



Best Management Practices for Releasing ITAR Technology into the Public Domain

Every year the U.S. Department of Energy (DOE) engages in a multitude of projects. These efforts include nuclear weapons–related activities, biofuels research, high-performance computing, materials studies, and sensor development, among many others. Although DOE may be the funding sponsor for these activities, DOE may not be the final authority for the release of certain scientific and technical information, particularly information related to defense articles and technical data under the jurisdiction of the U.S. Munitions List (USML). In short, any controlled technology related to items on the USML requires approval from the Directorate of Defense Trade Controls (DDTC), including information that might have been misinterpreted as fundamental research. Please see below for further information, reach out to DDTC, or contact the Export Compliance Assistance Program (ECAP) for more details.

What is International Traffic in Arms Regulation (ITAR) technical data?

22 CFR §120.10 (the ITAR) provides the following examples of technical data:

1. Information that is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles, including blueprints, drawings, photographs, plans, instructions, or documentation.
2. Classified information relating to defense articles and defense services on the USML, as well as 500- and 600-series items controlled on the Commerce Control List.
3. Information covered by an invention secrecy order.
4. Software directly related to defense articles.



Note, the threshold for technical data is much lower for ITAR-related technology than for information controlled by other jurisdictional agencies, such as the U.S. Department of Commerce. The likelihood that authorization is needed for the release of ITAR-related technology is a real concern and reinforces the need for a formal export control review for any documents that could contain this type of information.

An export control review is required under DOE O 471.7, Controlled Unclassified Information, before the release of scientific and technical data. See <https://www.directives.doe.gov/news/new-doe-o-471-7-controlled-unclassified-information>. This order states that all documents must be reviewed to ensure they do not contain controlled unclassified information, which includes export-controlled information, before public release. Controlled unclassified information must be removed or decontrolled from documents before release.

What is considered "fundamental research" by the U.S. government under NSDD-189 and the various export control regimes?



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For more information on the Rules for Fundamental Research Results and Publicly Available Information, please visit the ECAP website (<https://ecap.doe.gov>).

Can the publication of research results be restricted?



YES! ITAR specifies in section 124.4(b)(13) that only technical data (technology) approved for public release (i.e., unlimited distribution) by the cognizant U.S. government department or agency or Office of Freedom of Information and Security Review is exempt from ITAR approval requirements.

Who is a cognizant U.S. Government department or agency?



Per guidance from National Nuclear Security Administration General Counsel, with respect to the "cognizant U.S. Government department or agency" for the purposes of ITAR 120.11(a)(7) and 125.4(b)(13), the U.S. Department of State's legal interpretation is that this refers to agencies with legal cognizance over dissemination of subject information to ensure that it is legitimately in the public domain.

Example 1: If the information or technology is related to the nuclear fuel cycle, DOE would likely be the cognizant agency (and authority).

Example 2: If the information or technical data is related to items or technologies on the USML, DDTC would be the cognizant agency (and authority).

"To the extent the publication includes technical data subject to ITAR, at a minimum a sponsoring agency should coordinate publication with State/DDTC prior to release."

— Zachary R. Stern, General Attorney, National Nuclear Security Administration, Office of General Counsel

To contact DDTC for assistance in determining ITAR release requirements or to submit a formal commodity jurisdiction request, please see <https://deccs.pmdtc.state.gov>.

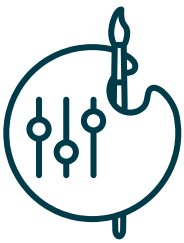
Can DOE authorize the release of ITAR-related technical data (i.e., such as high explosives information or technical data that results from DOE-funded research)?



NO! Explosive research is considered applied research and requires approval from the cognizant U.S. government department or agency. In this case, the cognizant agency would be the U.S. Department of State's DDTC.

The U.S. Department of State's DDTC takes the position that there is no such thing as fundamental research associated with high explosives.

Can DOE or its contractors be penalized for the unauthorized release of ITAR-related technical data?



YES! The penalties for ITAR violations can be very serious. Please see 22 CFR 127 for specific details on ITAR violations. Note that any violations should be self-reported to the relevant jurisdictional agency. ITAR violations that are willful in nature (i.e., you have been made aware of the ITAR requirements and consciously decide to publish the data anyway) must be reported to the U.S. Department of Justice in addition to the U.S. Department of State. Please see the ECAP page "Best Management Practices on Voluntary SelfDisclosures" at <https://nnsa.nsis.anl.gov/ecap/dashboard#/public/topics/bestPractices.jsp> for more details.

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NOTE: Naval reactor technology controls are extremely complex and could involve multiple jurisdictional agencies. Any questions related to that subject area should be directed to the Office of Naval Reactors.