



Export Control Reform:  
Fulfilling the Promise  
**UPDATE**  
CONFERENCE ON EXPORT CONTROLS AND POLICY

# Deemed Exports and the Export Control Reform Initiative

**Bernard Kritzer**  
**Director**  
**Office of Exporter Services**  
**July 24, 2013**



U.S. DEPARTMENT OF COMMERCE  
BUREAU OF INDUSTRY AND SECURITY

## Agenda

Bernard Kritzer – Director – Office of Exporter Services –  
*Introduction*

Stephen Hall – Office of Exporter Services-*Deemed Exports Overview*

Julie Salcido – Special Agent in Charge – Office of Export Enforcement – San Jose, CA – *Enforcement Issues with Deemed Exports*

Patricia Peterson – Dual-Use Division – Defense Technology Security Administration – *Deemed Licenses*

Bernard Kritzer – *The Challenge of Deemed Exports*



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## Geopolitical Landscape

- Multipolar world
- State sponsors of terrorism
- Rise of individuals and terrorist groups



## Why are items controlled ?

- Safeguard national security
- Foreign targeting of critical technologies
- Enhance U.S. competitiveness and technology leadership
- Therefore, prevent diversion of technology to bad people, bad place and bad end-uses.





## To Whom are items controlled ?

- Countries that pose a military threat re: conventional arms
- Proliferators of weapons of mass destruction
- State sponsors of terrorism
- Terrorist groups and persons



## What technologies are controlled ?

- Technologies for the “use”; “development”; and “production” of items on the Commerce Control List.
- Most technologies are based on U.S. participation in and administration of multilateral controls (e.g., Wassenaar)
- Anti-terrorism controls on 5 countries





## How are items controlled ?

- Licenses for items on CCL
- BIS 22,800 license in CY2012 with 85% approval rate
- Denial rate <1%
- Processing time under 30 days
- BIS educates exporters, reexporters, freight forwarders, other affected members of the public to increase compliance with the regulations



## Evolution of Deemed Exports

- 2011-Present: entrance of more universities and research institutes
- Growth of industry-university research partnerships
- Increase in U.S.-foreign university collaboration on research
- University participation in Federally funded research
- Compliance iceberg







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## Technology Developments

- Short product cycles and high capital costs
- Constant innovation with premium on R&D for emerging technologies
- International collaboration at commercial and R&D level, including academia
- Emergence of highly talented and mobile work force with emphasis on education



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## BIS/Academic Dialogue

- Conducted 29 deemed outreach activities in FY 2012, a record
- BIS is working with the academic community and the President's Export Council Subcommittee on Export Administration Outreach Committee to expand the dialogue.
- Universities participate in and support the work of the Emerging Technology and Research Advisory Committee.
- Universities contributing comments to Export Control Reform



## Deemed Exports & the Export Control Reform Initiative

- Strategic Trade Authorization (STA)
- Technology and Software – Unrestricted (TSU)
- Emerging Technologies and ECCN O\_521
- Harmonized definitions





## Strategic Trade Authorization

- STA is also applicable to deemed exports as a license exception
- Non-Disclosure Agreements
- Applicable to nationals from the 36 countries
- 117 companies have exported under STA (vs. 3 in July 2011)
- 1,743 shipments under STA (vs. 4 in July 2011)
- \$165.7 million worth of exports under STA
- Top destinations for STA – Sweden and Taiwan
- Top ECCNs – 0A987 (optical sights-firearms), 6A003 (cameras) and 9A004(spacecraft-related)



## License Exception TSU

- License Exception Technology and Software-Unrestricted Corresponds with ITAR – 125.4(b)(10)
- Announced June 21, 2013 with the transition rule

*“authorize the release in the United States of “technology” and source code that is subject to the EAR by U.S. university to foreign persons who are their bona fide and full time regular employees” subject to certain conditions.*

- No release to foreign nationals from countries subject to U.S. arms embargo





## OY521

- Provides a mechanism for identifying and controlling items that warrant export controls but are not yet categorized on the CCL or USML, like emerging technologies
- Subject to world-wide license requirement (except Canada) under Regional Stability – RS Column 1
- Review Procedures: US Government will review the sensitivity of each potential OY521 item on a case-by-case basis.
- Duration: 1 year initial duration with possible two one year extensions as OY521.
  - Time needed to get US Government and international control regimes to reach agreement if item is to be controlled



