

The Impact of Export Control Regulations on Global Companies

Deemed Export

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This article will discuss how the export control regulations can and do impact global companies, whether that company exports a manufactured product or solely deals with technology. The author will discuss the definition of a deemed export, what the deemed export rule means to technology companies and what best practices a company can implement to ensure compliance with the export control laws.

Despite the impression one gets from the media, many U.S. companies actively export products to destinations around the world. Most of these companies are aware of the fact that they are subject to a variety of export laws and regulations. But, should a company be concerned if it is not exporting a manufactured product, but instead deals in technology?

Unfortunately, there is no simple answer. As counsel to any global company, you should be aware of what export red flags to be aware of and how these potential issues can adversely impact your client—even if that client doesn't physically export a product.

On Nov. 23, 2010, the U.S. Citizenship and Immigration Services (USCIS) revised the Form I-129 petition for a nonimmigrant worker. This form is used by employers seeking to secure an H-1B,¹ L-1² or O-1A³ work visa for a non-U.S. citizen. The revised form contains a "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States," which is found in Part 6 of the Form I-129 and provides:

With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

1. A license is not required from either U.S. Department of

Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or

2. A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary until and unless the petitioner has received the required license or other authorization to release to the beneficiary.

Part 6 of the Form I-129 requires petitioners to affirm that they have reviewed the export regulations and attest that either a license *is* or *is not* required from the Department of Commerce (DOC) or the Department of State (DOS) to release technology or technical data to the beneficiary of the petition. If a license is required, the petitioner attests that the beneficiary will not have access to the technology or technical data until the license has been obtained.

Never before has the visa petition process required a certification relating to export controls, and it has raised many questions. Why now? What led to these revisions? They are the result of a 2002 Government Accounting Office (GAO) report titled *Department of Commerce Controls over Transfers of Technology to Foreign Nationals Needs Improvement*.

The GAO was asked to assess DOC's efforts to ensure that organizations: 1) apply for these licenses when required to do so; and 2) comply with the license conditions. One of the key findings was that DOC did not review all relevant visa and immigration data, and thus might overlook foreign nationals potentially subject to deemed export licensing requirements. As a result, the recommendation was for the secretary of commerce to work with Immigration and Naturalization Services (INS) to use all existing U.S. government data in its efforts to identify all foreign nationals potentially subject to deemed export licensing.

What are the export regulations that Part 6 references? Why are two different agencies involved? What does it mean to release technology or technical data? And, what does it

mean if the certification made is false or inaccurate?

The export regulations referenced in Part 6 to the Form I-129 are the Export Administration Regulations⁴ (EAR) and the International Traffic in Arms Regulations (ITAR). The EAR is administered by the DOC, which regulates the export and re-export of most commercial items and specified activities, including “dual use” or purely commercial technologies. The ITAR, administered by the DOS, controls defense-related articles and services on the U.S. Munitions List and those items that are specifically designed or modified for military or space application. In addition to furthering U.S. foreign policy objectives, the ITAR was implemented to safeguard U.S. national security.

Companies that physically export products should already be well aware of the export regulations and the application of those regulations, since the export regulations are not new. These regulations affect global companies that export in the traditional sense and, more importantly, affect those companies that work with or hire foreign nationals. In implementing Part 6 to the Form I-129, USCIS and DOC have said that the document seeks to ensure that organizations that work with or hire foreign nationals are aware of the export regulations, specifically, the “deemed export” rule.⁵

A deemed export occurs when either technology or source code is released to a foreign national within the United States.⁶ This means that an export, in the traditional sense of exporting a product from the United States to a destination outside of the U.S. borders, is not the only activity covered. Rather, the term also covers a transfer that takes place *in the United States* with the “release” of information that is “deemed” to have been exported to the foreign national’s home country, requiring a U.S. government export license.

To break down the elements of Part 6 to the Form I-129, one must first understand that it applies to foreign nationals. *Any* foreign national is subject to the deemed export rule *unless* that foreign national has been granted permanent residence (a green card), or U.S. citizenship, or is considered to be a “protected person” under 8 U.S.C. Section 1324b(a)(3).

