It is generally understood that shipments or transfers of good or data from the United States to another country represent an export that is subject to U.S. export regulations and may potentially require a license or other authorization. What is less widely understood, however, is that the release of data even within U.S. borders is deemed by U.S. export control laws to be an export to the recipient’s country of nationality or citizenship. Similarly, the delivery of data in a foreign country to a national or citizen from a third country can be deemed a re-export to that third country. It is important to remember that rules for exports of technology are separate from rules related to deemed exports and re-exports.¹

Consequently, to avoid exposure to significant civil liability – as well as damage to the organization’s reputation and good standing, and, potentially criminal liability – companies, universities and other organizations (collectively hereinafter companies) should exercise caution in their management and release of export controlled information and technology both inside and outside the territorial United States and implement appropriate policies and procedures.

The export control law regulations govern deemed exports (and re-exports). Export screening must be conducted consistent with anti-discrimination and privacy laws, both in the U.S. and abroad. Due to the nature and complexity of this topic, this update does not address all aspects of technology transfers, and such transfers should be assessed on a case-by-case basis. This note provides an update of the anti-discrimination provisions.

The Office of Special Counsel (OSC) for Immigration-Related Unfair Employment Practices at the Department of Justice (DOJ) is responsible for enforcing the anti-discrimination provision of the Immigration and Nationality Act (INA), which protects work authorized individuals from employment discrimination on the basis of citizenship status or national origin discrimination, including discrimination in hiring and the employment eligibility verification (Form I-9) process. The OSC has from time to time issued determinations and rulings that have provided guidance on the request and collection of such information.

**Overview of Export Control Law Considerations**

For the purposes of the deemed export regulations, “U.S. Persons” are those who qualify as
"protected individuals" under the Immigration Reform and Control Act (IRCA) of 1986. These individuals are U.S. citizens, U.S. legal permanent residents (green card holders), refugees, asylees, and temporary residents under specific IRCA amnesty provisions. U.S. Persons may be exposed to unclassified export-controlled information without triggering deemed export regulations. Anyone who is not a U.S. Person is a “foreign national” (under the Export Administration Regulations (EAR)) or a foreign person (under the International Traffic in Arms Regulations (ITAR)), which are legally equivalent terms.

The EAR and ITAR have historically differed in their determination of foreign person status in one crucial respect: the identification of the relevant nationality or citizenship of the foreign person. The Commerce Department’s Bureau of Industry and Security (BIS) guidance on this matter has stated that the agency looks only at a person’s latest citizenship or legal permanent resident alien status in determining restrictions. The State Department’s Directorate of Defense Trade Controls (DDTC), under the ITAR, however, historically has taken into account all of the person’s nationalities and citizenships and imposed controls that correspond to the most restrictive nationality of citizenship, and continues to do so. So, for example, a Chinese citizen who subsequently became a Canadian citizen generally will be treated as Canadian by the EAR and as Chinese and Canadian by the ITAR. The Department of Energy (DOE) takes into account all of a person’s nationalities and citizenships, similar to the approach taken by DDTC which the DOE documented in its 2015 rule making.

On September 8, 2016, the DDTC issued a new rule which in part addressed deemed export compliance. As noted above, transfers among U.S. persons (regardless of dual citizenship) generally do not trigger licensing with respect to unclassified export controlled technology. With respect to foreign persons who are not U.S. persons, DDTC historically has considered all nationalities, including place of birth and any subsequent or former citizenships. In the September rule, DDTC stated: “The Department confirms that in circumstances where birth does not confer citizenship in the country of birth, it does not confer citizenship or permanent residency in that country for purposes of the ITAR. One commenter noted that the DDTC Agreement Guidelines refer to the country of origin or birth, in addition to citizenship, as a consideration when vetting DN/TCNs. The Department has updated the Agreement Guidelines consistent with the interim final rule.” Accordingly in certain cases, countries of birth would no longer be considered by DDTC if the country does not grant citizenship based on mere fact of birth within its territory and the person never acquired such citizenship. This development would allow companies to focus on citizenship in the vast majority of factual scenarios rather than country of birth. Given the BIS focus on the most recent citizenship or permanent resident alien status, companies could consider changes to their export screening questionnaires depending on their export compliance risk assessment, including whether they have solely EAR technology or both ITAR and EAR technology. However, it is important to review all the guidance by DDTC under the ITAR included in the rule, including the requirement to assess all countries
where that person holds or has held citizenship or is a permanent resident, and that such authorization(s) must authorize all applicable designations. This inquiry should include all countries where that foreign person has held citizenship, including citizenships a foreign person has renounced.