## OY521

- Determination of item to be placed in OY521:
  - BIS, with concurrence from Departments of State and Defense, will identify and classify items to be placed in OY521
  - BIS seeks additional input from the Technical Advisory Committees
  - Appeal – under 756.1 (a)(1) the EAR provides that the public may submit a request to: amend, revoke or appeal a regulation at any time
  - Identification of the item in OY521 – BIS will seek to identify items by a broader descriptor that need not be company specific





## BIS & Deemed Export Outreach

- We have gained useful information to update the Deemed Exports FAQ's and Supplement 1 to part 734 of the EAR
- New – Deemed Export Interactive Tool available soon – self-paced determination if deemed license application is needed



## Export Control Reform and Academia

- Expanded and focused outreach and compliance
  - Virtual training
- Interactive compliance tools
- Export Control Reform – public comments
- BIS participation at University of Pennsylvania 2 day deemed conference March 2013 and University of Washington – August 2012 – information gathering for policy changes





## BIS Contact Information

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*Senior Analyst – Deemed Exports*  
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## Recent Developments in Deemed Export Licenses

**Stephen B. Hall**  
**Office of Exporter Services**  
**July 24, 2013**





## Four Elements of Deemed Exports

1. What is a deemed export ?
2. Which agencies are involved in deemed exports ?
3. What software and technologies?
4. Who can have access to controlled software and technologies ?



## What is a Deemed Export ? – EAR

- The obligation to get a license *before* releasing controlled technology to a foreign person is informally referred as the “deemed export” rule.
- Releases of controlled technology to foreign nationals in the U.S. are “deemed” to be an export to the foreign national’s country or countries of nationality.
- Therefore, prevent diversion of technology to bad people, bad place and bad end-uses.





## What Is Being Targeted?

- Key Dual-Use Technologies
  - Biotechnology
  - Pharmaceuticals
  - Nanotechnology
  - Quantum Computing
  - Advanced Materials
  - Encryption & Communications
  - Electronics



## Methods of Targeting

- Unsolicited emails
- Front companies
- Compromise of laptop
- Hacking
- Downloading information from network
- Visiting foreign delegations
- Circumventing export control laws
- Attending/hosting conferences

Other vulnerabilities: locating R&D overseas;  
foreign liaisons with university research labs





## Which Agencies Control Deemed Exports ?



- Conducts Visa interviews at Embassies – Bureau of Consular Affairs
- Administers military-related export licenses through DDTC



- Issues export licenses through BIS



- Approves and implements information on the I-129 form through U.S. Citizenship & Immigration Service



## What Technologies and Source Code are Controlled under the Deemed Exports Rule ?

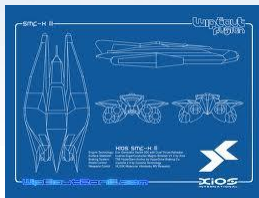
- Release of technology or non-encryption source code
  - Non-encryption source code may be technology or software
- In the EAR under each category look for
  - Product Group “E” – Technology
  - Product Group “D” – Software





## 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.



## Publically Available Technology

- If technology is “publically available” as defined in the EAR, it is not subject to the regulations
- Examples
  - Sales through newsstands and bookstore
  - Through subscriptions available to anyone
  - At libraries open to the public or where the public can obtain documents





# Who Can Have Access to Controlled Technologies ?

Nationality:

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



## Nationality (continued)

## Exempted from the Deemed Export Rule

- 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).

NOTE: anyone with U.S. citizenship is exempted.





## Fundamental Research

- EAR §734.8 – information that arises during or results from fundamental research is not subject to the EAR.
- “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.”



## The Deemed License Application Process

I-129 Form

Visa

BIS or State Dept. License

Follow-Up/Compliance





## 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.



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## 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 must first obtain an export license.
- So far in 2012 – huge increase in H1B visa petitions – 25,600 since April 1



