



Export Control Coordinators Organization:

*Technology Licensing Issues and
Deemed Exports*

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Agenda

- Deemed export year in review
 - Trends
 - Withdrawal of Advanced Notice of Proposed Rulemaking
 - “Use” technology
 - Country of origin licensing policy
 - Export controls in the context of fundamental research
 - Deemed Export Advisory Committee
- Deemed export topic du jour
- Technology Control Plan (TCPs):
- Export Enforcement cooperation



Deemed Export Year in Review

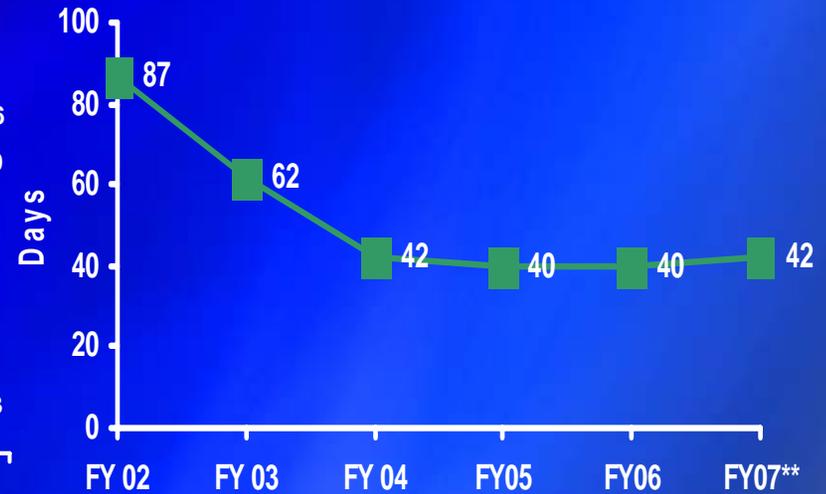
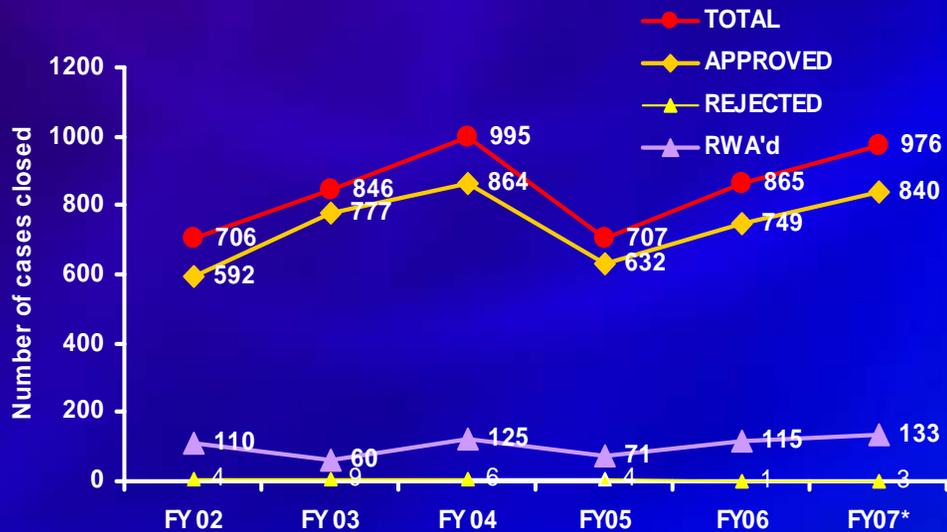
- Deemed export staffing doubled from three to six full time employees
- BIS published two deemed export related Federal Register Notices
- Established the Deemed Export Advisory Committee
- Maintained robust deemed export outreach program conducting over 120 outreach events



Deemed Export Year-End Summary

- The deemed export program remains an important mechanism to prevent the diversion of sensitive dual use technologies to countries and end users of concern
- In FY2006, the Bureau approved 85%, returned without action approximately 14%, and denied less than 1% of the total of 830 deemed export license applications
- Almost 60% of the deemed export licenses processed are for PRC foreign nationals
- Followed in descending order by foreign nationals from India (13%), Iran (7%), Russia and Germany (2%) and UK (1%)
- Most deemed export licenses are processed in 40 days

Annual Deemed Export Licensing Trends



* Projected

** To Date

Most Common Deemed Exports:

- Semiconductor & Electronics - Category 3
- High Performance Computers - Category 4
- Telecommunications - Category 5



