

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 080512652-8653-01]

**Request for Public Comments on Deemed Export Advisory Committee Recommendations:
Narrowing the Scope of Technologies on the Commerce Control List Subject to Deemed Export
Licensing Requirements and Implementing a More Comprehensive Set of Criteria for Assessing
Probable Country Affiliation for Foreign Nationals**

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Notice of Inquiry.

SUMMARY: The Bureau of Industry and Security (BIS) is publishing a notice of inquiry in order to elicit comments regarding two specific recommendations made by the Deemed Export Advisory Committee (DEAC) with respect to BIS's deemed export licensing policy. BIS is requesting comments on whether the scope of technologies on the Commerce Control List that are subject to deemed export licensing requirements should be narrowed, and if so, which technologies should be subject to deemed export licensing requirements. Additionally, BIS is seeking comments on whether a more comprehensive

set of criteria should be used to assess country affiliation for foreign nationals with respect to deemed exports.

DATES: Comments must be received no later than [INSERT DATE 90 DAYS AFTER PUBLICATION].

FOR FURTHER INFORMATION CONTACT: Alex Lopes, Director, Deemed Exports and Electronics Division, 202-482-4875, alopes@bis.doc.gov. Ilona Shtrom, Senior Export Policy Analyst, Deemed Exports and Electronics Division, 202-482-3235, ishtrom@bis.doc.gov. The DEAC report may be accessed at <http://tac.bis.doc.gov/2007/deacreport.pdf>.

ADDRESSES: You may submit comments, identified by “DEAC Report comments,” by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: rp2@bis.doc.gov. Include “DEAC Report comments” in the subject line of the message.
- Fax: 202-482-3355
- Hand Delivery/Courier: Steven Emme, U.S. Department of Commerce, Bureau of Industry and Security, Regulatory Policy Division, 14th & Pennsylvania Avenue, N.W., Room 2705, Washington, D.C. 20230, ATTN: DEAC Report comments.

SUPPLEMENTARY INFORMATION

Background

Under the Export Administration Regulations (EAR), 15 C.F.R. Parts 730-774 (2008), which implement the Export Administration Act of 1979, as amended, 50 U.S.C. app. §§ 2401-2420 (2000), and the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1706 (2000)), the Bureau of Industry and Security (BIS) administers licensing for deemed exports, which are the “release of technology or source code subject to the EAR to a foreign national” (§ 734.2(b)(ii) of the EAR). When technology or source code is released to a foreign national, it is deemed to be an export to the home country or home countries of the foreign national. For purposes of the EAR’s deemed export rule, foreign nationals do not include U.S. citizens, U.S. permanent residents, and protected individuals under the Immigration and Naturalization Act ((8 U.S.C. § 1324b(a)(3)).

To determine a foreign national’s home country for purposes of deemed export licensing, BIS uses a foreign national’s most recently established legal permanent residency or most recently established citizenship. For example, in the deemed exports context, an Iranian foreign national who establishes legal permanent residency in Canada and subsequently immigrates to the United States would be treated as a Canadian. Similarly, an Iranian foreign national who establishes citizenship in the United Kingdom (U.K.) and subsequently immigrates to the United States would be treated as a U.K. citizen for deemed export licensing purposes. In implementing this policy, BIS relies on exporters to self-determine a foreign national’s home country with additional guidance provided on the BIS website at www.bis.doc.gov.

The existing guidance provided on the BIS website emphasizes that there will be deemed export licensing scenarios where an exporter will have difficulty determining where a foreign national’s ties lie. Some of these difficulties may include the following scenarios: prior or current employment at a prohibited end-user (such as employment at an entity on the Entity List in Supplement No. 4 to part 744), expiration of the foreign national’s permanent residency status while that foreign national continues to

receive technology or source code subject to deemed export licensing requirements, and the possibility of a foreign national not being able to comply with a country's permanent residency requirements. In these instances, exporters are advised to submit a license application or to seek guidance from BIS before proceeding with the release of controlled technology or source code subject to the EAR to the foreign national.