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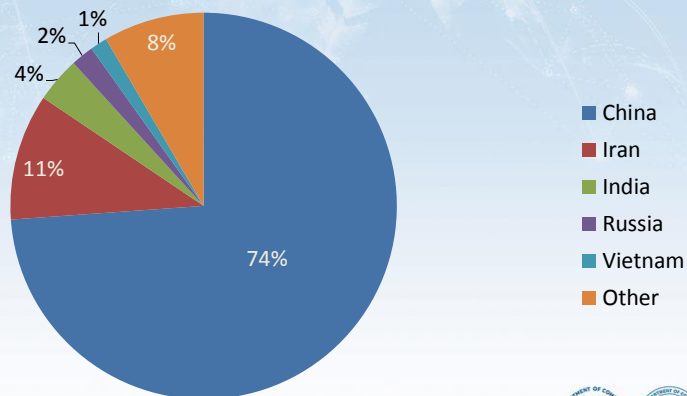


## Deemed Export Licenses, 2009-2012

|                         | 2009 | 2010 | 2011  | 2012 | Total | % change 09-12 |
|-------------------------|------|------|-------|------|-------|----------------|
| Approved                | 654  | 750  | 1,160 | 842  | 3,406 | 28.7%          |
| Rejected                | 3    | 3    | 4     | 2    | 12    | -33.3%         |
| Return Without Action   | 93   | 76   | 76    | 71   | 316   | -23.7%         |
| Total                   | 750  | 829  | 1,240 | 915  | 3,734 | 22.0%          |
| Average Processing Time | 37.5 | 42.2 | 40.5  | 45.4 | 41.4  | -              |

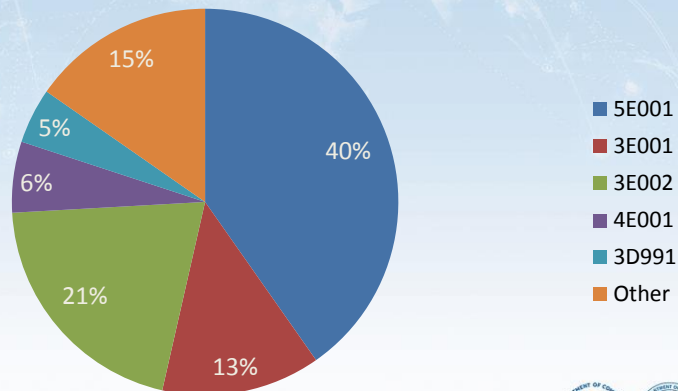


## Top Nationalities Receiving Deemed Export Licenses, CY2012





## Top ECCNs Receiving Deemed Export Licenses, CY2012



## Deemed Export License Processing

- SNAP-R application
- Complete CV/resume
- Letter detailing assignment/position/responsibilities
- I-129 visa form
- 30-40 days processing time – cannot begin without this authorization
- Attend Roundtable #20 on Thursday





## 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](http://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](http://www.pmddtc.state.gov)



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**San Jose Office for Export Enforcement**

**Bureau of Industry and Security**

**Washington DC – JULY 2013**

**DEEMED EXPORT ENFORCEMENT**

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## OFFICE OF EXPORT ENFORCEMENT

- Sensitive technology transfer and unauthorized use of export controlled data are BIS Enforcement priorities.
- Compliance managers are urged to routinely audit who has access to export controlled technical data and software and what authorizations exist for use.



## Deemed Export Compliance Considerations

- Trade compliance should provide ongoing training to human resource and hiring managers.
- Areas of vulnerability include intern and contract employee access to projects that contain controlled technology.
- Technical exchange between US and foreign engineers in global subsidiaries, subcontracted facilities and/or universities.





## I-129 Certification

- This certification requires that the company sponsoring Visa applicant has examined what access, if any, the foreign employee will have to export controlled data within the scope of their employment and confirm that all US export license requirements have been met.



## Deemed Export Audits

- The Office of Export Enforcement in conjunction with Office of Exporter Services will complete more than 50 Deemed Export Outreaches in FY13 to confirm compliance with conditions on Deemed Export Licenses issued.
- More Deemed Export Outreach anticipated for FY14 with a focus on items in USML Categories VIII (aircraft), XI (electronics) and XV (satellites) transferring to the CCL.





## RECENT DEEMED EXPORT ENFORCEMENT CASES

### RECENT CIVIL PENALTY CASES

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

July 2012 - \$111k fine: Unauthorized release of 3E001 controlled U.S. technology for design and manufacture of bellows used in semiconductor wafer processing equipment at manufacturing facility in Singapore to Chinese employees (Deemed Reexport). Also unauthorized export of the bellows to manufacturing partners in China.