Recent Debate Over Deemed Export Policy

- 2004: Commerce Office of Inspector General (OIG) Report
 - Highly critical of the Deemed Export Program
- 2005: BIS published two deemed export related Federal Register Notices:
 - Establishment of Advisory Committee and Clarification of Deemed Export-Related Regulatory Requirements (71FR29301 of 05/22/06)
 - Withdrawal of the Deemed Export Advanced Notice of Proposed Rulemaking (71FR30840 of 05/31/06)
- 2006-2007: Deemed Export Advisory Committee deliberations



Clarification of “Use” Technology

- The use of export controlled equipment is not a deemed export. Deemed exports occur only if controlled technology is transferred.
- The regulatory definition of “use” is technology for “operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing.”
- General Technology Note:
 - The term “technology” as used in the EAR refers to specific information “required” for the “development,” “production,” or “use” of specific product (e.g. computer, fermenter, machine tool, etc.).
 - “Required” technology refers only to that portion of technology which is peculiarly responsible for achieving or exceeding controlled performance levels, characteristics or functions.
- Controlled “use” technology requires all six attributes of the definition in order to qualify as controlled “use” technology. Otherwise the technology is likely EAR99.



Reaffirmation of Foreign National Licensing Policy

- Naturalized U.S. citizens, U.S. Legal Permanent Residents and U.S. Asylees and Refugees are protected individuals and are not subject to the deemed export rule.
- Deemed export licensing policy for foreign nationals that are not protected individuals (i.e., third country nationals) is based on recently established legal permanent residence or citizenship.
 - For example: A foreign national born in Iran that has established citizenship or permanent residency in Canada would be treated for licensing purposes as a Canadian.
- If an exporter is unable to determine a foreign national's country of origin for deemed export licensing, the exporter should consult with BIS.
- For deemed reexports to a foreign national of another country, licensing is also based on the foreign national's recently established permanent residency or citizenship.



Scope of Fundamental Research Is Unchanged

- “Fundamental research is basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community.” (EAR Part 734.8)
- "While the product of the fundamental research is not subject to the EAR because the results of that research are intended for publication and dissemination within the scientific community, *authorization may be required if during the conduct of the research controlled technology is released to a foreign national.*"(71FR30840 of 05/31/06)



Scope of Fundamental Research Is Unchanged

- Fundamental research technology is not subject to the EAR because:
 - the technology that arises during or results from the research is normally made public; and,
 - the technology necessary to conduct the research is normally obtained from public or published sources.
- If preexisting technology necessary to conduct the research is export controlled; or, if a researcher makes a decision to control the technology that results from the research, then, deemed export licensing requirements must be considered.



Deemed Export Advisory Committee

- Comprehensive policy review
- Required by law to meet quarterly
- Meetings open to the public
- The final report is expected to be delivered to the Secretary of Commerce in late 2007



Deemed Export Advisory Committee

- **DEAC Members**

- **Norman Augustine, Retired Chairman & CEO, Lockheed Martin Corporation*;**
- **Robert Gates, PhD, President of Texas A&M University****
- **Albert Carnesale, PhD, Former Chancellor of the University of California at Los Angeles;**
- **Ruth David, PhD, President & CEO, Analytic Services, Inc.;**
- **The Honorable John Engler, President, National Association of Manufacturers;**
- **Anthony Frank, PhD, Provost and Senior Vice President, Colorado State University;**
- **General John A. Gordon, Former Deputy Director, Central Intelligence Agency;**
- **Sean O'Keefe, Chancellor, Louisiana State University;**
- **Eva Pell, PhD, Senior Vice President and Dean of the Graduate School, Penn State University;**
- **Michael Splinter, CEO, Applied Materials;**
- **James Siedow, PhD, Vice Provost for Research and Professor of Biology, Duke University;**
- **William A. Wulf, PhD, President, National Academy of Engineering and Professor of Computer Science and University Professor, University of Virginia.**

** Chairperson ** Resigned to become Secretary of Defense*



Deemed Export Control Topic Du Jour

- Exporters must distinguish between the following to insure the correct licensing authorization:
 - Deemed export of technology;
 - Deemed reexport of technology;
 - Technology export; and,
 - Technology reexport.
- Exporters in general are creating unnecessary licensing burdens for themselves.



