

exportcontroladvisory

New Export Control Certification Requirement on Visa Applications

January 2011

Beginning on February 20, 2011, the U.S. Citizenship and Immigration Services (“USCIS”) will require that all employers who wish to submit a Petition for a Nonimmigrant Worker certify under penalty of perjury their compliance with U.S. export control laws and regulations. Specifically, employers will now have to certify that they have (1) reviewed the Export Administration Regulations (“EAR”) and the International Traffic in Arms Regulations (“ITAR”), (2) determined whether a license or other authorization is or is not required before the foreign employee can have access to controlled products or technology, and (3) if a license or authorization is required, prevent the foreign employee from obtaining access to the controlled products or technology until the required license or authorization has been obtained. The new certification requirement appears in a revised Form I-129.

It is generally well recognized that an export occurs when an item or related technology / technical data is physical transferred outside the United States. Less well recognized is the so-called “deemed export” rule. The new certification requirement goes to the heart of the rule, and makes it critically important that employers of foreign nationals understand and comply with U.S. export control laws and regulations, including the deemed export rule, *before* they complete the certifications and risk perjury.

Under the deemed export rule, the release of technology or technical data to a foreign national within the United States constitutes an “export” of that technology or technical data to the home country of the foreign national. Such releases can be subject to U.S. Government export

licensing or approval requirements under the EAR or the ITAR, and an unauthorized release to a foreign national within the United States constitutes an export violation. The term “release” is broadly defined and can occur through a variety of means, including visual inspection of a product, instruction in its design, use or maintenance, access to computer networks, and verbal exchanges. A “foreign national” for these purposes is anyone who is not a U.S. citizen, a permanent resident (i.e., aliens possessing a valid Form I-551 or “green card”), or a so-called protected individual (generally, an individual here on asylum or similar special status). Anyone holding a temporary visa (B, E, F, H-1B, H-3, J-1, L-1, etc.) is treated as a foreign national for these purposes.

U.S. employers have always been required to comply with the “deemed export” rule. The new Form I-129 certification requirement will not change the rule in any way. However, making the certification may prove challenging for employers who wish to hire foreign nationals. Making inaccurate certifications can expose employers to liability for making false statements to the U.S. government, as well as liability for any underlying export control violations.

All employers, particularly those that may be required to make future certifications, are encouraged to review their export compliance programs and compliance status in order to ensure that procedures exist for accurately determining (a) whether their products (and equipment) and related technology and technical data are controlled by the EAR or the ITAR, and (b) whether their foreign national employees (current or future) require access to

controlled technologies and technical data. In addition, procedures must exist for ensuring that any necessary U.S. Government licenses or approvals are obtained in a timely manner. Employers should also consider including language in offer letters that clearly indicate that employment is subject to first obtaining required export control licenses.

What remains to be seen is how the new certification requirement will be enforced by the USCIS. By signing Form I-129, employers grant USCIS the authority to perform audits. Therefore, it is possible that USCIS or other Federal agencies acting on their behalf may appear at an employer's doorstep to confirm certifications made on the new form. Civil penalties ranging from fines to loss of export privileges, as well as criminal penalties, have been imposed on companies and individual corporate personnel involved in export violations. Moreover, foreign nationals who participate in an export violation may face exclusion or deportation. Penalties of perjury for false certifications, even if unintentional, now get added to the mix.

Noncompliance with the deemed export rule is pervasive. For instance, the U.S. government has reported that just 44 businesses were responsible for submitting 80% of the deemed export license applications during FY2008, despite the fact that hundreds, perhaps thousands, of U.S. companies and institutions conducted operations subject to the rule. In light of the U.S. Government's renewed enforcement focus and the potential for severe penalties for violations, companies and institutions can no longer afford to ignore the deemed export rule.

If you have questions regarding the information contained in this G&S advisory or need assistance with export controls compliance, please contact attorneys Kerry Scarlott or Eby Pineda-Dorcena.

[Kerry T. Scarlott](mailto:kscarlott@goulstonstorrs.com) 617.574.3572
kscarlott@goulstonstorrs.com

[Eby Pineda-Dorcena](mailto:epinedadorcena@goulstonstorrs.com) 617.574.6573
epinedadorcena@goulstonstorrs.com

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U.S. Export Control Reform – What does it mean for you?

**By Kerry Scarlott and Eby Pineda-Dorcena
Goulston & Storrs
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Nothing yet, but stay tuned. About a year ago, President Obama tasked members of his cabinet, including Secretary Gates, Secretary Clinton, and Secretary Locke, to perform a broad-based interagency review of the current U.S. export control system in order to make recommendations on how to reform it. On August 31, 2010, during a Department of Commerce annual conference, President Obama announced key elements of the administration's export control reform effort. The focus of the reform is to control key technologies and items that pose the greatest national security threat to the United States, while at the same time enhancing competitiveness of the manufacturing and technology sectors in order to increase exports and create jobs.