The issue of home country determinations was highlighted in a report issued by the Office of the Inspector General (OIG) of the Department of Commerce in March of 2004. The OIG report concluded that BIS policies could enable foreign nationals from countries and entities of concern to access controlled technology and source code without a license. Among its findings, the OIG recommended that the foreign national's country of birth should be used to determine deemed export license requirements rather than the foreign national's most recent citizenship or legal permanent residency.

In response to this and other recommendations made by the OIG, BIS published an advance notice of proposed rulemaking on March 28, 2005 (70 FR 15607), seeking comments on how the OIG's recommendations would affect industry, the academic community, and government agencies involved in research. On May 22, 2006, BIS published a notice (71 FR 29301) that announced the creation of the Deemed Export Advisory Committee (DEAC), a federal advisory committee established under the terms of the Federal Advisory Committee Act (FACA), 5 U.S.C., app. 2 (2005), the EAA, and IEEPA to provide recommendations to the Secretary on BIS's deemed export policy. The DEAC was formed to help ensure that the deemed export licensing policy most effectively protects U.S. national security while ensuring U.S. technological innovation.

After reviewing comments submitted in response to the advance notice of proposed rulemaking, BIS published a withdrawal of advance notice of proposed rulemaking on May 31, 2006 (71 FR 30840). In that notice, BIS stated that it would maintain the current policy of using a foreign national's most

recent country of citizenship or legal permanent residency when determining licensing requirements. BIS reasoned that a declarative assertion of affiliation was more significant than the geographical circumstances of birth when determining the home country of the foreign national.

Comments submitted in response to the advanced notice of proposed rulemaking were reviewed by the DEAC. Following six public meetings held in Washington, DC and in cities around the country at which the committee heard from interested stakeholders in academia, industry, and government, the DEAC submitted its final report, “The Deemed Export Rule in the Era of Globalization,” to the Secretary of Commerce on December 20, 2007. The report contained several recommendations to improve and streamline BIS’s deemed export rule. This notice of inquiry focuses on two of those recommendations.

DEAC Recommendations

Narrowing the Scope of Technologies on the Commerce Control List Subject to Deemed Export Licensing Requirements and Conducting an Outside Review of Technologies

Among its recommendations, the DEAC urged that BIS narrow the scope of technologies on the Commerce Control List (CCL) and involve an outside panel of experts to conduct an annual “zero-based” review of which technologies should be on the CCL, with an eye toward determining which technologies should be subject to deemed export licensing requirements. In its report, the DEAC recommended narrowing the scope of technologies on the CCL because it believed that BIS should concentrate on those technologies having the greatest national security concerns and should eliminate from the CCL those technologies having little national security concerns. By building higher walls around fewer technologies, the DEAC believed that BIS could more effectively protect U.S. national security interests while maintaining U.S. innovation.

Partly in response to the DEAC's recommendation regarding the scope of technologies on the CCL, BIS announced the formation of the Emerging Technologies and Research Advisory Committee (ETRAC), a technical advisory committee that will be established under the terms of the EAA, IEEPA, and FACA, and will comprise representatives from research universities, government research labs, and industry. The ETRAC will make recommendations to BIS regarding emerging technologies on a regular basis as well as advise BIS on the conduct of a "zero-based" technology review envisioned by the DEAC. A zero-based review means determining what should be controlled without reference to what is currently controlled, rather than reviewing current controls and identifying what should be decontrolled. While BIS is already conducting a systematic review of the CCL to assess what controls should be retained or revised, many technologies on the CCL are subject to multilateral controls and thus cannot be changed unilaterally by the United States. However, deemed export licensing requirements are not multilateral and thus may be changed by the United States without agreement by other countries. Therefore, BIS is focusing this recommendation for a zero-based review only on those technologies that should be subject to deemed export licensing requirements.

With this notice of inquiry, BIS is seeking comments from the public on the DEAC's recommendation to narrow the scope of technologies on the CCL in the specific context of BIS's deemed export licensing requirements.