Distinguishing Deemed Export from Technology Export

- A deemed export is the release of controlled technology or source code to a foreign national in the U.S.
- A technology export is the release of controlled technology in a foreign country
- Deemed export licensing authorization is based on a review of the individual foreign national's background, country of origin and level of technology
- Technology export licensing authorization is based on the ultimate consignee's country, the level of technology and the bonafides of the consignee
- BIS does not license individual employees of consignees on a technology export license



Distinguishing Deemed Reexport from Technology Reexport

- A deemed reexport is the release of controlled technology or source code to a foreign national of another country; this is deemed to be a reexport to the foreign national's home country
- In many cases technology exported to the country home of that foreign national may be exported NLR or under License Exception (LE) not available for the foreign national's home country
 - e.g., ECCN 5E001 technology may be exported to a company in Ireland under LE TSR.
 - A Russian foreign national employee of that company in Ireland requires deemed reexport license authorization to receive this technology
- A technology reexport is the actual shipment or transmission of controlled technology from one foreign country to another foreign country



Considerations to Ease Licensing Burden

- If a consignee on a technology export license intends to send employees to the U.S. for training or other requirements resulting in the need for controlled technology, identify this on the export license application
 - A duplicative deemed export license is not required
- If your company has multiple subsidiaries in different countries, technology export authorization could authorize reexports as well
 - Exporters need to specify these requirements in its application
 - This could also authorize deemed reexport requirements for employees of the company's foreign subsidiaries visiting its other foreign subsidiaries
- A technology export license does not require information on individual employees



Developing a Technology Control Plan (TCP)

- The requirement for a TCP is a standard condition of approval for a deemed export license
- A TCP should include the following six essential elements:
 - Corporate commitment to export compliance
 - Physical security plan
 - Information security plan
 - Personnel screening procedures
 - Training and awareness program
 - Self evaluation program



Essential Elements of a TCP

1. Corporate commitment to export compliance

- Organizational chain of command of export compliance team
- Must have member of senior management team responsible for export compliance
- Demonstrate how compliance issues are resolved
- Show evidence of methodology for commodity classification of technology in the workplace
- Top-down leadership (e.g., CEO company wide letter that establishes a corporate culture of export compliance)



Essential Elements of a TCP

2. Physical security plan:

- Structure of building security at each technology location
- Description of physical security plan (badge access, secure door access...).
- Perimeter security and access control.



Essential Elements of a TCP

3. Information security plan:

- Command structure of IT security at each technology location
- Description of IT security plan (password access, firewall protection plans...)
- Verification of technology authorization (terminated employees, individuals working on new projects...)
- Intranet and internet security



Essential Elements of a TCP

4. Personnel screening procedures:

- At minimum must review entities and denied parties list.
- What types of background checks are conducted (criminal, drivers license, credit...).
- Must know procedures that 3rd party contractors use (e.g. temporary employment agencies)
- Non-disclosure agreements



Essential Elements of a TCP

5. Training and awareness program:

- Schedule of training program for informing foreign national employee of technology access limits
- Description of training for U.S. employees which have access to controlled technology areas
- Export control awareness training for all employees



Essential Elements of a TCP

6. Self evaluation program:

- Self auditing schedule
- Checklist of items reviewed during each audit
- Action item and corrective procedures
- Internal or external audit



TCP Summary

- There is no one-size-fits-all
- Necessary to provide assurance that information will not be diverted to foreign national's home country
- Typical agenda item for BIS site visit
- Verification of TCP effectiveness is a goal of domestic post shipment verification/pre-license check to assure compliance with license conditions²⁰



Export Enforcement Role in Deemed Exports: Deemed Export Domestic PSV Program

- Joint EE/EA Program: Deemed export compliance program designed to determine:
 - Compliance with license conditions
 - Deviations from the scope of license
 - Compliance with the Technology Control Plan (TCP)
 - Possible unauthorized releases of controlled technology to the foreign national or unauthorized foreign nationals



Export Enforcement Role in Deemed Exports: Deemed Export Domestic PSV Program

- Spans all Commerce Control List categories
- 2006: EE /EA conducted 10 domestic PSVs
- 2007: Plans to conduct an additional 10-15 PSVs
 - License holders have demonstrated a high degree of compliance
- Preparing for domestic PSV: Internal compliance assessment
- EE continues to review selected licenses based on certain risk factors & conduct domestic PSVs as necessary



BIS Web site

www.bis.doc.gov

- **Licensing**

- **Deemed Exports**

- [Process Improvements](#)
 - [Licensing Guidance](#)
 - [Frequently Asked Questions](#)
 - [Q&A's on Clarification of Deemed Export Regulatory Requirements](#)



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