DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 060505121-6121-01]

Establishment of Advisory Committee and Clarification of Deemed Export-Related Regulatory Requirements

AGENCY: Bureau of Industry and Security, Commerce

ACTION: Notice

SUMMARY: The Bureau of Industry and Security (BIS) is announcing the creation of a Federal Advisory Committee that will review and provide recommendations to the Department of Commerce on deemed export policy. The Deemed Export Advisory Committee (DEAC) will help ensure that the deemed export licensing policy most effectively protects national security while ensuring the U.S. continues to be at the leading edge of technological innovation. This notice also provides an overview of steps that BIS has taken to improve understanding of deemed export policy within academia and industry, including outreach activities conducted by
ADDRESSES: Although there is no official comment period for this notice, you may submit comments, identified by Docket No. 060505121-6121-01, by any of the following methods:

- Email: publiccomments@bis.doc.gov. Include “060505121-6121-01” in the subject line of the message.
- Fax: (202) 482-3355


Public comments received by BIS in response to the ANPR are available at:

http://efoia.bis.doc.gov/
BACKGROUND

BIS is proposing the establishment of a “Deemed Export Advisory Committee” (DEAC) under the terms of the Federal Advisory Committee Act (FACA) (Public Law 92-463, 5 U.S.C., App. 2). The DEAC will serve as forum to address complex questions related to an evolving deemed export control policy. Specifically, the DEAC will be charged with reviewing the current deemed export policy and determining whether to recommend any changes to that policy. A separate notice will specifically address the comments received in response to the “Advance Notice of Proposed Rulemaking: Revision and Clarification of Deemed Export Related Regulatory Requirements” (ANPR) published in the Federal Register on March 28, 2005.

A. Deemed Export Advisory Committee (DEAC); Notice of Recruitment of Private-Sector Members

The nature of research and technological development is constantly changing and there is evidence of growing participation of foreign nationals in U.S.-based research as well as their employment in U.S.-based high-technology industries. There is also an increasing interdependence between commercial and academic research. Over the course of the past decade, these changes have inevitably led to the increased transfer of controlled information to foreign nationals in the course of research and commercial technology development.

To ensure that the deemed export policy best protects U.S. national security, while
striving not to impede the ability of U.S. industry and academic research to continue at the leading edge of technological innovation, BIS is establishing a “Deemed Export Advisory Committee” (DEAC) under the terms of the Federal Advisory Committee Act (FACA) (Public Law 92-463, 5 U.S.C., App. 2). The DEAC will undertake a comprehensive review of the national security, technology, and competitiveness dimensions of the deemed export issue and provide recommendations for potential changes to the current deemed export policy. The DEAC’s review will include, but not be limited to, the recommendations made in the Department of Commerce Office of Inspector General (OIG) Report entitled “Deemed Export Controls May Not Stop the Transfer of Sensitive Technology to Foreign Nationals in the U.S.” (Final Inspection Report No. IPE-16176-March 2004).

The DEAC, which will not exceed 12 members, will be structured to ensure a balanced membership that will offer a comprehensive point of view on the complex technical and policy questions at issue. The advisory committee will consist of representatives from industry, academia, and other experts in the field to ensure a full discussion of all aspects of deemed exports and knowledge transfer from the corporate, academic, and national security perspectives. Members will be called upon to advise BIS on highly technical issues surrounding technology transfer and to help ensure that BIS effectively carries out its critical national security function. To that end, the DEAC shall have a diverse membership with expertise in national security affairs, scientific research and development (R&D) policy, and the various forms of technology subject to the EAR, such as nuclear, chemical, missile, electronics, computer, telecommunications, and avionic technology. For a full list of technology and software subject
to the EAR, see 15 C.F.R. Part 774, Supp. 1.

