for the foreign software and technology. The report must include the percentage of U.S.-content by value and a description of your calculations including relevant values, assumptions, and the basis or methodologies for making the percentage calculation. The three criteria important to BXA in its review of your report will be the export price of the U.S.-content, the assumption regarding future sales of software, and the choice of the scope of foreign technology. Your methodologies must be based upon the accounting standards used in the operation of your business, and you must specify that standard in your report. Regardless of the accounting systems, standard, or conventions you use in the operation of your business, you may not depreciate the fair market values reported or otherwise reduce the fair market values by other accounting conventions such as depreciation. You may rely