Second, Part 6 appears to be very specific in that it appears to *only* address the release of technology and technical data. The deemed export rule is concerned with the export of technology or source code. Although the certification set forth in Part 6 to the Form I-129, appears to be limited to technology and technical data, source code has not been specifically excluded from consideration. Regardless of the fact that Part 6 appears to be limited to technology and technical data, from a compliance standpoint, any global company must determine whether it is in compliance with all U.S. export control laws.

Technology, which includes technical data, is defined in the Commerce Control List⁸ of the EAR and within the U.S. Munitions List⁹ in the ITAR. Under the EAR, technology is “specific information necessary for the ‘development,’ ‘production,’ or ‘use’ of a product[,]”¹⁰ and includes, but is not limited to blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, and read-only memories.¹¹ Controlled technology or technical data can be released in a variety of ways: through telephone conversations, emails, technical meetings, or conversations at the water cooler. The release of technology or technical data usually occurs through ordinary workplace interaction: when it is made available to the foreign national for visual inspection (reading technical specifications, plans, blueprints, etc.); through conversation;

when technology is made available by practice or application under the guidance of a person with knowledge of the technology; when employees collaborate or engage in technical conversations with the foreign national; when the foreign national receives technical training; or when one collaborates with a U.S. customer’s foreign national employee when the foreign national has access to databases that contain controlled technology.

There are many types of dual-use technologies that have seemingly unexceptional and commonplace functions, but the potential military applications are not obvious, especially to those who only use the technology commercially. Examples of dual-use articles include ball bearings and the recent developments in the life sciences. Both have commercial, legitimate and beneficial purposes. The ball bearing helps run a mechanical printing press and the research in life sciences could help produce new vaccinations to cure serious disease. However, both also could be used to serve foreign military governments and in the development of weapons of mass destruction.

When dealing with deemed exports, the first step is to determine whether a company works with controlled technologies. If so, does the company employ foreign nationals from countries in which an export license is required? Simply because a company works with or hires foreign nationals that have access to technology or technical data, as defined by the export regulations, does not mean that an export license is necessarily required.

The importance of examining the type of technology and technical data, and determining whether that technology is controlled, cannot be overstated. Generally, technologies that tend to be subject to licensing requirements are dual-use, that is, technology that has both civil and military applications and

is, generally, subject to one or more control regimes, such as national security, nuclear proliferation, missile technology or chemical and biological warfare. Computers, GPS technology, lasers and sensors, navigation and avionics systems, marine equipment and telecommunication technology are examples of the type of technologies that tend to be subject to licensing requirements.

Further, there are types of industries that are generally more likely than other industries to be subject to controlled technology and/or technical data. Some of these industries include telecommunications, semiconductor, software (encryption), electronic components, aerospace/defense, biotech, and chemical and materials.

Defining technology and whether it is licensable is not always a clear cut determination. What is often seen is foreign technology commingled with U.S.-origin technology, which again, may be subject to the EAR and thus require an export license. Accordingly, while a product may appear to have a purely commercial use, it may nevertheless require a license if the technology within that product is controlled. Just because the foreign technology is commingled or is part of a product that seems designed purely for commercial use does not mean the foreign technology is exempt from any licensing requirements; therefore, take the time to examine the technology.

The reality is, *most* technology is *not* considered controlled for export or release to foreign nationals.

Technology and technical data that is publicly available¹² in the public domain, or is information that is considered fundamental research,¹³ is not subject to license requirements under the export regulations. If the general public already has access to the information, or will have access to it because the information, technology or software will be placed in the public domain, and that is

the normal course of business for such information, software or technology, then it is considered “publicly available.”

Finally, what are the repercussions if the certification made is false or inaccurate? If a petitioner knowingly makes a false statement or conceals a material fact from the U.S. government, not only will the petition be denied, but the petitioner may be subject to civil administrative and/or criminal penalties, in addition to potentially losing its exporting privileges.

Administrative monetary penalties can range from \$250,000 per violation to twice the amount of the transaction being penalized, whichever is greater. The criminal penalties that can be assessed are \$1,000,000 and/or 20 years in prison.

