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[Proposed Rules]
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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 734 and 772

[Docket No. 050316075-5075-01]
RIN 0694-AD29

Revision and Clarification of Deemed Export Related Regulatory
Requirements

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Bureau of Industry and Security (BIS) is reviewing the recommendations contained in the U.S. Department of Commerce Office of Inspector General Report entitled ``Deemed Export Controls May Not Stop the Transfer of Sensitive Technology to Foreign Nationals in the U.S.`` (Final Inspection Report No. IPE-16176-March 2004). Certain of these recommendations would require regulatory changes that would affect existing requirements and policies for deemed export licenses. BIS is seeking comments on how these revisions would affect industry, the academic community, and U.S. government agencies involved in research.

DATES: Comments must be received by May 27, 2005.

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ADDRESSES: You may submit comments, identified by RIN 0694-AD29, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>.

Follow the instructions for submitting comments.

E-mail: scook@bis.doc.gov. Include ``RIN 0694-AD29`` in the subject line of the message.

Fax: (202) 482-3355.

Mail or Hand Delivery/Courier: U.S. Department of Commerce, Bureau of Industry and Security, Regulatory Policy Division, 14th & Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230, ATTN: RIN 0694-AD29.

FOR FURTHER INFORMATION CONTACT: Alex Lopes, Director, Deemed Exports and Electronics Division, Bureau of Industry and Security, telephone: (202) 482-4875, or e-mail: alopes@bis.doc.gov. Copies of the referenced OIG Report are available at <http://www.oig.doc.gov/oig/reports/2004/BIS-IPE-16176-03-2004.pdf>

SUPPLEMENTARY INFORMATION:

Background

In its report, the Office of Inspector General (OIG) concluded that existing BIS policies under the Export Administration Regulations (EAR) could enable foreign nationals from countries and entities of concern to access otherwise controlled technology. Adopting the OIG's recommendations to address these concerns would entail regulatory or other administrative action that would clarify the definition of ``use'' technology subject to the EAR, base the requirement for a deemed export license on a foreign national's country of birth, and modify regulatory guidance on licensing of technology to foreign nationals working with government-sponsored research and research conducted in universities.

Definition of ``Use'' Technology

The OIG stated that confusion existed over the definition and implementation of controls associated with the ``use'' of equipment by foreign nationals in the United States. In Sec. 772.1 of the EAR, the term ``use'' is defined as: ``Operation, installation (including on-site installation), maintenance (checking), repair, overhaul, and refurbishing.'' The OIG expressed concern about the presence of the word ``and'' in the definition being interpreted to mean that all of the activities enumerated in the definition must be present in order to constitute ``use.''

The OIG concluded that whereas, under the ``use'' definition, BIS grants approval for foreign entities to operate, install, maintain, repair, overhaul, and refurbish equipment exported from the United States in order to permit the end-user the full range of uses for an exported item, the same ``use'' definition did not seem to apply to deemed exports (i.e., to foreign nationals ``using'' the equipment in the United States). The OIG concluded that it would be unlikely that one individual would have the responsibility or capability of accomplishing all of the enumerated tasks that together constitute ``use'' in most situations. In addition, the OIG also noted that two of the four multilateral control regimes defined the term ``use'' either with an ``or,'' or without any conjunction (i.e., a bullet point list of the activities).

The OIG further concluded that this difference in interpretation is critical in determining how to implement and enforce the deemed export provisions in the EAR. The OIG reported that U.S. academic and federal research institutions generally use the fundamental research exemption under the EAR for most of the research they conduct. However, when equipment is used by foreign nationals at a U.S. university or federal research facility, the OIG concluded that it is most likely accompanied by some transmittal of use or other information or instruction constituting ``technology.'' According to the OIG, many of the academic

and federal officials the OIG met with had not contemplated the transfer of technology associated with the ``use'' of equipment as a deemed export; others contended that the transfer of ``use'' technology related to equipment in furtherance of fundamental research is exempt under the regulations. The OIG suggested that BIS revise the definition of ``use'' in Sec. 772.1 of the EAR to replace the word ``and'' with the word ``or,'' as follows:

``Use''. (All categories and General Technology Note)--Means all aspects of ``use,'' such as: operation, installation (including on-site installation) maintenance (checking), repair, overhaul, or refurbishing.

