

E-ALERT | International Trade Controls

October 4, 2011

DEPARTMENT OF ENERGY PROPOSES SIGNIFICANT REVISION TO NUCLEAR EXPORT CONTROLS

The Department of Energy (“DOE”) has published a notice of proposed rulemaking that would significantly revise, for the first time in 25 years, the regulations governing the provision of technology and assistance related to certain foreign nuclear activities by persons subject to U.S. jurisdiction. This long-awaited revision to 10 C.F.R. Part 810, published on September 7, 2011, provides a unique opportunity for industry to comment on and influence the development of the regulations that control the export of unclassified nuclear technology and technical assistance. Comments are due by November 7, 2011.

The proposed rule contains potentially significant clarifications regarding the scope of Part 810, as well as a reorganization of the general and specific authorizations in the section (which are similar to general and specific licenses) and new limitations on specific authorizations. The revisions also would bring the DOE regulations in line with other U.S. export control regimes by making clear that the restrictions extend to “deemed exports,” transfers of controlled technology to foreign nationals in the United States.

BACKGROUND

Section 57b of the Atomic Energy Act of 1954, as amended, empowers the Secretary of Energy to authorize individuals and entities subject to U.S. jurisdiction to engage directly or indirectly in the production of “special nuclear material” outside of the United States. “Special nuclear material” is defined as plutonium, uranium-233, or uranium enriched above 0.711 percent by weight in the isotope uranium-235.

The Part 810 regulations implement this statutory authorization by setting forth a list of “general authorizations” and, for covered activities that do not qualify for those general authorizations, instructions for applying for “specific authorizations” from the Secretary. A primary goal of the regulations is to enable DOE to control the export of nuclear technologies and services while advancing U.S. nonproliferation and national security objectives.

CLARIFICATION OF THE SCOPE OF ACTIVITIES SUBJECT TO PART 810

The current regulations provide a non-exhaustive description of activities subject to Part 810. The proposed regulations, by contrast, are designed to state more explicitly the scope of DOE’s jurisdiction under Part 810.

The proposed regulations provide that Part 810 applies to:

- All persons subject to the jurisdiction of the United States (also called “U.S. persons”) “who or that engage directly or indirectly in the production of special nuclear material outside the United States, by transferring to foreign persons technology that is related to the production of special nuclear material”; and
- “Assistance and the transfer of technology by U.S. persons to foreign persons, conducted either in the United States or abroad by U.S. persons or by licensees, contractors or subsidiaries under their direction, supervision, responsibility, or control.”

The proposed regulations then provide a comprehensive list of activities, one or more of which apparently needs to be involved for the activity to be subject to Part 810.¹ The listed activities include (among other things):

- Chemical conversion and purification of uranium and thorium from milling plant concentrates and in all subsequent steps in the nuclear fuel cycle;
- Nuclear fuel fabrication, including preparation of fuel elements, fuel assemblies, and cladding thereof;
- Uranium isotope separation (uranium enrichment);
- Storage of irradiated nuclear materials;
- Processing of high-level radioactive waste;
- Movement of irradiated nuclear materials and their specially designed containers;
- Nuclear reactors; and
- The transfer of technology for the development, production, or use of equipment or material specially designed or prepared for any of the listed activities.

Companies, universities, research institutions, and others subject to U.S. jurisdiction involved in nuclear-related activities that have non-U.S. dimensions will need to carefully compare their specific activities with the coverage contemplated by the proposed regulations. In some instances, the proposed regulations may expand (or narrow) the reach of Part 810. For example, the proposed rule’s coverage of the storage and movement of irradiated nuclear materials (and their specially designed containers) may sweep broader than the activities covered by the current regulations.

Significantly, the proposed regulations also state explicitly that Part 810 does not apply to uranium and thorium mining and milling, nor to nuclear fusion reactors (except for supporting systems involving hydrogen isotope separation). The proposed rule also clarifies that “public information” and “basic scientific research” are outside the scope of Part 810. (Currently, “furnishing public information” is within the scope of Part 810 but generally authorized.)

