

Deemed Export Rule



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Who Should Care About The Deemed Export Rule?

IF YOU MEET THE FOLLOWING CRITERIA THAN YOU SHOULD CARE

- Do you/client “use” advanced technology?
 - Semi-conductors
 - Electronics
 - Telecommunications equipment
 - Encryption software (special rules apply)

AND

- Do you have foreign nationals in your work place?



Why should you care about the Deemed Export Rule?

An export of controlled technology can easily occur within the walls of your company located within the borders of the United States. The proper controls are needed to ensure that any such export occurs legally and does not expose your company to penalties.



Who Administers the Deemed Export Rule?

- U.S. Department of Commerce - Dual-Use Items
 - Bureau of Industry and Security (BIS)
 - Export Administration Act (50 U.S.C. § 2401)
 - Export Administration Regulations (EAR) 15 C.F.R. Part 730
- Items & Activities Subject to the Export Administration Regulations (EAR)
 - U.S. origin
 - high-tech and dual-use commodities, technology & services
 - data relating to controlled technology that is not “publicly available”



What is a Deemed Export?

A deemed export is the release, to a foreign national located in the United States, of technology or a source code that is subject to the Export Administration Regulations (EAR).



Who is considered a Foreign National?

Any foreign national is subject to the deemed export rule except:

- A foreign national granted U.S. citizenship;
- A foreign national granted permanent residence status (i.e., “Green Card” holders);
- A foreign national granted status as a “protected individual,” including political refugees and political asylum holders.



Some Examples of a Deemed Export

- Example A: Visit of foreign delegations to your facilities.
- Example B: Visual inspection of technical data by foreign nationals.
- Example C: Providing technical assistance to foreign nationals.
- Example D: Shared work with foreign nationals on any of the above.



Some Examples of a Deemed Export

Example A: Visit of foreign delegations to your facilities

- For company internal technical conferences
- Tour of facilities that is not open to the general public



Some Examples of a Deemed Export

Example B: Visual inspection of technical data by foreign nationals

- Specifications
- Plans
- Blueprints



Some Examples of a Deemed Export

Example C: Providing technical assistance to foreign nationals

- Includes verbal exchange
- Any guidance through practice or application



Some Examples of a Deemed Export

Example D: Shared work with foreign nationals on controlled technology

- Placing technology on the intranet for shared use with non-US-based departments
- Forming project teams that include foreign nationals



Examples of When There is No Deemed Export

- Conferences open to the general scientific community
- Technology arising during or as a result of fundamental research
- Patent applications (some)
- Publicly available technology and software (except for encryption items)
- Technology which is educational



Does the Rule Apply to You?

- Classification under the Commerce Control List (“CCL”) is the key to exporting with confidence.
- Export Classification Category Number (“ECCN”) describes:
 - what items fall within the category
 - the reason the export of the item is controlled
 - where the item can be exported to without a license
 - where the item can be exported to with a license



Does the Rule Apply to You?

- Examples of Technology Subject to the Deemed Export Rule
- ECCN 4E001: Technology” for development, production, or use re equipment or software in or in connection with such systems, equipment, and components as -- Electronic computers and related equipment and “electronic assemblies” and their specially designed components



Does the Rule Apply to You?

- Examples of Technology Subject to the Deemed Export Rule
- ECCN 4D003: operating system software; software development tools and compilers specially designed for “multi-data-stream processing” equipment in “source code”; information security/encryption software having the characteristics or performing functions exceeding specified limits; program proof and validation software; software allowing the automatic generation of “source codes” and operating system software specially designed for real time processing equipment.; software for use in computers for fingerprint equipment



Does the Rule Apply to You?

The technology may not be subject to the EAR

- Literary publications (books, newspapers)
- Publicly available technology and software
- Information resulting from fundamental research
- Items with a de minimis percentage of controlled U.S. content



Does the Rule Apply to You?

- Determine the home country of the foreign national.
- Controlled technology being released to a foreign national is a deemed export.
- Technology and home country of the foreign national determine licensing requirements.



Is a License Required?

- A controlled product may not need a license for export if:
 - It is classified as EAR 99
 - The product is eligible for a License Exception.



