**US Export Controls FAQ**

**Background**

The Open Research Institute (“ORI”) is committed to compliance with U.S. export control laws, regulations and requirements. From time to time, ORI receives questions regarding whether information published on our web site and related repositories is subject to either the International Traffic in Arms Regulations (“ITAR”), or the Export Administration Regulations (“EAR”). The purpose of this FAQ is to communicate ORI’s understanding that its Data for Digital microwave broadband communications systems for space and terrestrial amateur radio use (“Data”), is not subject to U.S. export control laws.

In order to confirm its understanding, ORI submitted a series of requests to the U.S. Government, including a Commodity Jurisdiction (“CJ”) request to the State Department, a Commodity Classification Request (“CCR”) to the Commerce Department, and an Advisory Opinion to the Commerce Department. We also reviewed the Information or Informational Materials Exception codified in the so-called Berman Amendment to the International Emergency Economic Powers Act (“IEEPA”) and the Trading with the Enemy Act (“TWEA”) by Congress, and accompanying regulations from the Treasury Department were also reviewed to confirm ORI’s position. The key points are summarized below.

ORI submitted a CJ request to the State Department’s Directorate for Defense Trade Controls (“DDTC”) in order to determine whether the Data could be controlled on the United States Munitions List of the ITAR. The State Department confirmed that the Data is not subject to the ITAR, and recommended that ORI consider whether the Data was controlled by the Commerce Department.

Therefore, ORI submitted a CCR seeking confirmation of the Data’s classification on the Commerce Control List (“CCL”) of the EAR. The Commerce Department’s Bureau of Industry and Security (“BIS”) issued a Commodity Classification confirming that the Data should be classified under Category 9 (Aerospace and Propulsion) on the CCL of the EAR. Specifically, it confirmed applicability of Export Control Classification Numbers (“ECCNs”) 5D515 and 5E515 for the software and technology, respectively.

Next, ORI submitted an Advisory Opinion Request to address the question whether “published” software and technology is subject to the EAR. The Commerce Department issued a response confirming that when the Data is publicly disseminated, it is longer subject to the EAR.

Finally, ORI reviewed the Information or Informational Materials Exception codified in the Berman Amendment to the IEEPA and the TWEA, and implemented in regulations promulgated by the Treasury Department’s Office of Foreign Assets Control (“OFAC”), including the Iranian Transactions and Sanctions Regulations. Based on this research, we have concluded that the Data would not be subject to sanctions under these authorities.

In summary, the CJ determination, the CCR determination, the Advisory Opinion, and our research into the Information or Informational Materials exemption, all confirm ORI’s longstanding belief that its Data is not subject to U.S. export controls or sanctions after it has been published to our web site or related repositories.

This FAQ addresses the following topics in regard to the US exports controls of ORI’s Data:

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7. **COMMODITY JURISDICTION REQUEST**

STATE DEPARTMENT / DIRECTORATE FOR DEFENSE TRADE CONTROLS

* 1. **What is a Commodity Jurisdiction Request?**

The CJ procedure permits members of the public, like ORI, to submit a CJ request in order to determine whether an item or service is described in the U.S. Munitions List (“USML”) and therefore subject to export controls administered by DDTC pursuant to the Arms Export Control Act (“AECA”, 22 USC 2751 *et seq.*) and the ITAR (22 CFR Subchapter M). CJ determinations are used to assist in deciding the jurisdiction for a *specific* commodity and do not provide generalized guidance for an industry or issue area.

* 1. **Why did ORI Submit a Commodity Jurisdiction Request?**

ORI submitted a CJ request to determine whether its Data is subject to the ITAR or subject to jurisdiction instead by the Commerce Department under the CCL of the EAR (15 CFR Part 730 *et seq*.).

 As described in ORI’s CJ Request, Space and ORI Ground Station may contain elements of the following USML entries that could have made ORI’s data subject to jurisdiction by the State Department:

* Category XV(a) Spacecraft, including satellites and space vehicles, whether designated developmental, experimental, research, or scientific, or having a commercial, civil, or military end-use;
* Category XV(b) Ground control systems or training simulators, specially designed for telemetry, tracking, and control (TT&C) of spacecraft in paragraph (a) of this category; and
* Category XV(e) Spacecraft parts, components, accessories, attachments, equipment, or systems.

