

International Trade Alert

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DOE Overhauls Export Controls for Nuclear Technology

On February 23, 2015, the Department of Energy (DOE) released a long-awaited final rule overhauling its Part 810 Regulations (10 C.F.R. Part 810) governing the export of certain nuclear technology and assistance. Effective on March 25, these revisions clarify the scope of these regulations, update the set of countries for which “specific authorization” is required, create new reporting requirements and establish rules governing “deemed exports,” among other things. In some cases, companies may need to act quickly to adjust their compliance programs to align with this updated regulatory framework. These changes may also provide new opportunities for U.S. companies in certain parts of the world, while imposing more onerous restrictions on others.

Below, we (i) provide a brief background of these regulations, (ii) summarize the major revisions to Part 810, (iii) identify those changes that have been made since DOE’s last proposed rule, (iv) describe the transition process and (v) discuss the impact of the updated regulations on the nuclear energy industry.

Background

At their core, the Part 810 Regulations, which implement sections of the Atomic Energy Act of 1954 and the Nuclear Nonproliferation Act of 1978, establish when the export of controlled nuclear technology and assistance is “generally authorized” and when it requires “specific authorization.” Whether general or specific authorization is required depends on which countries and types of activities are involved. If activities are generally authorized, they can typically proceed without prior approval from DOE (or other agencies) and are subject only to reporting requirements. Where specific authorization is required, it is generally necessary to obtain approval from the Secretary of Energy after an interagency review that involves the receipt of assurances from foreign governments. This tends to be a long and onerous process that does not align well with business realities. These regulations have remained largely the same since 1986 and have received criticism for being imprecise and outdated.

To address these concerns, DOE issued a Notice of Proposed Rulemaking (NOPR) in September, 2011 offering revisions to the regulations. In response to significant comments from the nuclear industry and other groups, DOE issued a Supplemental Notice of Proposed Rulemaking (SNOPR) in August 2013 with further revisions to Part 810 and adjustments to the NOPR. The final rule issued this week is the culmination of these efforts to update the regulations over the past three-plus years.

Overview of the Major Changes to Part 810

Among other things, the final rule contains the following major changes to the current regulations:

Clarifications Regarding Activities Within Scope

To address uncertainty regarding the scope of the regulations, Section 810.2 contains a detailed list of activities that are subject to Part 810, particularly those related to nuclear reactors and aspects of the nuclear fuel cycle. It also contains a list of activities that are excluded from the regulations, including exemptions for:

- transfers of publicly available information/technology or the results of fundamental research
- exports that are authorized by the Department of State, the Department of Commerce and the Nuclear Regulatory Commission (NRC)
- certain activities involving radiopharmaceuticals, if the process does not involve special nuclear material
- uranium and thorium mining and milling
- certain activities involving nuclear fusion reactors.

Changes Related to Generally and Specifically Authorized Countries

One of the most significant changes is the new identification of a list of generally authorized countries, replacing the previous framework in which the regulations conversely identified “restricted” countries for which specific authorization requirements generally applied. The final rule provides an appendix with a list of countries to which exports are generally authorized, except in cases that involve certain sensitive technology. Under the new rule, countries not identified in the appendix are subject to specific authorization requirements for essentially all controlled exports.

Beyond restructuring these lists, DOE has also amended the qualification of different countries for general and specific authorization under the regulations. Notable changes include:

- Croatia, Kazakhstan, the United Arab Emirates and Vietnam have become generally authorized destinations. The primary reasons for these changes are that these countries have either entered into a nuclear cooperation agreement with the United States (“123 Agreement”) or, in the case of Croatia, joined Euratom.
- In the case of Mexico and Chile, the final rule identifies them as generally authorized destinations, consistent with the current regulations, but with respect to only certain projects.
- On the other hand, countries such as the Philippines and Thailand are no longer generally authorized.

In total, the updates to Part 810 result in fewer countries being qualified for general authorization treatment.

Deemed Export Rules Codified and Expanded

The revisions codify DOE’s long-standing policy of controlling deemed exports of technology to foreign nationals within the United States (or in a third country, in the context of deemed re-exports). To assist in

this clarification, Part 810 now defines foreign national (i.e., non-U.S. person), consistent with the policy of other U.S. export control regulations, to mean individuals who are neither (i) U.S. citizens, (ii) U.S. legal permanent residents nor (iii) “protected individuals,” such as asylees.

The determination regarding whether general or specific authorization is required for a particular deemed export largely depends on whether the foreign national is from a generally authorized country identified in the appendix. However, the updated regulations also provide general authorization for deemed exports to foreign nationals of countries that are not in the appendix, provided that the foreign national (i) is working at an NRC-licensed facility, (ii) is lawfully employed by or contracted to a U.S. employer in the United States, (iii) executes a confidentiality agreement with the U.S. employer to safeguard the technology and (iv) has been granted unescorted access in accordance with NRC regulations at an NRC-licensed facility, and (v) that the U.S. employer authorizing access to the technology complies with certain notification requirements.

Changes in the Final Rule Not in the SNOPR

The provisions of the final rule are closely similar to earlier provisions included in the SNOPR, but with some notable modifications. These include:

- The list of generally authorized countries has been updated since the SNOPR to remove and add countries. For example, Thailand has been removed from the appendix, and Croatia and Vietnam have been added.
- Although Ukraine remains generally authorized, the final rule includes new provisions that require notification to DOE 10 days prior to beginning generally authorized activities involving Ukraine and additional post-activity reporting requirements. These changes are in response to the recent conflict in that region.
- In addition, the final rule clarifies that technology related to the steam turbine generator portion of a nuclear power plant does not fall within the scope of Part 810 controls. Consequently, this clarifies that such technology is subject to the Export Administration Regulations administered by the Department of Commerce.

Transition Process

The final rule also provides a process and timetable for transitional implementation of the new rules. DOE provides that:

- **Change to General Authorization** – Any pending request for specific authorization involving countries that now appear on the generally authorized appendix (e.g., Croatia, Kazakhstan, Ukraine, United Arab Emirates or Vietnam) should be withdrawn starting when the final rule takes effect on March 25, 2015.
- **Change to Specific Authorization** – If an activity is generally authorized under the current rules but requires specific authorization under the final rule, that request must be submitted by August 24,

2015. However, the activity may continue until DOE acts on the request. This rule applies only if the contracts, purchase, orders or licensing arrangements are in effect prior to March 25, 2015.

- **Unreported Deemed Exports** – Any entity that has not previously reported deemed exports to foreign nationals that now require specific authorization should do so by August 24, 2015. This reporting requirement suggests a disclosure requirement for companies and is somewhat ambiguous in how it applies to companies.

Impact on the Nuclear Industry

The impact of this final rule on a particular company will depend on its particular activities, the geography of its customers and partners, and the nationalities of its employees. These regulatory changes reduce ambiguity and may lessen the burden of doing business in certain markets that are now generally authorized. However, these rules alter the regulatory framework for companies in the nuclear industry; impose specific authorization requirements where activities were once generally authorized; and do not lessen the burden of doing business in major markets, such as China and India. Consequently, Part 810 compliance obligations will remain and may be increased, particularly in the near term.

To ensure that operations are aligned with the amended regulations, we recommend that affected companies conduct a comprehensive review of their Part 810 compliance program in order to identify affected areas. Regulated companies should expect that they will need to adjust their compliance practices and that implementation of the amended regulations will make it necessary to file certain submissions with DOE in conjunction with their operations, as discussed above. In light of the March 25 effective date and the August 24 transition deadline, companies will need to act deliberately and on a structured timetable to ensure that they fully comply with this updated framework established by the final rule.

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