



Meeting the Deemed Export Challenge

Moderator: Bernard Kritzer
Director
Office of Exporter Services, BIS



Meeting the Deemed Export Challenge



Update 2012
July 18, 2012
Bernard Kritzer



Panelists:

- Bernard Kritzer, Director, Office of Exporter Services (OEXS)
- Stephen Hall, Senior Policy Advisor (OEXS)
- Julie Salcido, Special Agent in Charge, San Jose Field Office, Office of Export Enforcement
- Tracy Minnifield, Director, Dual-Use Licensing, Defense Technology Security Administration, Department of Defense
- July 2012

3



Competitiveness Challenge

- Technology leadership requires access to limited international pool of talent (e.g., H1B visas).
- International collaboration between industry and academic institutions.
- Collaboration involves many foreign nationals with advanced technical degrees.
- Large number of foreign nationals receiving technical degrees from U.S. universities.

July 2012

4



Origin of the Threat

■ U.S. Intelligence Community has noted:

- Collection and acquisition activities from over 56 foreign nations
 - 13 countries assessed to be most aggressive collectors of U.S. proprietary economic information and critical technologies
- Use of clandestine and illegal methods to collect technology
- U.S. private sector studies estimate loss in the billions every year

July 2012

5



The Threat

- Significance: Both national security and U.S. economy can be seriously damaged by illegal technology transfers.
- Damage to the economy can include loss of large amounts of proprietary R&D completed over many years.
- Loss of proprietary R&D can result in the establishment and/or enhancement of foreign competitors in leading edge technology sectors.

July 2012

6



The Debate

- Some favor stringent licensing with numerous conditions and compliance requirements.
- Others advocate License Exception with some compliance for industry (Intra-Company Transfer).
- Others support expansive interpretation of “fundamental research” by the academic and research community.

July 2012

7



Evolution of Deemed Exports

- 1994-1997: Initial licensing regime and U.S. technology growth (700+ licenses)
- 1997-2004: Streamlining licensing and conditions
- 2004-2011: Engagement with academic community; the DEAC; and ETRAC
- 2011-Present: Increasing number of licenses; I-129 certification; and awareness of more universities and small and medium enterprises

July 2012

8



Current BIS Outreach and Compliance Activities

- Over past year, 15 outreach activities with universities, trade associations, and groups such as the National Academies.
- August 2012 special seminar with University of Washington involving universities and research institutions.
- Deemed export compliance site visits
- Collaboration with State Bureau of Consular Affairs and Homeland Security on visa issues such as the I-129.

July 2012

9



Compliance “Iceberg” Challenges

- 1,200+ licensing activities in FY2011 and related provisos
- Industry and university interaction such as summer interns.
- Impact on small and medium sized firms
- I-129 Visa issue

July 2012

10



Moving Forward

- Expanded outreach and compliance --
 - Virtual training
- Deemed export site visits
- ECR and deemed exports (STA and Transition Rule)
- Interactive compliance tools

July 2012

11

Defense Technology Security Administration



**Department of Commerce Annual Update Conference
DoD Deemed Export License Review Process
July 18, 2012**

Tracy Minnifield

DTSA 
Ensuring the Edge



OVERVIEW

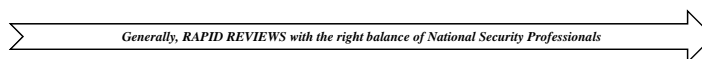
- License Review Process
- Trends
- Tips for Rapid DoD Decisions
- Technology Security Plan/Program

13



LICENSE REVIEW PROCESS

- Daily Dual-Use Tiger Team Meeting
- Scientists, engineers, licensing, and policy experts
- Average 80 – 90 licenses daily!
 - Approve ~77% on the spot
- ~ 25 Deemed Export licenses received weekly