Currently there are three agencies responsible for the promulgation and enforcement of export control regulations: 1) Department of Commerce – which governs commercial and dual use items (i.e. items that have both a commercial and military applications) and administers the Commerce Control List (CCL); 2) Department of State – which governs items specifically designed for military application and administers the United States Munitions List (USML); and 3) the Department of Treasury's Office of Foreign Assets Control – which administers special sanction and economic embargo programs. The agencies have different approaches to identifying and controlling products and technology, and as a result exporters aren't always clear on which agency has jurisdiction.

In order to address the jurisdictional issue and other pitfalls of the existing regime, the Obama administration plans on doing a complete overhaul of the export control system. To that end, the administration has identified five significant anticipated changes to the existing regime: 1) developing a single export-control list, 2) forming a single licensing agency, 3) forming a single enforcement-coordination agency, 4) transitioning to a single information technology system, and 5) consolidating the lists of restricted or banned end-users into a single frequently updated list. The proposed changes will be implemented via a three-phased process, which is discussed below in more detail. These efforts will be led by the Departments of Commerce, State and Treasury, with significant input from the Department of Defense and others. In addition, in the coming weeks President Obama plans on signing an executive order establishing an Export Enforcement Coordination Center that will coordinate and strengthen enforcement efforts across various departments and agencies.

Phase I and II

During Phase I and Phase II applicable regulatory agencies will establish new criteria for determining what items need to be controlled, and develop a common set of policies for determining when an export license is required.

The Department of Commerce will then coordinate a restructuring of the CCL as currently embodied in the Export Administration Regulations (EAR), and the Department of State will coordinate a restructuring of the USML as currently embodied in the International Traffic in Arms Regulations (ITAR), in order to create "positive lists" based on objective criteria (i.e.,

technical parameters such as horsepower or microns), rather than broad, open-ended, subjective, catch-all, or design intent-based criteria.

Each list will then be broken into three tiers. Tier I will be for highly sensitive items – items that provide a critical military or intelligence advantage to the United States and are available exclusively from the United States, or items that constitute weapons of mass destruction. Tier II will be for somewhat less sensitive items – items that provide a substantial military or intelligence advantage to the United States and are available almost exclusively from multilateral partners and allies of the United States. Tier III will be for items that provide a significant military or intelligence advantage, but that are broadly available.

Once items are assigned to a tier, a licensing policy will be developed. Currently, the expectation is that a license will generally be required for items in Tier I for all destinations, while most of the items in Tier II will be authorized for export to certain destinations under license exemptions or general authorizations, and items in Tier III would not need a license. The overhaul of the two lists will result in some items being moved from the USML to the CCL or being decontrolled altogether.

Furthermore, the administration plans on creating a clear jurisdictional “bright line” between the items that are subject to control under the EAR (CCL) and those controlled under the ITAR (USMC). The goal is to allow exporters to easily and consistently know from which agency they must seek export approval. The administration will also make sure that the two lists are structurally aligned so that they can be combined during Phase III (see below). The administration’s goal is to begin issuing proposed revisions to the control lists and licensing policies later this year.

In addition to the above efforts, the administration plans on 1) harmonizing definitions of common terms that are used throughout the various regulations, 2) creating a common export license application form for use by the Departments of State, Commerce, and Treasury, and 3) develop a single list of proscribed persons and entities that will consolidate all the lists used by State, Commerce and Treasury.

The administration is also working on transitioning to a single information technology (IT) system. Currently, the Departments of Defense and State are being transitioned to the same IT system and the expectation is that by early 2011 the Department of Commerce will be using this same IT system. This change will ensure that the license reviewing process is efficient and that the various agencies have all the necessary information with which to make an informed decision.

Phase III

The most significant changes will occur during Phase III of the reform, which entails 1) combining the Commerce Control List and the USML into one list; 2) creating a single licensing agency; and 3) forming a single enforcement-coordination agency. The creation of a single enforcement-coordination agency means that enforcement will become an even higher priority for the United States government and that they plan on increasing efforts against individuals and companies who disobey the rules or have inadequate internal compliance programs.

While most of the proposed changes can be carried out primarily by executive order, creating a single licensing agency and a single enforcement coordination agency will require congressional

action. This will be dependent upon the outcome of the mid-term elections and where export control reform appears on Congress' agenda.

Conclusion

As you can see, the Obama administration has a lot of work ahead of it in order to overhaul a system that has its roots in the Cold War era. While to-date no changes have been made to the current regulations, we expect to see limited movement by the end of the year or early next year. In the meantime, enforcement activity in connection with the current regulations continues to ramp up, making compliance a priority.

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Kerry T. Scarlott

617-574-3572

kscarlott@goulstonstorrs.com

Eby Pineda-Dorcena

617-574-6573

epinedadorcena@goulstonstorrs.com

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