The Bureau of Industry and Security (BIS) routinely publishes notices of individuals and corporate entities indicted for various violations of the export control laws. For example, in 2009, a professor emeritus at the University of Tennessee was convicted of conspiring to export controlled technology to foreign nationals from the People’s Republic of China and Iran. The controlled technical data was related to a restricted U.S. Air Force contract to develop plasma actuators for a military unmanned aerial vehicle. The professor was sentenced to 48 months in prison and two years of supervised release.

In 2008, Maxim Integrated Products, Inc. was charged with making 31 unlicensed exports and re-exports of national security controlled integrated circuits and related components to the People’s Republic of China, Estonia, Russia and the Ukraine. The company also released controlled technology to an Iranian national employee and a Chinese national employee without the required BIS license. Maxim did apply for a deemed export license for the release of controlled technology to the Chinese national, but failed to restrict his access to the technology while the license

application was pending. As a result, Maxim paid a civil penalty of \$192,000. These are just two examples of the types of reports, indictments and sentences the BIS publishes on almost a daily basis. Some cases involve conspiracy, others are examples of what happens when companies do not have an export compliance program.

Whether a company engages in conventional exports or hires and works with foreign nationals, it is important to develop internal controls in line with the company’s export business practices. An export compliance program is a best practice that must be driven from the top down, which creates a culture of compliance. As part of this effort, *all* employees, not just the foreign nationals who might affect an export transaction, should receive training to understand the impact and importance of the export regulations.

A company’s internal controls should be documented in a manner that reflects the actual business practices that are in effect. These documented internal controls are a living document that changes as the company’s business practices change and grow. Once a company has its internal controls implemented and documented, it is important to test those policies and procedures on a periodic basis. Testing a company’s internal processes confirms that the processes and procedures are in compliance with all the export control laws; enables the company to identify and better monitor areas of risk and liability; improves information and communication within the company; and provides the opportunity to examine the company’s responsiveness to reports of violations.

An effective compliance program will streamline business practices and reduce the likelihood of governmental investigations, thus reducing the company’s exposure to potential sanctions. Implementing a compliance program is especially important as a matter of due diligence as

companies merge to become a bigger player in the international market, and as acquisitions are made to further grow a company's global business environment.

Whether a company is just entering the global marketplace or has been in the global community for years, now is the time to examine what internal processes and procedures are in place, whether those processes and procedures are effective and whether any changes need to be made.

There are several steps a company can take to ensure it is in compliance with the export control regulations. Most importantly, however, is the development of export policies and procedures, which should be implemented within the entire company, including separate divisions and subsidiaries. In addition, companies can keep current with updates to the government's export control laws and regulations; centralize all export-related questions and issues; standardize procedures; maintain complete documentation for all foreign nationals' employee files or for all sensitive export transactions. Although dealing with export controls and the deemed export rule can be complex, understanding your business operations is critical to defining what your company needs and how robust a system is required.

The export control regulations and the export regulatory agencies are going through a period of tremendous change and reform. The current administration is reviewing the U.S. export control system to make changes to enhance U.S. national security and to strengthen the country's ability to counter threats such as terrorism and the proliferation of weapons of mass destruction. As part of this review, the administration has identified four component areas, with a transformation to a:

- single control list,
- single primary enforcement coordination agency,

- single information technology (IT) system, and
- single licensing agency

To deploy this new system, the administration has prepared a comprehensive, three-phase approach, and is making specific reforms that can be initiated immediately and without legislation. The reformation of the export control regulations seeks to reconcile existing definitions, regulations and policies for export controls to ensure uniformity and consistency.

Currently, the system has two different control lists with distinctly different approaches to identifying and controlling products; there are also several different licensing agencies, each with different procedures, different information technology systems and different regulatory definitions. By implementing a single control list and a single licensing agency with a unified information technology system and enforcement coordination center, the export control system will be more transparent and predictable system that will be easier for exporters to navigate.¹⁴

These are not easy tasks, but the agencies and the administration recognize that the U.S. export control system is complicated, contains redundancies and is not as effective as it could be to protect critical national security priorities. The changes in the future should strengthen U.S. national security and allow key U.S. manufacturing and technology sectors to maintain levels of global competitiveness. ♪

Endnotes

1. H-1B and H-1B1 visa category applies to people who wish to perform services in a specialty occupation, services of exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project, or services as a fashion model of dis-

tinguished merit or ability. Essentially, the job must meet one of the criteria to qualify as a specialty occupation:

- Bachelor's or higher degree or its equivalent is normally the minimum entry requirement for the position.
- The degree requirement for the job is common to the industry or the job is so complex or unique that it can be performed only by an individual with a degree.
- The employer normally requires a degree or its equivalent for the position.
- The nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree.