14





TOP TRENDS w/DEEMED EXPORT LICENSES

- Broad request for unspecified “technology” for design, development and/or production
 - Single ECCNs for “technology” listed on license, but the license “Description” cites multiple ECCNs
- Expired Visas and missing/incomplete forms (e.g., I-20s)

Ensure ECCNs are relevant and germane...avoid requesting transfers to cover “Incidental Contact”

15



TOP TRENDS w/DEEMED EXPORT LICENSES

- Resume: Unexplained breaks in timelines
- Missing Letter of Explanation (LOE)
- Experience and background appears incompatible with requested scope of technology (Design, Development and Production)
 - (e.g., Logistics/Transportation Specialist and Communications/Event Manager)

Make sure you submit completed packages!

16





TECHNOLOGY SECURITY PLAN/PROGRAM

- Periodic employee training on best security practices (Export Compliance Managers and Corporate Security Team)
- Eliminate physical protection shortcuts to secure proprietary information
- Emphasis on a strict “Need to Know” policy (eliminate incidental contact license applications)



17



TECHNOLOGY SECURITY PLAN/PROGRAM

- Enhanced security screening -- consider including compliance managers in the new hire interview process
- Implement non-attribution ways to encourage employees to report suspicious activity
- Address practice of monitoring computer networks for activity prohibited by the company

18





TIPS FOR RAPID DoD DECISIONS

- Establish Internal Quality Control process (License Submission)
- Full disclosure of nature and scope of technology transfer
- Complete and thorough answers to requests for information
- Strong internal compliance plan/program

If you get questions from us, answer them completely...saves re-referral time!

19



Thank You!

20



**U.S. Department of Commerce
Bureau of Industry and Security
Office of Export Enforcement**



Julie L. Salcido

Special Agent in Charge, San Jose

UPDATE 2012

Washington DC – JULY 2012

**OEE OUTREACH
HOW DO WE DECIDE WHO TO VISIT?**

- Strategic significance of the products a company makes or sells.
- Regularity of foreign visitors – visas.
- Export and licensing history.
- Information from other investigations or industry sources.
- In 2011, OEE made 1053 outreach contacts with industry.

DO I NEED TO APPLY FOR AN EXPORT LICENSE FOR TECHNOLOGY UNDER THE "DEEMED EXPORT" RULE

Assuming that no license exception is available, U.S. entities must apply for an export license under the "deemed export" rule when both of the following conditions are met:

- (1) they intend to transfer controlled technologies or source code to foreign nationals in the United States; and
- (2) transfer of the same technology or source code to the foreign national's home country would require an export license.

RECENT DEEMED EXPORT ENFORCEMENT CASES

MERGERS AND ACQUISITIONS
(HIDDEN COSTS OF MOVING U.S TECHNOLOGY OFF-SHORE)




VOLUNTARY DISCLOSURE

RECENT DEEMED EXPORT ENFORCEMENT CASES

RECENT CIVIL PENALTY CASES

March 2011 - \$100k fine: Technology transfer of non-combat military vehicle manufacturing technical data to foreign manufacturing partners and non-US employee.


February 2012 - \$230k fine: Transfer of technology, manufacturing equipment, and technical data to non-US employee related to crime control items (remote monitoring equipment)



Bureau of Industry and Security
Office of Export Enforcement

VOLUNTARY SELF-DISCLOSURE – \$764.5

- Benefits of submitting a VSD
- Great Weight Mitigation of 50%
- The majority of VSD cases result in Warning letter or no adverse action
- Costs of not disclosing violations
- Risk of criminal investigation and associated costs
- Damage to Brand/Corporate Reputation



How the Government Determines Appropriate Enforcement Action

VSD Investigations generally consider these key factors to decide investigative strategy and case resolution:

- What was the item?
- How serious is the potential damage to National Security?
- Where did the item end up?
- Would a license have been approved for that end user or end use?
- How did the violation happen?
- Isolated mistake? Intentional bad act? Systemic problem? Negligence?
- How was the violation discovered?
- What steps did the company take to investigate and rectify?
- Was the company cooperative and concerned about compliance?
- How will the company prevent future violations?