The specific references to transfers of nuclear-related “technology” being subject to Part 810 are also a noteworthy element of the proposed rule. “Technology” would be defined as “specific information required for the development, production, or use of any facility or activity listed in § 810.2(c).” (The proposed rule refers to § 810.2(c), but this appears to be a mistaken reference to § 810.2(b).) This definition roughly tracks the definition of “technology” in the Export Administration

¹ As drafted, the rule is ambiguous as to whether a single one of the listed activities triggers the application of Part 810, since it uses the term “and” rather than “or.” However, we believe the correct interpretation of the rule is that a single activity would trigger Part 810.

Regulations (“EAR”), which control the export and reexport of commercial and “dual use” commodities, software, and technology that are not subject to the jurisdiction of other U.S. government agencies.² As under the EAR, “technology” in Part 810 would include “technical data” and “technical assistance.” Both these terms are defined differently than in the EAR, however; “technical data” would include not just data in all written and electronic forms (manuals, blueprints, diagrams, models, etc.) but also computational methodologies, algorithms, and computer codes that can directly or indirectly affect the production of special nuclear material. Similarly, “technical assistance” includes not just instruction, consulting services, and the like as in the EAR definition but also “any other assistance as determined by the Secretary [of Energy].”

The proposed revisions appear to provide some welcome clarification as to the scope of Part 810, though they also contain ambiguities that may impair the intent to be more precise about the jurisdictional scope of the regulations. For example, the reference to engaging directly or indirectly in the production of special nuclear material outside the United States by transferring to foreign persons technology related to the production of special nuclear material – coupled with the incorporation of a definition of “technology” similar to that which has long been used in the EAR – appears to helpfully delineate the reach of the regulations. Moreover, the exclusion of various activities such as uranium milling and activities related to fusion reactors also is likely to be welcomed by industry.

However, other parts of the proposed rule are not so clear. For example, the proposed rule states that Part 810 reaches “[a]ssistance and the transfer of technology” related to “nuclear reactors.” This language is potentially too broad and ambiguous, as “assistance” is not defined in the rule. In addition, “technical assistance” is defined in an open-ended and circular way to include “any assistance as determined by the Secretary.” Also, as noted above, the rule states that it applies to “persons subject to the jurisdiction of the United States” as well as to subsidiaries, contractors, etc. under a U.S. person’s “control” – yet the rule does not define what makes a person “subject to the jurisdiction of the United States” or what “control” means in the context of joint ventures, contractors, etc. This vagueness, which seems present in the current scheme as well, is troubling given the potential derivative liability for the conduct of third parties. Finally, the proposed rule defines “technology” to include information required for the “use” of any listed facility or activity, and defines “use” to mean “operation, installation (including on-site installation), and maintenance (checking), repair, overhaul and refurbishing.” However, it is unclear whether DOE intends these terms in the “use” definition to be conjunctive, so that technology is not controlled unless it relates to all six listed activities, or disjunctive, so that technology is controlled if it relates to one or more of the listed activities. This has been an important issue in the Commerce dual-use rules, and Commerce confirmed several years ago that technology must relate to all six activities to qualify as “use” technology under the Commerce Department dual-use regulations.

NEW REGULATIONS CONCERNING DEEMED EXPORTS

As noted, the proposed regulations now make explicit what previously was generally understood – that Part 810 applies to the “deemed export” of technology covered by Part 810 to foreign nationals in the United States. This is relevant to U.S. companies who seek to employ and accord access to this technology to foreign nationals, such as employees or contractors who are not U.S. citizens, who do not possess U.S. lawful permanent residence status (i.e., a U.S. “green card”), or who do not qualify as protected individuals under U.S. immigration law. U.S. companies must obtain a specific authorization if they seek to employ a foreign national from a country not listed in Section 810.6, or to employ a foreign national from any country in a position where they could receive access to

² The various types of controlled technology (development, production, and use) also are defined similarly to how those terms are defined in the EAR.

sensitive nuclear technology or specifically authorized nuclear activities. The proposed rule also provides guidance about what information DOE expects in deemed export applications.