Is a License Required?

Products classified as EAR 99 face no restrictions on export, except;

- to embargoed countries: Cuba, Iran, North Korea, Sudan, Syria
- to denied parties



Is a License Required?

- Depending on the EAR classification and intended destination (i.e. country of foreign national), the technology may be eligible for one or more License Exception(s):
 - CIV – to civil end-users for civil use
 - TSR – to a recipient who commits to certain procedures
 - TSU -- for "technology" that is the minimum necessary for the installation, operation, maintenance (checking), and repair of those products that are eligible for License Exceptions or that are exported under a license.



Is a License Required?

Use of a license exception may nevertheless require pre-disclosure of required information or of semi-annual reports to BIS.



Is a License Required?

U.S. entities must apply for an export license under the "deemed export" rule when both of the following conditions are met:

- They intend to transfer controlled technologies to foreign nationals in the United States; and
- Transfer of the same technology to the foreign national's home country would require an export license.



Is a License Required?

YES, if the technology is:

- controlled for export;
- being released to a foreign national who have been ineligible to receive it in their home country; and
- ineligible for a license exception



Is a License Required?

NO EXPORT ALLOWED

if the technology is for release to a foreign national:

- from an embargoed country: Cuba, Iran, North Korea, Sudan, Syria
- who is on the **Denied Persons List**
- is on the **Specially Designated Nationals** and **Blocked Persons List**
- who works for/is affiliated with an organization on the **Entity List**
- Release of controlled technology to an employee of a listed entity is treated as a release of controlled technology to the listed entity itself.



BIS License Application Review

- Personal background, including visa status
- Technology and purpose of the release
- Applicant's Technology Control Program
- Projected outcome of employment
- Permanent employee



Penalties for Violating U.S. Export Control Laws

- Individual civil fine of the greater of \$250,000.00 or twice the value of the transaction involved in the illegal export.
- Individual criminal fine of up to \$1,000,000.00 per violation, imprisonment for up to twenty (20) years, or both.
- Company criminal fine of up to \$1,000,000.00.
- Denial of export privileges for up to ten years from the date of conviction.



Penalties for Violating U.S. Export Control Laws

- **Violation:** Hexcel Corporation granted a Taiwanese national access to technology to produce bismaleimide resin without acquiring a license.
- **Penalty:** Civil penalty of \$203,400.00 for this deemed export violation and other export violations.



Penalties for Violating U.S. Export Control Laws

- **Violation:** Fujitsu Network Communications, Inc. failed to acquire a license for the release of controlled technology to foreign nationals from the People's Republic of China and Ukraine employed by the firm to conduct research on the development and manufacturing of commercial digital fiber-optic transmission and broadband switching equipment, software, and technology.
- **Penalty:** Civil fine of \$125,000.00



Penalties for Violating U.S. Export Control Laws

- **Violation:** Suntek Microwave failed to acquire a license for Chinese nationals who were employed by Suntek and trained in DLVA manufacturing technology.
- **Penalty:**
 - Criminal fine of \$339,000.00
 - CEO imprisoned for 12 months and 1 day
 - Civil fines totalling \$462,000 (suspended)
 - Denial of export privileges for 20 years



Export Control Compliance Program Elements

- Corporate commitment to export compliance.
- Physical security plan.
- Information security/record-keeping plan.
- Personnel screening procedures.
- Training and awareness program.
- Self evaluation program.



Export Control Compliance Program Elements

Record-keeping

- No Shippers Export Declaration (SED)
- Retain originals of all applications, licenses, and communications with BIS
- Retain originals of memoranda, notes, correspondence, contracts
- Five-year requirement



- **BIS is seeking public comments on refining the Deemed Export Policy.**
- Should the technologies subject to the rule be narrowed?
- Should the criteria for determining a foreign national's country affiliation be changed?



- Globalization has brought increased opportunities and increased avenues for international communications.
- U.S. export control laws affect the export of a wide range of such communications and interchange related to high-tech technology and technical data.
- A compliance program is essential for ensuring that your company stays on the right side of U.S. export control laws.



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