BIS/OEE 2011 VSD Statistics

In FY2011 BIS/OEE completed 262 VSD investigations.

Case Resolutions included:

- 174 Closed by issuance of Warning Letter (66%)
- 41 Closed by issuance of a No action letter or with no violation (16%)
- 39 Other closed-possibly due to existing case or referred to another agency (15%)
- 8 Closed by issuance of Administrative Sanctions (3%)

(One VSD, Flowserve investigation resulted in 11 separate charging letters filed and a \$2.5 million settlement)

In 2011, 221 new disclosures were submitted to OEE.



Protecting U.S. Security through Prevention and
Enforcement



Julie L. Salcido
Special Agent in Charge
San Jose Field Office

408-291-4211

Julie.Salcido@BIS.DOC.GOV



U.S. Department of Commerce
Bureau of Industry and Security

Meeting the Deemed Export Challenge

Update Conference

July 18, 2012

Stephen B. Hall - Office of Exporter Services



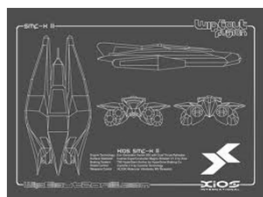
Bureau of Industry and Security (BIS)

- BIS administers and enforces controls on the export of *dual-use* and commercial items for national security and foreign policy reasons
- Goal – Ensure authorized trade in controlled commodities, software, and technology consistent with U.S. national security interests



What is Technology ?

- In the EAR--“specific information necessary for the ‘development,’ ‘production,’ or ‘use’ of a product.”
- Seen in: blueprints, manuals, models engineering diagrams etc.





Deemed Exports

- The obligation to get a license *before* releasing controlled technology or source code to a foreign person is informally referred as the “deemed export” rule.
- Releases of controlled technology or source code to foreign persons in the U.S. are “deemed” to be an export to the person’s home country.



Publicly Available Technology

- No license needed if technology is “publicly available”
- Examples-
 - Publication in periodicals, books, print, electronic, or any other media available for general distribution to the public or community of interested persons
 - Ready availability at libraries open to the public or at university libraries
 - Instruction in catalog courses and associated teaching laboratories of academic institutions



Publicly Available Technology

- Through published patents and patent applications;
- Through release at an open conference, meeting, seminar, trade show or exhibition;
- Through fundamental research in science and engineering where the resulting information is published and shared broadly in the scientific community



Nationality

- Commerce Department looks to a foreign person's most *recent* country of citizenship or permanent residence.
- State Department looks at current nationality and ***all*** prior nationalities and place of birth.



Nationality (continued)

- A person granted U.S. citizenship
- A person granted permanent residence status –Green Card holders
- A person granted status as a “protected individual” under 8 U.S.C. 1324b(a)(3).



Critical National Assets

“Intellectual property is deemed critical if by its nature it is a game changing technology, process, or conceptual idea and its loss or compromise would jeopardize U.S. national and/or economic security”

Federal Bureau of Investigation



What technologies are being targeted ?

- Pharmaceuticals
- Nanotechnology
- Quantum Computing
- Advanced Materials
- Communication and Encryption Technology
- Weapons Systems yet unclassified
- Biotechnology



Methods Used to Target Technology

- | | |
|--|--|
| ■ Unsolicited emails | ■ Attending/Hosting conferences |
| ■ Front companies | ■ Relocating R&D facilities overseas |
| ■ Liaisons with universities that have ties to defense contractors | ■ Circumventing export control laws |
| ■ Recruitment by foreign intelligence services | ■ Visiting scientific and research delegations |
| ■ National laboratories | ■ Hacking |
| ■ Compromise of laptop while traveling overseas | ■ Downloading information from your network |



Part 6- DHS I-129 Form

Part 6. Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States

(For H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions only. This section of the form is not required for all other classifications. See Page 3 of the Instructions before completing this section.)