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## How the Government Determines Appropriate Enforcement Action

- What was the item or technology transferred?
- How serious is the potential damage to National Security?
- Where did the item or technology end up?
- Would a license have been approved for that end-user/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?



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## Technology Exports and Deemed Re-export

- When manufacturing or development technology is transferred from the United States for use in another country.
- Do your manufacturing partners understand EAR requirements and how to avoid deemed reexport violations?
- Make sure to classify U.S. technology developed or used by your company and identify export authorization requirements prior to exporting technology or sharing it with foreign partners.



## Technology Exports

- Global transfer of technology for manufacturing and technical support must be examined for export control requirements.
- When license requirements exist create a plan for compliance and obtain written agreements on how compliance responsibilities will be met and maintained.
  - Also ensure that you share all license conditions with your overseas partner and ensure they can be complied with.





## Export Control Reform

- Does your company possess ITAR technology that will transition to Commerce control?
  - ITAR and EAR standards for deemed exports differ
    - ITAR: control based on country of birth and all subsequent nationalities
    - CCL: control based on country of most recent citizenship or permanent residency
- If so, how will your technology control plan change? What are your plans for transition and implementation?



## Protecting U.S. Security through Prevention and Enforcement



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## ***OVERVIEW***

- DoD Deemed Exports License Review Process
- Trends
- Technology Security Plan/Program
- Tips for Rapid DoD Decisions
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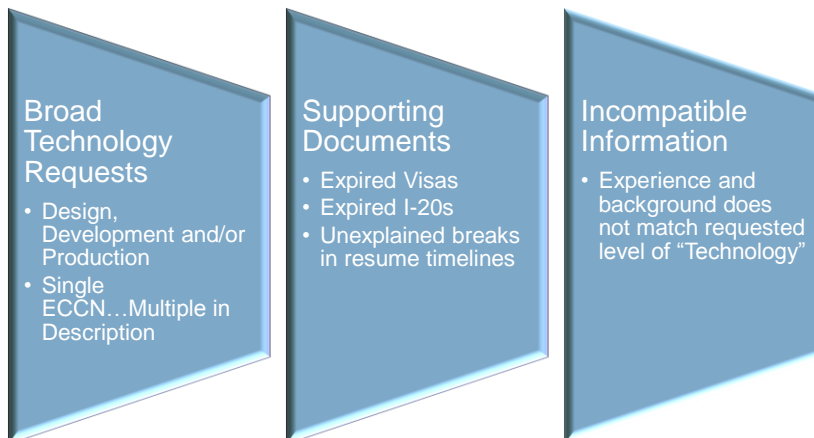
## ***LICENSE REVIEW PROCESS***



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## ***TOP TRENDS w/DEEMED EXPORT LICENSES***



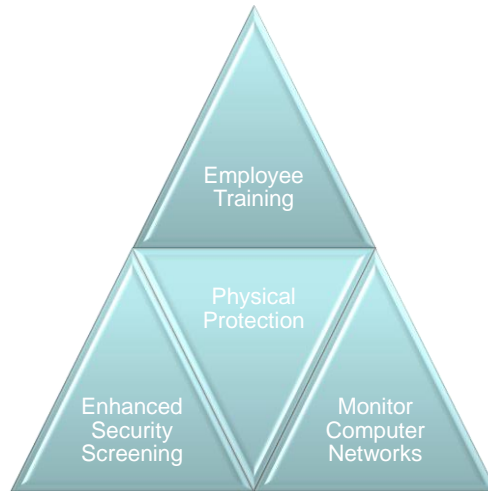
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## ***TECHNOLOGY SECURITY PLAN/PROGRAM***

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## ***OVERVIEW***

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## ***TIPS FOR RAPID DoD DECISIONS***

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- Begin with 15 CFR Chapter VII, Parts 738.4 and 748
- Full disclosure of nature and scope of technology transfer
- Complete and thorough answers to requests for information
- Strong internal compliance plan/program
- Establish Internal Quality Control process (License Submission)

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## ***OVERVIEW***

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# Questions

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## Backup Information

- <http://www.fbi.gov/sanfrancisco/press-releases/2012/former-dupont-scientist-pleads-guilty-to-economic-espionage>
- <http://www.fbi.gov/chicago/press-releases/2012/suburban-chicago-woman-convicted-of-stealing-trade-secrets-from-motorola-before-attempting-to-travel-to-china>