

Mandatory Certification for Export Control Compliance Prompted by GAO Audit Recommendations

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Government contractors must now ensure that export control-related certifications are made on an immigration form when transferring technology or technical data to foreign nationals on temporary work visas. As of February 20, 2011, employers seeking to hire foreign workers to temporarily perform services are required to certify on Form I-129 (Petition for a Nonimmigrant Worker) whether or not an export license is required from the Department of Commerce (Commerce) or the Department of State (State) to release controlled technology or technical data to those foreign persons. Depending on the type of technology or technical data, Commerce may control such information under the Export Administration Regulations (EAR) or State may control it under the International Traffic in Arms Regulations (ITAR).

Under Commerce rules, any release of technology or source code subject to the EAR to a foreign national in the United States is "deemed" to be an export to the home country or countries of the foreign national. Thus, the same licensing requirements for the actual export would apply to the deemed export. Under State rules, disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad, is defined as an "export." Therefore, under State rules, authorization must be requested for foreign nationals employed by U.S. persons to have access to ITAR-controlled defense articles and/or technical data. There are exceptions to these requirements where, for example, the EAR and the ITAR do not require licenses to export publicly available or public domain information.

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The new I-129 export control certification requirement was triggered in part by a series of audit reports since 2002 that have focused on the need to prevent unauthorized technology releases to foreign nationals in the United States. One of the audit recommendations, which prompted the I-129 certification, was for the Department of Homeland Security (DHS) and Commerce to improve coordination and use of immigration data in order to detect potential unlicensed deemed exports.

In February 2011, the Government Accountability Office (GAO) released the most recent in this series of audit reports focused on deemed exports. (GAO-11-354, Improvements Needed to Prevent Technology Releases to Foreign Nationals in the United States see <http://www.gao.gov/new.items/d11354.pdf>) In this Report, the GAO cited approvingly the I-129 certification development and reported that agency officials with export control enforcement responsibilities (Commerce, Justice, FBI, and Immigration and Customs Enforcement (ICE)) believed this certification requirement could lead to more successful export control investigations. According to the GAO, agency officials said one of the reasons for the relatively low level of deemed export criminal enforcement actions was that it is difficult to prove an organization or individual *willfully* intended to violate deemed export control regulations. The new I-129 certification requirement will now provide another enforcement option, allowing agencies to charge organizations or individuals with making inaccurate or false statements to the U.S. Government, without having to demonstrate intent.

In addition to the focus on improved agency coordination on the use of data for enforcement purposes, the February 2011 GAO Report found:

- Unauthorized access to controlled technology by foreign nationals is an area of continuing risk;
- Technologies most often targeted for unauthorized transfers include aeronautics, computers and information systems, electronics, lasers and optics, sensors and marine technology and unmanned aerial vehicles and biotechnology;
- Commerce investigations closed between FY 2004 and 2009 involved foreign nationals from three countries of concern (which were identified in the classified version of the report);
- Commerce and ICE failed to adequately address prior recommendations to formulate and implement deemed export outreach plans, which should include small and mid-sized companies; and
- Commerce, Justice, FBI and ICE failed to address prior recommendations to improve deemed export enforcement coordination.

The February 2011 GAO Report also suggested the White House consider its findings and recommendations related to deemed export licensing and enforcement in the context of its larger Export Control Reform Initiative. This recommendation appears to dovetail with recent developments related to the Export Control Reform Initiative. On November 9, 2010, the President issued Executive Order 13558 establishing the Export Coordination Enforcement Center within DHS and mandating coordination amongst all of the export enforcement agencies. Notably, the Executive Order does not give primary or exclusive investigative authority to any one agency, but it does facilitate coordination that was previously *ad hoc* at best.

The White House is in the midst of a fundamental overhaul of the current export control system aimed at transforming to a single control list, a primary enforcement coordination agency, single information technology system and a single licensing agency. This initiative will be implemented in three phases with current efforts focused on phase I and reforming the Commerce and State export control lists and improving enforcement coordination.

The recent developments with the I-129 export control certification, the February 2011 GAO Report on deemed exports and the President's Export Control Reform Initiative make it clear that export control compliance and enforcement is a dynamic area that will continue to pose challenges for government contractors.

The new I-129 export control certification requirement also poses unique challenges to government contractors under federal employment laws, because making the certification may require them to collect information from applicants and employees that is heavily regulated under Title VII of the Civil Rights Act and the Immigration Reform and Control Act of 1986.