

Deemed Exports Rules Apply to You Company or Organization

By Ric Frantz

Deemed Exports. We have been hearing this term from the Bureau of Industry and Security (BIS) for more than a decade including in more than 100 outreach events each year since 2004. In 2005 only 4.2% (707) of BIS' 16, 719 license applications reviewed were for deemed exports and it may be that some U.S. organizations still don't fully understand that their activities are subject to the deemed export regulations. This has been documented in the Department of Commerce's Office of Inspector General (OIG) report of September 2004 to Congress that states that companies and academic institutions often are unaware of or unclear about their obligations under these regulations. This year BIS is forming a Deemed Export Advisory Committee to review all issues regarding the deemed export policy.

A deemed export is any release of technology or source code subject to the Export Administration Regulations (EAR) to a foreign national in the U.S. It does not apply to persons lawfully admitted for permanent residence in the United States or to persons who are protected individuals under the Immigration and Naturalization Act [8 U.S.C. 1324b(a)(3)]. See 15 CFR 734.2(b)(2) of the EAR for its "Deemed Export" regulation. Note that the International Traffic in Arms Regulation (ITAR) has a corresponding regulation that applies to technical data exported foreign persons which is found at 22 CFR 120.17(a)(4). Such technology items can be in a tangible form (technical data) or in an intangible form (technical assistance). The technology items can be applicable to product development, production or use of an item.

Some organizations may think that if they do no manufacture controlled products the deemed export regulations are not applicable to them. This thinking could get the organization into trouble. Controlled technology or source code may be used in their process of developing or producing non-controlled products.

Other organizations may no have or think they may not have any foreign national employees. Even those without foreign national employees need to be concerned with foreign national customers, venders, contractors and other individuals that visit their facility or they otherwise have dealings with.

A suggested deemed export control program should have a system of identifying the citizenship or permanent residencies of hires, contractors, and others as part of the hiring process and a classification system that identifies the technology and/or software that the individual will need to access in his/her job responsibilities. A decision then can be made to determine what ongoing export authorization will be required before the foreign national begins his or her job duties. The program need to include a system that restricts the foreign national from non-authorized technology and source code. In addition a system needs to be in place that identifies changes in technologies that may become available to the foreign national due to new technologies available in the organization or a change in job responsibilities. The program also needs a system to deal with visitors as well.

The deemed export control program needs reflect the current BIS deemed export control

regulation policies as they can be revised from time to time. A helpful source is the BIS “Deemed Export” Questions and Answers at <http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html>.

Finally it needs to be noted that BIS’ Office of Export Enforcement actively pursues violations of the deemed export regulations along with their ongoing export violation investigations.