Use of Foreign National's Country of Birth as Criterion for Deemed Export License Requirement

Current BIS deemed export license requirements are based on a foreign national's most recent citizenship or permanent residency. The OIG expressed concern that this policy allows foreign nationals originally from countries of concern to obtain access to controlled dual-use technology without scrutiny if they maintain current citizenship or permanent resident status in a country to which the export of the technology would not require a license. For example, transfer of technology to an Iranian who has established permanent residency or citizenship in Canada would be treated, for export licensing purposes under the existing guidelines, as a deemed export to a Canadian foreign national. This policy is described in the deemed export guidance provided on the BIS Web site at:

<http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html>

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The OIG recommended that BIS amend its policy to require U.S. organizations to apply for a deemed export license for employees or visitors who are foreign nationals and have access to dual-use controlled technology if they were born in a country where the technology transfer in question would require an export license, regardless of their most recent citizenship or permanent residency.

Clarification of Supplemental Questions and Answers on Government Sponsored Research and Fundamental Research

The OIG reviewed the questions and answers in Supplement No. 1 to part 734 of the EAR. OIG noted that whereas the questions and answers did not cover all scenarios, the intent was to help potential license applicants understand how BIS applies the EAR to specific facts. The OIG reported that it considered two of the answers provided may be inaccurate or unclear.

Answer to Question A(4)

Question A(4) from Supplement No. 1 to part 734, which falls under the ``publication of technology'' category, discusses whether ``prepublication clearance'' by a government sponsor (in this case the Department of Energy) would void the exemption in the EAR for material to be published and trigger the deemed export rule. See Sec. 734.7. (Published Information and Software). The answer states, ``no * * * the transaction is not subject to the EAR.'' The OIG stated that, according to Sec. 734.11 of the EAR, if research is funded by the U.S.

government and national security controls are in place to protect any resulting information, the research is subject to the EAR.

In its comments on the OIG report, BIS concurred with the OIG that the answer to Question A(4) requires clarification. BIS stated that it proposed to modify in the answer to Question A(4) to state, by reference to Question A(2) in this Supplement, that, if the government sponsor reviewer imposed restrictions on publication of the research, then the technology would continue to be subject to the EAR.

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Answer to Question D(1)

Question D(1), which falls under the ``research, correspondence, and informal scientific exchanges'' category, discusses whether a license would be required for a foreign graduate student to ``work'' in a laboratory. The answer provided in the supplement states, ``not if the research on which the foreign student is working qualifies as `fundamental research' * * *'' However, because allowing scientists, engineers, or students to work in a laboratory may necessitate their ``use'' of equipment, the OIG stated that this answer may lead a potential license applicant to assume that ``use'' of equipment is covered under the fundamental research exemption.

In its comments on the OIG report, BIS agreed that the answer to question D(1) requires clarification. BIS proposes to revise the answer for D(1) to qualify the statement that no license is required, by stating that, whereas no license is required for the transfer of technology to conduct ``fundamental research,'' a license may be required if, in conducting fundamental research, the foreign graduate student needs access to technology to ``use'' equipment if the export of the equipment to the student would require a license under the EAR.

Request for Comments

The Department of Commerce is interested in evaluating the impact that the changes recommended by the OIG would have on U.S. industry, academic institutions, U.S. government agencies, and holders of export controlled technology.

To ensure public participation in the review process, BIS is soliciting comments for 60 days on this proposal. BIS is particularly interested in views on the impact the proposal will have on technology developers and manufacturers, academic institutions, and U.S. government research facilities. BIS is interested in receiving specific information regarding the impact of the regulations, e.g., data on the number of foreign nationals in the United States who will face licensing requirements if the OIG's recommendations were adopted, and impact of compliance with the new licensing requirements--cost, resources, procedures. BIS is also interested in receiving any alternative suggestions regarding the concerns raised by the OIG.

Parties submitting comments are asked to be as specific as possible. BIS encourages interested persons who wish to comment to do so at the earliest possible date.

The period for submission of comments will close May 27, 2005, BIS will consider all comments received before the close of the comment period in developing a final rule. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. BIS will not accept public comments

accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. BIS will return such comments and materials to the persons submitting the comments and will not consider them in the development of the final rule. All public comments on this proposed rule must be in writing (including fax or e-mail) and will be a matter of public record, available for public inspection and copying. The Office of Administration, Bureau of Industry and Security, U.S. Department of Commerce, displays these public comments on BIS's Freedom of Information Act (FOIA) Web site at <http://www.bis.doc.gov/foia>. This office does not maintain a separate public inspection facility. If you have technical difficulties accessing this Web site, please call BIS's Office of Administration at (202) 482-0637 for assistance.

List of Subjects

15 CFR Part 734

Administrative practice and procedure, Exports, Inventions and patents, Research, Science and technology.

15 CFR Part 772

Exports.

Dated: March 23, 2005.
Matthew S. Borman,
Deputy Assistant Secretary for Export Administration.
[FR Doc. 05-6057 Filed 3-25-05; 8:45 am]

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