Check Box 1 or Box 2 as appropriate:

With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

- ☐ 1. A license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or
- ☐ 2. A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.



DHS Form I-129- Part 6-

- Now in effect and only for H-1B,O-1A and L-1 non-immigrants
- Petitioner does not need to obtain an export license prior to filing, just confirmation that deemed export rules will not be violated prior to getting a license if one is needed
- Organizations releasing controlled technology or source code must first obtain an export license.



DHS Form I-129- Part 6-

- Since Introduction in February 2011
 - Human Resources Department more often involved in export controls
 - Increase in deemed export licenses



Deemed Export Licenses- 2008-2011

	2008	2009	2010	2011	Total	% change 08-11
Approved	726	654	750	1,155	3,290	59.8%
Rejected	5	3	3	4	15	-20.0%
RWA	87	93	76	76	332	-12.6%
Total	818	750	829	1,240	3,637	51.6%

-

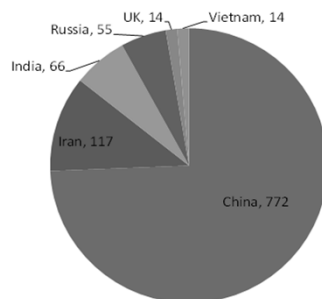


Top Deemed Licenses Approved- by ECCN

ECCN	2008	2009	2010	2011	Total
3E001	225	186	242	323	976
5E001	162	141	246	309	858
3E002	64	56	61	199	380
4E001	50	44	27	39	160
2E003	35	36	24	30	125
1E001	48	69	24	29	170



Top 6 Countries of Approved Deemed Export Licenses, 2011





Deemed License Procedures-EAR

1. Obtain PIN from SNAP-R
2. SNAP-R- complete basic information
3. Add letter of explanation
4. Add applicant technology control plan
5. Add resume
6. Application checklist- review
7. *Sign the application!!!*



15 CFR- 734 Provisions

- Fundamental Research - § 734.8
- Educational Information - § 734.9
- Patent Applications - § 734.10
- Government-sponsored research covered by contract controls - § 734.11

Be aware of license exceptions and country groups.



Challenges to Universities

- U.S. based Universities setting up overseas branches
- With reduction in state funding-increase need for private/government research monies and full tuition from foreign students and researchers
- Increased collaboration with overseas researchers
- U.S. universities face increasing competition abroad



Challenges to Universities

Fundamental Research:

- No restriction on access of information vs. deemed export license and conditions
- Procedures/compliance requirements
- NSDD-189- *to the maximum extent possible- items of fundamental research remain unrestricted*



Challenges to Universities

- Compliance with Part 734 of the EAR
 - NDA/Confidentiality Agreements
 - Material Transfer Agreements
 - Training with appropriate staff
 - Commitment/Questionnaire
 - “Use” technologies
 - Proposal review for export control
 - Use of license exceptions-not always used



Deemed Export Resources

- On BIS Website:
 - Deemed Exports FAQ's
 - Deemed Exports Fact Sheet
 - Guidelines for Preparing Export License Applications Involving Foreign Nationals
- On USCIS website:
 - Form I-129 Part 6 FAQ's



Upcoming BIS Deemed Exports Activity

- August 3- Seattle, Washington
- Sponsored by- University of Washington –
*“Compliance Implications for Universities and
Research Institutions in the Pacific North West”*
- Contact: Carol Rhodes- Office of Sponsored
Programs, University of Washington- tel: 206-
543-2139 or carhodes@u.washington.edu



Contacting Us

U.S. Dept. of Commerce (dual-use licenses)

-Washington D.C. telephone- 202- 482-4811

-Irvine, CA office- telephone- 949- 660-0144

Web site – www.bis.doc.gov- has FAQ's for
deemed exports & upcoming workshops

U.S. Dept. of State (military-related licenses)

Telephone- 202-663-1282

Web site: www.pmddtc.state.gov