 However, none of the entries on the USML of the ITAR govern the Data. Furthermore, “technical data” as defined by the USML does not include information in the public domain (22 CFR 120.10-11). DDTC issued its CJ determination that ORI’s Data is not subject to its jurisdiction.

ORI submitted its CJ application on February 20, 2020. The CJ cover letter and application can be viewed [here](https://github.com/phase4ground/documents/blob/master/Regulatory/ITAR_EAR/Final%20CJ%20Cover%20Letter.pdf) and [here](https://github.com/phase4ground/documents/blob/master/Regulatory/ITAR_EAR/CJ0003120%20as%20submitted%20on%20February%2020%202020.pdf), respectively.

* 1. **What was DDTC’s Commodity Jurisdiction Determination?**

 On August 11, 2020, DDTC issued CJ0003120, finding the following:

*The [State Department] has determined that the Information and Software for a Digital Microwave Broadband Communications System for Space and Terrestrial Amateur Radio Use is not subject to its jurisdiction. However, the item is subject to the Export Administration Regulations (EAR) administered by the Commerce Department, Bureau of Industry and Security (BIS). In order to satisfy the applicable regulatory requirements of the EAR, BIS requires that you submit to it a classification request.*

 Therefore, the State Department does not have jurisdiction over ORI’s Data, but it is subject to the EAR administered by the Commerce Department’s BIS. The DDTC also advised ORI that a classification request was required.

 The CJ Final Determination from DDTC can be viewed [here](https://github.com/phase4ground/documents/blob/master/Regulatory/ITAR_EAR/CJ%200003120%20Final%20Determination%20Letter.pdf).

1. **COMMODITY CLASSIFICATION REQUEST**

COMMERCE DEPARTMENT / BUREAU OF INDUSTRY AND SECURITY

1. **What is a Commodity Classification Request?**

When an item is subject to the jurisdiction of the Commerce Department, a CCR is used to determine if the item has a specific ECCN that is found on the CCL, or if it is designated EAR99.

1. **Why did ORI Submit a Commodity Classification Request?**

ORI submitted a CCR to determine whether authorization was required to export its Data. Additionally, the State Department advised ORI in its CJ determination that a classification request was required.

ORI submitted CCR Z1667514 on October 5, 2020.

1. **What were BIS’s Classifications?**

 On January 26, 2021, BIS classified the ORI items in Commodity Classification Automated Tracking System (“CCATS”) number G185407 as follows:

* ORI Satellite and Ground Station Technology – **ECCN 9E515.a**;
* ORI Software (Binary) – **ECCN 9D515.a**;
* ORI Technology for the ORI Software (Binary) – **ECCN 9E515.a**;
* ORI Software Source Code – **ECCN 9D515.b.2**; and
* ORI Technology for the ORI Software Source Code – **ECCN 9E515.b.**

 The licensing officer(s) also provided the following comment for each item:

*Based on the information provided, this item is classified under ECCN [9D/E515] and is controlled for National Security, Regional Stability and Anti-Terrorism reasons with NS Column 1, RS Column 1 and AT Column 1 license requirements. In addition, the application must also comply with General Prohibitions four (4) through (10) listed in Part 736 of the Export Administration Regulations. Items otherwise eligible for export under NLR may require a license if the exporter knows or is informed that the items will be used in prohibited chemical biological or nuclear weapons or missile activities or other prohibited end-users or end-uses as defined in Part 744 of the EAR.*

 However, the classifications of these items did not cover the unclassified technology or software that has been “published” by ORI. See the Advisory Opinion discussion in Section 3), below.

 CCATS G185407 from BIS can be viewed [here](https://github.com/phase4ground/documents/blob/master/Regulatory/ITAR_EAR/G185407.pdf).