For the non-U.S. citizen to qualify to accept a job offer in a specialty occupation, the applicant must meet one of the following criteria:

- Have completed a U.S. bachelor's or higher degree required by the specific specialty occupation from an accredited college or university.
- Hold a foreign degree that is the equivalent to a U.S. bachelor's or higher degree in the specialty occupation.
- Hold an unrestricted state license, registration, or certification which authorizes you to fully practice the specialty occupation and be engaged in that specialty in the state of intended employment.
- Have education, training, or progressively responsible experience in the specialty that is equivalent to the completion of such a degree, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

It should be noted that the prospec-

tive employer must also file an approved Form ETA-9035, Labor Condition Application (LCA), with the Form I-129, Petition for a Non-immigrant Worker. *U.S. Citizenship and Immigration Services*; see also, 8 C.F.R. § 214.2(h)(4)(iii)(A) and (C).

2. The L-1A visa category enables a U.S. employer to transfer an executive or manager from one of its affiliated foreign offices to one of its offices in the United States. This classification also enables a foreign company which does not yet have an affiliated U.S. office to send an executive or manager to the United States with the purpose of establishing one.

The L-1B visa category enables a U.S. employer to transfer a professional employee with specialized knowledge relating to the organizations interests from one of its affiliated foreign offices to one of its offices in the United States. Again, this classification enables a foreign company that does not have an affiliated U.S. office to send a specialized knowledge employee to the U.S. to help establish one. *U.S. Citizenship and Immigration Services*.

3. The O-1A visa category is for the individual who possesses extraordinary ability in the sciences, education, business, or athletics (not including the arts, motions pictures or television industry) or who has a demonstrated record of extraordinary achievement in the above-mentioned areas. *U.S. Citizenship and Immigration Services*.

4. Besides the Department of State, there are other federal agencies that regulate exports or re-exports including the Department of Treasury, the Nuclear Regulatory Commission, Defense Technology Security Administration, and the Department of Energy, for example. The Bureau of Industry and Security provides a link to other agencies involved in exports

at www.bis.doc.gov.

5. The revisions to the Form I-129 are the result of a 2002 Government Accounting Office (GAO) Report called "Department of Commerce Controls over Transfers of Technology to Foreign Nationals Needs Improvement." The GAO was asked to assess commerce's efforts to ensure that organizations: 1) apply for these licenses when required to do so; and 2) comply with license conditions. One of the key findings was that commerce did not review all relevant visa and immigration data, and thus might overlook foreign nationals potentially subject to export licensing requirements. As a result, the recommendation was for the secretary of commerce to work the USCIS to use all existing U.S. government data in its efforts to identify all foreign nationals potentially subject to deemed export licensing requirements.
6. Section 734.2(b)(2)(ii) of the Export Administration Regulations (EAR).
7. Protected persons include political refugees and political asylum holders. It is important to note that individuals seeking protected person status must satisfy all of the terms and conditions that are fully set forth in 8 U.S.C § 1324b(a)(3).
8. 15 C.F.R. § 730-774 Supplement 1.
9. 22 C.F.R. § 121.
10. 15 C.F.R. § 772.1.
11. *Id.*
12. Publicly available information is information that is generally accessible to the general public in any form and, therefore, not subject to the EAR. Publicly available technology is that which is already published or will be published; arising during or as a result of fundamental research.
13. Fundamental research is ordinarily published and shared broadly within the scientific community.
14. Remarks of Daniel O. Hill, deputy

undersecretary for industry and security, U.S. Department of Commerce, C5 European Forum on Export Controls; Brussels, Belgium; Feb. 7, 2011.

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