

The Deemed Export Rule

By John O'Rourke (WHGC, P.L.C.)

Many American companies could be violating U.S. export laws and not even realize it. By allowing even the slightest exposure of controlled technology to a foreign national, an employer may be violating the "Deemed Export Rule." Under this little known rule, something as simple as showing a blueprint, giving a seminar, sketching a circuit, or even talking about a controlled item, with a non-U.S. citizen, may be treated as a "deemed export." And if such an export normally requires a license, or if it is prohibited outright, the company may be subject to harsh civil and criminal penalties.

The Deemed Export Rule is codified in the Export Administration Regulations (EAR), and it basically states that controlled technology, software, or information that is "released" to a foreign national in the United States will be considered an "export" to that individual's home country.[1] Such a release can occur under

seemingly innocuous circumstances, including:

- Allowing a visual inspection of technical data or plans,
- Providing technical assistance or guidance on the use of the technology,
- Having an oral exchange about the technology.[2]

Typical organizations that may require export licenses under the Deemed Export Rule include universities, research and development institutions, electronics companies, avionics contractors, and bio-chemical firms.

For example, a deemed export license may be required for a university that plans to allow a foreign exchange student, with a valid visa, to have access to a controlled laser during research.[3] Deemed exports aren't limited to physical technology, they also include "know-how." Discussing how to develop or produce technology can be a violation.

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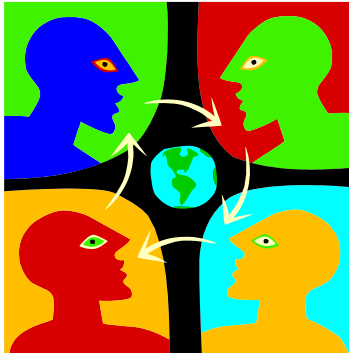
The Deemed Export Rule is enforced by the Bureau of Industry and Security (BIS), an agency under the U.S. Department of Commerce, which regulates U.S. exports, particularly for purposes of national security, and it is largely concerned with the export of "dual-use" items.[4] These are products that have been developed for commercial purposes, but that can also have military, national security, or anti-terrorism applications as well.

The BIS has categorized under the Export Administration Regulations (EAR), certain dual-use items that are subject to export controls on the Commerce Control List (CCL). Each item on this list is given an Export Control Classification Number (ECCN) indicating the type of license that is required prior to that item's release.[5] Some items that are not on this list may nevertheless be controlled by the

Department of State, (which controls the export of defense-related items and services), or other agencies, such as the Department of Energy (which controls the export of technology related to the production of special nuclear materials).

Many technologies do not require authorization prior to their release because the technology arises as a result of “fundamental research” or because they are already publicly available. Publicly available research includes applied research in science and engineering, where the resulting information and techniques are ordinarily published and shared broadly within the scientific community.[6]

With all of this in mind, organizations should take the following measures with the assistance of an attorney in order to ensure that they are in compliance with the Deemed Export Rule:



Request an official classification from the BIS

If you are unsure how to classify the item, you may request an official Commodity Classification Request online through the Simplified Network Application Process – Redesign (SNAP-R).[7]

Even if a license is not required, there may be additional requirements you must satisfy prior to exporting.

Self-Classify

If you have a technical understanding of your item, and you are familiar with the CCL, you can identify the appropriate category and product group for your item, and then match the item to one of the specific ECCNs. But beware! Even if a license is not required, there may be additional requirements you must satisfy prior to exporting.

Go to the Source

The original manufacturer or producer of the item may have previously classified their product if they have exported it in the past; however, ECCNs may change over time, so be careful.

Check with Other Agencies

The State Department maintains a “Debarred List” of parties that are prohibited from receiving exports under the International Traffic in Arms Regulations. The Treasury Department’s Office of Foreign Asset Control similarly maintains a “Specially Designated Nationals/Blocked Persons List,” which is a list of parties with specified export prohibitions.

Clearly, businesses must exercise caution *before* they engage in any activity that may violate the Deemed Export Rule. Breaking this rule, *even unintentionally*, can subject a person or a company to administrative penalties that can reach the greater of \$250,000 per violation, or twice the amount of the transaction.[8] And the criminal penalties that

may be imposed for willful violations can reach \$1,000,000 and 20 years imprisonment per violation.[9] Violators may also be subject to denial of future export privileges, which means they will be prohibited from engaging in any activities governed by the EAR.[10]

Companies should work with a qualified attorney to institute business-wide programs and preventive measures that will ensure compliance with the EAR prior to any potential release of a controlled product or information. Prudence is advisable because when it comes to the Deemed Export Rule, the prevention of violations is the only cure!

About the author

John F. O'Rourke is a registered patent attorney at WHGC, P.L.C. He has nearly 40 years of overall experience in the applied sciences. He counsels and represents clients in matters concerning technology and intellectual property law. Mr. O'Rourke has prepared several hundred original U.S. patent applications across a broad spectrum of technical disciplines. JohnORourke@WHGCLaw.com

ENDNOTES

[1] U.S. Department of Commerce, Deemed Exports FAQs, Bureau of Industry and Security, *Available at* <https://www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-exports-faqs?view=category&id=33#subcat34>, What is the Deemed Export Rule?, "An export of technology or source code (except encryption source code) is "deemed" to take place when it is released to a foreign national within the United States. See §734.2(b)(2)(ii) of the Export Administration Regulations (EAR).

[2] See EAR §734.2(b)(3)

[3] David J. Glynn and Lizabeth C. Rodriguez, The Deemed Export Rule: Little-known but Pervasive, Winter 2009-2010, *Available at* <http://www.nals.org/?p=491>

[4] Zimmerman's Research Guide, LexisNexis, Bureau of Industry and Security, *Available at* <https://law.lexisnexis.com/infopro/zimmermans/disp.aspx?z=1254>

[5] U.S. Department of Commerce, Bureau of Industry and Security, Dual Use Export Licenses, export.gov, *Available at* 1.usa.gov/1dUOhIJ

[6] Bureau of Industry and Security, Deemed Exports and Fundamental Research for Biological Items, *Available at* 1.usa.gov/17JN0AI

[7] U.S. Department of Commerce, Bureau of Industry and Security, Commerce Control List Classification, *Available at* 1.usa.gov/159J79N; see also BIS SNAP-R website at 1.usa.gov/17JN5Ea

[8] Bureau of Industry and Security, Enforcement, Penalties, *Available at* 1.usa.gov/1b6vsnQ, penalties codified under the Export Administration Act of 1979, as

amended (EAA), 50 U.S.C. app. §§ 2401-2420 (2000), and the Export Administration Regulations, 15 C.F.R. Parts 730-774 (2007) (EAR); On October 16, 2007, President Bush signed into law the International Emergency Economic Powers (IEEPA) Enhancement Act, Public Law No. 110-96, amending IEEPA section 206. The Act enhances criminal and administrative penalties that can be imposed under IEEPA and also amends IEEPA to clarify that civil penalties may be assessed for certain unlawful acts. Criminal penalties can reach \$1,000,000 and 20 years imprisonment per violation and the administrative penalties can reach the greater of \$250,000 per violation or twice the amount of the transaction that is the basis of the violation.

[9] *Id.*

[10] *Id.*