

Bona fide, Full-time Employees (BFE)

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ASSOCIATION OF UNIVERSITY EXPORT CONTROL OFFICERS

Under the EAR and ITAR, release of controlled technical data to a bona fide, full time university employee in the U.S. may not require a license in some circumstances. The ITAR provides relief from licensing requirements in 125.4(b)10 and the EAR provides authorization for these exports in 740.13(f). While these two provisions are similar, each contains distinct requirements and nuances. This document will explain the similarities, the differences, and recommend steps for documenting utilization of these provisions.

ITAR 125.4(b)10

Disclosures of unclassified technical data in the U.S. by U.S. institutions of higher learning to foreign persons who are their bona fide and full time regular employees are exempt from licensing requirements provided that:

- The employee's permanent abode throughout the period of employment is in the United States;
- The employee is not a national of a country to which exports are prohibited pursuant to §126.1; and
- The institution informs the individual in writing that the technical data may not be transferred to other foreign persons without the prior written approval of the Office of Defense Trade Controls.

Additional considerations:

The term "bona fide and full time regular employee" does not apply to student employees (like graduate students) regardless of the number of hours they may work. Many universities find that only H-1B visa holders appear to meet the criteria above.

The requirement that the employee's "permanent abode throughout the period of employment" is understood to mean "residence throughout the period of employment". Employees who return home for short periods of time (for example, over winter break) are not disqualified from qualifying as an "employee" for 125.4(b)(10) purposes. Employees using this provision should be advised in writing that they should not take controlled technical data abroad or remotely access it from another country. They should also be informed that restrictions on further dissemination of controlled technical data survive termination of the employment relationship.

The exemption permits disclosure by the university employer through any means, provided all of the criteria listed above are met. However, the potential for provision of additional defense services should be carefully evaluated and a license obtained if necessary. This exemption **does not** cover discussions involving the controlled technical data that might occur between the bona fide, full time regular employee and a third party, such as a research sponsor. In these instances, the non-university party is responsible for obtaining a license to transfer or export controlled technical data to the foreign national.

Documentation

Note that both ITAR and EAR provisions require that the university inform the employee in writing that no further transfers or exports can occur without proper authorization. Universities may opt to develop a form that logs each time 125.4(b)10 or 740.13(f) are utilized. Universities should also document that proper steps were taken to ensure all criteria were met prior to use of these exemptions. Examples are attached.

The Association of University Export Control Officers is a forum for members to share best practices related to university compliance with U.S. Export Control regulations. To find out more, please email your inquiry to auecogroup@gmail.com.



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BFE (continued)

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EAR 740.13(f) (Technology and Software Unrestricted)

Release of “technology” and source code in the U.S. by U.S. universities to their bona fide and full time regular employees is authorized provided that:

- The employee’s permanent residence throughout the period of employment is in the U.S.;
- The employee is not a national of a destination listed in Country Group D:5 (see Supplement No. 1 to Part 740 of the EAR);
- The university informs the individual in writing that the “technology” or source code may not be transferred to other foreign nationals without prior U.S. Government authorization. The obligation not to transfer technology extends past beyond the tenure of employment at the University.

For purposes of this provision, the term “regular employee” means an individual permanently and directly employed by the university. Individuals under a long-term contractual relationship with the university and working at the university’s facilities may qualify as well, provided that additional requirements are met (see 740.13(f)(3)(ii)).

Additional considerations:

This provision in the EAR was intended to mirror the ITAR’s 125.4(b)(10) and was created prior to export control reforms transferred USML items to the CCL. By creating 740.13(f), BIS was hoping to avoid situations where transfers exempt from licensing under the ITAR suddenly became subject to licensing requirements under the EAR. However, the EAR version contains notable distinctions and in some aspects has significantly diminished utility.

Similar to 125.4(b)10, most universities find that only H-1B visa holders appear to meet the criteria above. Employees using this provision should be advised in writing that they should not take controlled technical data abroad or remotely access it from another country. They should also be informed that restrictions on further dissemination of controlled technical data survive termination of the employment relationship.

Part 744 of the EAR contains prohibitions on certain end uses and end users. No “technology” or source code may be released to a foreign national if the release would be inconsistent with these prohibitions. Thus, even in situations where 740.13(f) can be utilized, the exporter must also verify and document that **noting** in Part 744 prohibits the transfer. Similarly, no “technology” controlled for “EI” (encryption) reasons or “technology” or source code controlled for “MT” (Missile Technology) reasons may be released under this provision. Since a significant number of ECCNs are subject to EI and/or MT controls, this may disqualify a significant number of university releases of controlled technology. An individual validated license is typically required for exports subject to EI or MT controls.

Documentation

Note that both ITAR and EAR provisions require that the university inform the employee in writing that no further transfers or exports can occur without proper authorization. The EAR also requires that the employee be informed in writing that this provision survives termination of employment. Universities may opt to develop a form that logs each time 125.4(b)10 or 740.13(f) are utilized. Universities should also document that proper steps were taken to ensure all criteria were met prior to use of these exemptions. Examples are attached.

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