DEAC members will be appointed by the Secretary of Commerce and serve a term of not more than one year. DEAC members must obtain a secret security clearance prior to appointment. These clearances are necessary so that members may be permitted access to the classified information needed to formulate recommendations to the Department of Commerce. The DEAC will convene as appropriate, but in no case less than quarterly. To respond to this recruitment notice, please send a copy of your resume to Ms. Yvette Springer at Yspringer@bis.doc.gov. This Notice of Recruitment will be open until [60 DAYS FROM DATE OF PUBLICATION], 2006.

B. Current Deemed Export Policy

Given the extended public discussion of the OIG recommendations and the coming review of the deemed export policy by the DEAC, a reiteration of the current BIS deemed export policy regarding country of birth, the existing definition of “use” in the Export Administration Regulations (EAR), and the relationship of fundamental research to deemed exports is warranted. BIS has decided not to make any changes at this time to current regulations and policy on these three issues.
C. BIS Activities Related to Deemed Exports

In the past year, BIS has undertaken an enhanced and targeted deemed export outreach program. Since the issuance of the report by the OIG, BIS has significantly increased its outreach to the academic and research communities. This outreach has focused on the concerns identified by the OIG report to raise the level of awareness and to improve the understanding of the deemed exports regulatory requirements. In fiscal year 2004 and fiscal year 2005, over 120 outreach events were conducted annually, almost tripling that conducted in previous years. A third of these events – which range in content from presentations to large audiences, seminars, one-on-one consultations, and site visits – have been with the university and government research organizations and laboratories. These organizations were identified by the OIG report as needing additional knowledge of the EAR’s deemed export requirements. BIS is on track to conduct over 100 deemed export outreach events in the current fiscal year. BIS has already seen the benefit of increased outreach to, and communication with, the regulated community and believes that the DEAC will provide a particularly advantageous forum for further in-depth technical information exchange between and among BIS and the academic, corporate, and other interested sectors.

In addition to onsite visits, seminars, and the information provided in Supplement No.1 to Part 734 of the EAR, BIS has also provided deemed export related guidance on its Web site. (See Deemed Export FAQ’s at http://www.bis.doc.gov/policiesandregulations/index.htm) In particular, this guidance has addressed issues related to a foreign national’s country of origin –
an issue highlighted by the OIG report. This particular guidance explains that if the status of a foreign national is uncertain, it is important to consult with BIS to determine where the stronger ties lie, based on the facts of the specific case. BIS is committed to providing continued deemed export guidance and assistance to the regulated community on this important issue.

BIS has also participated in several Task Forces to address the deemed export issue, including an American Association of Universities/Council on Government Relations Task Force, the National Academies’ Government-University-Industry-Research Roundtable, the Federal Bureau of Investigation’s National Security Higher Education Advisory Board, and a White House, Office of Science and Technology Policy Interagency Working Group comprised of agency representatives with research laboratories (e.g., Department of Energy, Department of Defense, Department of Health and Human Services, Department of Agriculture, National Institutes of Health, Food and Drug Administration, National Institute of Standards and Technology, etc.). The goal of each of these groups is to assess the impact of the OIG’s recommendations and to address concerns raised by the regulated communities.

BIS has also increased its enforcement focus on deemed exports. A number of cases involving violations of deemed export requirements have been concluded with criminal and civil penalties and BIS will continue to pursue violations of the EAR’s deemed export requirements to ensure U.S. national security is not compromised by unauthorized technology transfers to foreign nationals. In addition, BIS is collaborating with the Federal Bureau of Investigation on related enforcement issues through the National Security Higher Education Advisory Board.
Finally, BIS received funding in the FY2006 budget to implement an Enhanced Deemed Export Control Initiative. This initiative has two components – licensing and enforcement. The initiative will enable BIS to: (1) process an increased volume of license applications in a timely manner, in order to ensure that U.S. entities are able to gain access to the expertise of foreign nationals who do not pose security concerns; and (2) ensure that U.S. entities are aware of and comply with U.S. deemed export license requirements through expanded outreach and enforcement activities. Both aspects are necessary to enhance U.S. national and economic security.

DATED:

Matthew Borman
Deputy Assistant Secretary of Commerce
for Export Administration