The proposed rule does not explain how DOE will determine which country a foreign national is from, which has been a major issue under the export control rules administered by the State and Commerce Departments. For instance, is a non-U.S. employee's nationality based on his or her most recent citizenship or permanent residency (Commerce's approach)? The proposed rule would require that an applicant provide information not just addressing the employee's current citizenship, but also all countries or territories where the individual has resided for more than six months; it would not explicitly require supplying "country of birth" information, in contrast to the Commerce licensing approach, where this information is evaluated as part of a deemed export license application (and in contrast to the traditional State Department approach in considering country of birth of non-U.S. persons in export licensing determinations).

RESTRUCTURING OF GENERAL AND SPECIFIC AUTHORIZATIONS

The proposed rule also would substantially revise the structure of general and specific authorizations under Part 810. At present, Part 810 lists the countries for which a person needs specific authorization before engaging in covered activities, unless the activities are generally authorized pursuant to one of eight general authorizations. The proposed rule reverses the approach, identifying 48 countries for which a general authorization is available, assuming that the activity does not involve "specifically authorized nuclear activities" or the transfer of "sensitive nuclear technology." All activities subject to Part 810 which are not generally authorized would require specific authorization.

In general, the list of countries where covered activities would require specific authorization is considerably expanded under the proposed rule. For example, under Part 810 currently, a company theoretically could engage in generally authorized activities in many countries if certain conditions were met, including Chile, Iceland, Jordan, Mexico, New Zealand, the Philippines, and Singapore. However, these countries do not appear on the proposed new list of 48 countries where activities will be generally authorized, perhaps because the United States has not signed 123 Agreements with these countries paving the way for transfers of nuclear items to these countries.³ On the other hand, activities in three countries — Kazakhstan, the Ukraine, and the United Arab Emirates — would be eligible for a general authorization under the proposed rule, whereas activities in those countries now must generally be specifically authorized.

Also of significance, the proposed rule would eliminate a "fast track" general authorization for the furnishing of information or assistance "to enhance the operational safety of an existing civilian nuclear power plant" in a country for which specific authorization is required. DOE comments in the preamble to the proposed rule indicate that this authorization has rarely been used and had proven confusing to applicants. The proposed revision would retain a form of this general authorization that would permit covered activities at safeguarded facilities, presumably in any country, "in order to prevent or correct a current or imminent radiological emergency . . ." This revision thus apparently removes the ability to rely on a general authorization (after notifying DOE and obtaining its approval) for safety-related activities in countries where a specific authorization otherwise would be required (for example, China, India, or Russia) in situations in which there is no current or imminent radiological emergency.

³ A "123 Agreement," referring to Section 123 of the U.S. Atomic Energy Act, is an agreement between the United States and another country (or group of countries) to permit significant transfers of nuclear material, equipment, and components. To enter a 123 Agreement with the United States, a country must commit itself to adhering to certain nuclear nonproliferation norms.

In addition, it is noteworthy that the proposed rule would limit specific authorizations to a five-year period, which is not part of the current Part 810 but which DOE stated is consistent with the practice it has followed for “a number of years.” However, specific authorizations granted before October 7, 2011 would not be affected by this limitation. The proposed rule, if adopted, would, however, require those who are engaging in generally authorized activities to obtain specific authorization under the new regulations, if specific authorizations were required for their activities under the revised rules. Such requests must be made by December 6, 2011. The previously generally authorized activities could continue while the specific authorization request is pending.

* * * * *

Our international trade controls group is well-positioned to assist and advise companies on the application of the current and proposed Part 810 regulations and DOE licensing requirements, as well as to assist companies who may wish to submit comments on the proposed revision to Part 810. We would be glad to discuss the proposed rule at your convenience.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Trade Controls practice group:

Peter Flanagan	+1 202.662.5163	pflanagan@cov.com
Corinne Goldstein	+1 202.662.5534	cgoldstein@cov.com
Peter Lichtenbaum	+1 202.662.5557	plichtenbaum@cov.com
Kimberly Strosnider	+1 202.662.5816	kstrosnider@cov.com
David Addis	+1 202.662.5182	daddis@cov.com
Gabriel Slater	+1 202.662.5159	gslater@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.

© 2011 Covington & Burling LLP, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. All rights reserved.