Comprehensive Assessment of Foreign National Affiliation

Within the recommended environment of narrowing technologies subject to deemed export licensing requirements, the DEAC also recommended that BIS expand its analysis of determining the home country of the foreign national, for deemed export licensing purposes, in favor of a more comprehensive assessment of a foreign national's country of affiliation. Specifically, the DEAC recommended expanding the determination of national affiliation to include country of birth, prior

countries of residence, current citizenship, and character of individual's prior and present activities to provide an increased level of assurance that technology subject to deemed export licensing requirements would not be diverted to unauthorized end-users or activities. The DEAC reasoned that using the most recent citizenship or legal permanent residency may not take into account the actual risk of diversion of export-controlled technology by the foreign national. For instance, the DEAC noted that most criminal cases of export control violations of which it had been made aware involve U.S. citizens and U.S. legal permanent residents, who are not even subject to deemed export licensing requirements under current BIS policy. Further, the DEAC stated that an adequate distinction has not been made for a foreign national residing in a specific country for the majority of his or her lifetime. For example, the risk of diversion posed by an individual recently attaining U.K. citizenship who was born and raised in Iran may be different from that of a native Iranian who became a citizen of the U.K. shortly after birth.

BIS intends to consider the DEAC's recommendation of an expanded set of criteria in determining home country/national affiliation in the context of the DEAC's other recommendation that BIS narrow the scope of technologies on the CCL, in the context of deemed exports, to a few critical technologies. With this notice of inquiry, BIS is seeking comments on the DEAC's recommendation to expand the criteria for determining national affiliation of foreign nationals for deemed export licensing purposes.

Requests for Comments:

To assist in developing a response to these two recommendations made by the DEAC, BIS is interested in comments from the public. BIS encourages all interested parties to submit comments in response to this notice of inquiry.

With respect to the first recommendation for an outside, zero-based review of technologies, BIS is seeking comments on whether technologies on the CCL that are subject to deemed export licensing requirements should be narrowed to a few critical technologies (i.e., a narrower set of technologies than those on the current CCL). If so, BIS would like comments to address which technologies the commenter believes should be subject to deemed export licensing requirements and what criteria should be used to make that determination. Comments providing a description of the technology as well as the use of the technology would be particularly helpful. Moreover, comments identifying the Export Control Classification Number (ECCN) of the technology would aid BIS in assessing whether the technology would rise to a level warranting deemed export control under the “higher walls, fewer fences” construct outlined by the DEAC. Comments made in response to this first DEAC recommendation will also be shared with the ETRAC for its analysis.

Additionally, BIS is seeking comments with respect to the DEAC recommendation that a more comprehensive assessment of foreign national affiliation should be used in the context of making home country determinations in the deemed export licensing process. BIS is interested in public comments addressing the issue of making foreign national affiliation determinations in situations where a foreign national’s ties may be easily established and in situations where it may be difficult to determine where a foreign national’s ties lie (such as for a foreign national employed at a prohibited entity). Comments submitted in favor of a more comprehensive assessment will be particularly helpful if they address what information should be taken into account for such a comprehensive assessment. Comments submitted in opposition to a more comprehensive assessment will be particularly helpful if they suggest what parameter(s) should be used in determining the home country for foreign nationals.

Parties submitting comments are asked to be as specific as possible. Comments including detailed statements of support will likely be more useful than comments that state a position without providing any support. BIS encourages interested persons who wish to comment to do so at the earliest

possible date. The period for submission of comments will close [INSERT 90 DAYS AFTER PUBLICATION]. BIS will consider all comments received before the close of the comment period in responding to the DEAC recommendations. 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 a response. All public comments on this notice of inquiry 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) website at <http://www.bis.doc.gov/foia>. This office does not maintain a separate public inspection facility. If you have technical difficulties accessing this website, please call BIS's Office of Administration at (202) 482-0953 for assistance.

DATED: May 14, 2008

Matthew S. Borman

Acting Assistant Secretary for Export Administration

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