1. **ADVISORY OPINION REQUEST**

COMMERCE DEPARTMENT / BUREAU OF INDUSTRY AND SECURITY

1. **What is “Published” information?**

 The EAR has a specific provision regarding “published” information, which is **not** subject to the EAR pursuant to Section 734.7:

1. *… unclassified “technology” or “software” is “published,” and is thus not “technology” or “software” subject to the EAR, when it has been* ***made available to the public without restrictions upon its further dissemination*** *such as through any of the following:*
	* 1. *Subscriptions available without restriction to any individual who desires to obtain or purchase the published information;*
		2. *Libraries or other public collections that are open and available to the public, and from which the public can obtain tangible or intangible documents;*
		3. *Unlimited distribution at a conference, meeting, seminar, trade show, or exhibition, generally accessible to the interested public;*
		4. ***Public dissemination (i.e., unlimited distribution) in any form (e.g., not necessarily in published form), including posting on the Internet on sites available to the public;*** *or*
		5. *Submission of a written composition, manuscript, presentation, computer-readable dataset, formula, imagery, algorithms, or some other representation of knowledge with the intention that such information will be made publicly available if accepted for publication or presentation:*
			1. *To domestic or foreign co-authors, editors, or reviewers of journals, magazines, newspapers or trade publications;*
			2. *To researchers conducting fundamental research; or*
			3. *To organizers of open conferences or other open gatherings.*

Therefore, ORI’s Data software and technology that has been publicly disseminated is “published” within the meaning of Section 734.7(a)(4), and not subject to the EAR.

1. **What is an Advisory Opinion?**

 An Advisory Opinion responds to a request for BIS to advise on the requester’s proffered interpretation of the EAR.

However, advisory opinions may not be relied upon or cited as evidence that the US Government has determined that the items described in the advisory opinion are not subject to the export control jurisdiction of another agency of the U.S. Government (*See* 15 CFR 734.3).[[1]](#footnote-1)

1. **Why did ORI Submit an Advisory Opinion Request?**

ORI submitted an Advisory Opinion request to obtain BIS’ guidance on whether its Data would be considered “Published” under Section 734.7(a) of the EAR after it becomes available under the following actions: release in an unrestricted online forum, placement in a public archive on the Internet, or posting either in written or online form by a university.

ORI submitted its request for an Advisory Opinion on February 23, 2021.

1. **What was BIS’s Response?**

 BIS issued a response on September 2, 2021:

*ORI’s technology and software are subject to the EAR until such time as they meet the criteria of § 734.7(a) of the EAR. The actions you have described (release in an unrestricted online forum, placement in a public archive on the Internet, or posting either in written or online form by a university) appear to fall within the scope of published information under § 734.7 (a) of the EAR. Once ORI’s technology and software meet the criteria of § 734.7(a), they would be no longer subject to the EAR.*

 Therefore, when ORI’s software or technology becomes available in actions such as those described above, it will be considered “Published” and no longer subject to the EAR.

 The Advisory Opinion response from BIS can be viewed [here](https://github.com/phase4ground/documents/blob/master/Regulatory/ITAR_EAR/BIS%20Advisory%20Response%20-%20ORI.pdf), with further clarification [here](https://github.com/phase4ground/documents/blob/master/Regulatory/ITAR_EAR/ORI%20CCR%20Closing%20Memo%20January%2028%202021.pdf).

1. **INFORMATION OR INFORMATIONAL MATERIALS EXCEPTION**

IEEPA, TWEA AND TREASURY DEPARTMENT / OFAC

1. **What is the Information or Informational Materials Exception?**

 In 1977, Congress enacted the IEEPA (50 USC 1701 *et seq.*). The IEEPA empowered the President to respond to unusual and extraordinary threats with the imposition of sanctions on countries that threatened national security, and to establish guidelines for regulating trade with hostile nations. The Berman Amendment [50 USC 1702(b)(3)] was added to the IEEPA in 1988, providing exceptions to the presidential grant of authority. It was revised in 1994 to include an exception for information or informational materials:

1. ***Exceptions to grant of authority***

*The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly- . . . .*

1. *the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of* ***any information or informational materials, including but not limited to, publications,*** *films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 4604 of this title, or under section 4605 of this title to the extent that such controls promote the nonproliferation or antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18;*

The Berman Amendment exempted information or information materials, such as publications, from Presidential sanctions, among other trade regulations. Therefore, pursuant to the IEEPA, information or informational materials can be sent to countries that would otherwise be sanctioned. BIS implements embargoes pursuant to the President’s authority under the IEEPA, so the information or informational materials exception applies to the embargoed countries in the EAR, including Iran, Syria, North Korea, Cuba and the Crimea region of the Ukraine.

The Information or Informational Materials exemption also applies to OFAC sanctions against Iran [31 CFR 560.210(c)], Syria [31 CFR 569.205(b)], North Korea [31 CFR 510.213(c)], and the Crimea region of the Ukraine (31 CFR Appendices to Part 589) pursuant to IEEPA. For example, the exemption can be found in Sections 560.210(c) and 560.315(a) of the Iranian Transactions and Sanctions Regulations (“ITSR”, 31 CFR 560 *et seq.*):

***§ 560.210 Exempt transactions.***

1. *Information or informational materials.*
2. *The prohibitions contained in this part* ***do not apply to the importation from any country and the exportation to any country of information or informational materials****, as defined in § 560.315, whether commercial or otherwise, regardless of format or medium of transmission.*
3. *This section does not exempt from regulation or authorize transactions related to information or informational materials not fully created and in existence at the date of the transactions, or to the substantive or artistic alteration or enhancement of informational materials, or to the provision of marketing and business consulting services. Such prohibited transactions include, but are not limited to, payment of advances for information or informational materials not yet created and completed (with the exception of prepaid subscriptions for widely circulated magazines and other periodical publications); provision of services to market, produce or co-produce, create, or assist in the creation of information or informational materials; and payment of royalties with respect to income received for enhancements or alterations made by U.S. persons to such information or informational materials.*

***§ 560.315 Information or informational materials.***

*(a) For purposes of this part, the term information or informational materials includes, but is not limited to,* ***publications****, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds.*

In addition, OFAC implements sanctions against Cuba pursuant to the TWEA, which was amended to include the Information or Information Materials exemption (50 USC 4301 *et seq.*). Therefore, Information or Informational Materials exemption applies to Cuba as well pursuant to TWEA and the implementing Cuban Asset Control Regulations [31 CFR 515.206(a)].

OFAC has taken the [position](https://home.treasury.gov/system/files/126/guidance_on_certain_publishing_activities.pdf) that the Berman Amendment did not exempt certain types of information from regulation, disallowing editors to significantly alter the works of an author residing in a sanctioned country where a substantive enhancement would provide a benefit to the sanctioned nation, including: services related to peer review, style and copy editing, and marketing of individual articles submitted by authors from sanctioned countries that involve the substantive or artistic alteration or enhancement of informational materials, or the provision of marketing and business consulting services. Please note that ORI does not engage in any of these activities.

The Information or Informational Materials Exception in its entirety for IEEPA and TWEA can be found [here](https://uscode.house.gov/view.xhtml?req=(title:50%20section:1702%20edition:prelim)) and [here](https://home.treasury.gov/system/files/126/twea.pdf), respectively.

1. **How does the Information or Informational Materials Exception Apply to ORI’s Data?**

 ORI’s Data qualifies as “information or informational materials” pursuant to the Information or Informational Materials Exception under the IEEPA and TWEA. Therefore, the Data is exempt from Presidential sanctions, among other regulatory guidelines, and does not require OFAC to issue a license before the Data can be exported to countries subject to sanctions under the IEEPA and TWEA.

1. Understanding that an Advisory Opinion does not constitute as evidence of jurisdiction, ORI submitted the CJ request in order to conclusively determine that the Commerce Department was the agency with jurisdiction over its Data. See the Commodity Jurisdiction discussion in Section 1), above. [↑](#footnote-ref-1)