**Overview of Anti-Discrimination Considerations**

Information regarding citizenship and country of birth must be collected in a process separate from the I-9 employment eligibility process. This is done to avoid any inconsistency with anti-discrimination laws, as based on past OSC precedent and existing guidance. The OSC has found that requesting specific documents during the I-9 process constitutes discrimination, and has imposed penalties for doing so. However, DOJ has also stated that employers may implement separate procedures to obtain information regarding citizenship or nationality for compliance with export control laws. Here are a few key points:

**2011 - Penalties Imposed Against Subsidiary of BAE:** The DOJ imposed penalties against a subsidiary of BAE Systems (BAE) in 2011, finding that the subsidiary engaged in a pattern or practice of discrimination by imposing unnecessary and additional documentary requirements on work-authorized non-U.S. citizens when establishing their eligibility to work in the United States. The BAE case related to the specific requests for particular documents in the context of the I-9 Form and process. DOJ emphasized that the employee has the right to show appropriate List A, or List B and C documents to the employer for identity and employment eligibility verification during the I-9 process. However, the employer cannot dictate the exact documents presented from these Lists for purposes of Form I-9 compliance. Further, DOJ stated that this case does not prevent companies from determining U.S. person status and citizenship/nationality separately as part of their normal export screening process. For additional information, click here.

**2010 DOJ Guidance from OSC:** The BAE decision is consistent with prior guidance issued by DOJ’s OSC on October 6, 2010, which provided that “The anti-discrimination provision of the INA does not prohibit an employer from implementing a separate and distinct verification procedure under the ITAR requiring the presentation of documents establishing citizenship or immigration status necessary to ensure compliance with the ITAR.”

**2016 Recent Guidance from OSC:** Most recently, the OSC issued guidance on March 31, 2016 regarding the proposed question below for job applicants or newly-hired employees:

- The following questions are for the sole purpose of ensuring compliance with U.S. rules concerning the export of controlled or protected technologies or information, including but not limited to U.S. State Department regulations at 22 C.F.R. Subchapter M, U.S. Department of Energy regulations found in 10 C.F.R. Part 810, the U.S. Nuclear Regulatory Commission regulations in 10 C.F.R. Part 110, and the U.S. Department of Commerce’s Export Administration Regulations found in 15 C.F.R. Part 730 et seq., as may be amended.
(collectively, Export Control Laws).

If you **do not** wish to be considered for positions whose activities are subject to the Export Control Laws, then you may **skip** the following questions. If you **do** wish to be considered for positions whose activities are subject to the Export Control Laws, then you **must** answer these questions:

1. I am one of the following: (a) a citizen of the United States; (b) a lawful permanent resident of the United States; or (c) a person admitted into the United States as an asylee or refugee: YES or NO

2. If you answered "NO" to Question 1, then please indicate you're a. Citizenship: b. U.S. Immigration Status

- In the most recent guidance from OSC, the office confirmed that, consistent with the 2010 guidance, an employer that implements a document verification process to determine only a new employee's immigration or citizenship status to comply with export control laws is unlikely to violate the anti-discrimination provision **if the document verification process is separate and distinct from the employment eligibility verification process**.

- However, OSC cautioned employers that to the extent these separate and distinct processes appear to be integrated, such as due to proximity in time, employees and human resource personnel may have the impression that the documentary requests are for employment eligibility verification purposes.

- With respect to the proposed language, OSC stated that the language above implicated several parts of the anti-discrimination provision, and noted the following:
  - The ITAR does not impose requirements on U.S. companies concerning the recruitment, selection, employment, promotion, or retention of a foreign person. Instead, the ITAR requires that employers obtain export licenses for non-U.S. person employees if their positions require access to information governed by the ITAR.
  - Assuming an employer is hiring for at least some positions not subject to export control laws, OSC discourages asking the proposed questions for positions that are **not** subject to export control laws to avoid generating confusion among applicants or human resources personnel about the need for this information.
  - The term "Admitted" could be confusing to job applicants, as they might have a different understanding of the term than the meaning carries under U.S. immigration laws.
  - If an employer were to reject a protected individual's application based on that individual's answers or a staffing agency were to limit the scope of potential assignments based upon a protected individual's answers, the employer may be engaging in citizenship status discrimination.
  - The questions above could lead to unlawful hiring decisions by HR personnel who make assumptions about an applicant's eligibility based on his or her country of citizenship or show a preference in hiring based on national origin.
It is important that export screening language and procedures avoid the pitfalls flagged above. For example, if required, the language should simply ask if the employee or applicant is a “U.S. citizen, lawful permanent resident of the United States (“green card holder”), an asylee, or a refugee” and not include any potentially misleading or confusing language. Further, the questionnaire should include an explanatory paragraph that clearly describes that the purpose of the questions is to ensure compliance with U.S. export control laws, thereby distinguishing the questionnaire and making it distinct in substance from the I-9 employment eligibility verification process.

As this is a complex area of law, companies should consult with outside counsel in developing these compliance processes.


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