DOE revises regulations on nuclear technology exports


New 'Part 810' regulations governing U.S. exports of nuclear technology came into effect in March. Alex Polonsky and Grant Eskelsen review the new rule and the impact to business of the changes, exemptions and authorisations it introduces.

After almost three-and-a-half years, the U.S. Department of Energy's ('DOE') new 'Part 810' regulations came into effect on 25 March 2015. The lack of a grandfather provision in the new rule means that many companies will need to take action – in the form of written export applications and/or written notices – to maintain compliance with their technology export obligations. If you were expecting the revised regulations to level the playing field between U.S. suppliers as compared to suppliers in other countries, then you will be disappointed.

Background

For more than 50 years, the DOE has regulated the export of certain non-public nuclear technology. The DOE's rules, which implement the Atomic Energy Act ('AEA') and are codified in 10 C.F.R. Part 810, restrict the transfer of certain nuclear technology and assistance to foreign persons whether they are located inside or outside the United States. The last time the DOE significantly revised Part 810 was in 1986.

Through its rulemaking, the DOE expressed an intent to update export 'destinations and activities' to comport 'with current US national security, diplomatic, and trade policy'.[1] The DOE received a significant number of pointed comments on its rulemaking. The DOE rejected, however, a large number of the comments, with the result that the national security interests appear to have outweighed diplomatic and trade policy interests.

The new rule

Part 810 applies to 'all persons subject to the jurisdiction of the United States who directly or indirectly engage or participate in the development or production of any special nuclear material outside the United States, and the transfer of technology that involves any of' a specific list of activities 'either in the United States or abroad by such persons…'[2] Additionally, Part 810 applies to a foreign company that is 'under the direction, supervision, responsibility, or control' of a 'person subject to the jurisdiction of the United States.'[3] 'Persons under U.S. jurisdiction are responsible for their foreign licensees, contractors, or subsidiaries to the extent' they have control over the activities of the latter.[4] The new rule does not clarify what constitutes control. This rule now makes explicit something that the DOE has regulated for decades – namely, that Part 810 applies to exports within the United States, also referred to as 'deemed exports' (because, for example, the technology is deemed to be exported to the home country of the foreign national who currently is inside the United States).

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Part 810 separates activities into three general categories: those that are exempt, those that are 'generally authorized', and those that are 'specifically authorized'. A general authorisation is granted by regulation and typically requires only that an exporter file a report with the DOE within 30 days after export activity begins, although there are new exceptions. A specific authorisation requires the DOE's prior approval before an export can occur.

In a change from the existing rule, the DOE is recognising that transfer of information that is already in the public domain is entirely exempt from Part 810.

The DOE is also expressly avoiding dual regulation by exempting exports approved by the U.S. Nuclear Regulatory Commission ('NRC'), the Department of State, or the Department of Commerce. Importantly, the DOE clarified in its Statements of Consideration announcing the new rule that the technology relating to the steam turbine generator portion of a boiling water reactor is not covered by Part 810, but rather by Department of Commerce regulations.[5]

Other exempt activities include uranium mining, spent nuclear fuel storage, and transportation; certain activities that involve nuclear fusion (as opposed to fission) reactors; and certain activities that produce radiopharmaceuticals.[6] The rule also now codifies the DOE's practice that transfers of technology to U.S. permanent residents (i.e., holders of a 'Green Card') and to those whom the U.S. government has granted asylum or refugee status, are exempt from Part 810.[7]

An important change that will affect U.S. domestic activities is the new general authorisation for transfer of technology to a national of a specifically authorised country who is employed by or contracted to work at a U.S. nuclear facility. This general authorisation is granted so long as the foreign citizen or national is working at an NRC-licensed facility as an employee of a U.S. company, the employee signs a confidentiality agreement, the employee has been granted unescorted access in accordance with NRC standards, and

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the employer reports the authorised access to the DOE. Importantly, the foreign employee does not have to be an employee of the NRC licensee.[8]

Authorised countries

The most visible change to the new rules is the replacement of a list of specifically authorised countries with those of generally authorised countries for purposes of evaluating exports or assistance to foreign commercial nuclear power plants. The old rules listed those countries that require a specific authorisation. In the new rules, however, a list of generally authorised countries is provided in an appendix, and all countries not listed are specifically authorised. As a result of this change, which seems innocuous on its face, dozens of countries that were generally authorised under the current rules will become specifically authorised under the new rules. Although commenters on the proposed rule requested that Russia, China and India be generally authorised, because they already have international nuclear cooperation agreements with the United States, the DOE declined to make that change. Accordingly, those countries remain specifically authorised. Moreover, the DOE has clarified that the designation of a country under Part 810 as generally or specifically authorised is a 'matter committed to agency discretion',[9] which leaves little room for the public to sway the agency's views.

Many countries have no change in their status, including 44 major nuclear trading partners, such as the United Kingdom, France, Japan, Spain, the Republic of Korea, Canada, and Argentina. On the bright side, Kazakhstan, Croatia, Vietnam, and the United Arab Emirates have switched from specifically authorised to generally authorised, based on, among other things, their entry into the European Union or their execution of international nuclear cooperation agreements with the United States. Mexico and Chile remain generally authorised, but only for projects that are identified in IAEA information circulars that are mentioned in the appendix.

Lastly, recognising the current geopolitical situation involving Ukraine, the DOE has added a new subsection, 810.14, that prescribes reporting requirements for exports to Ukraine, which has been added to the generally authorised list.[10] Under the new section, a written report is due to the DOE ten days before beginning any generally authorised activity in Ukraine, and a separate report is due ten days after completing the activity.

Unfortunately, the new rule does not grandfather technology exports covered by Part 810 to the dozens of countries that were previously generally authorised but now are specifically authorised. The new rule does, however, provide for a transition process. First, for any applications for a specific authorisation that are pending with the DOE for countries that are generally authorised under the new rule (i.e., for Croatia, Kazakhstan, Ukraine, United Arab Emirates, and Vietnam), the DOE is requiring that the applicant withdraw the application after March 25.[11] For activities that were generally authorised prior to the new rule, the exporter must apply for a specific authorisation by August 24.[12] However, those activities that switch from generally authorised to specifically authorised may continue until the DOE acts on the application. Similarly, companies that continue to make deemed exports to employees who were generally authorised but are now specifically authorised, must file reports by 24 August.[13]

Finally, the DOE is also giving the nuclear industry an opportunity to report previously unreported deemed exports. 'DOE recognizes that many companies with employees who are citizens or nationals of countries now subject to specific authorization requirements under the final rule announced today may not have previously reported the transfer of part 810 covered technology to such individuals to DOE under the old rules.'[14] The DOE is requesting that all such reports be made by 24 August 2015. This presents an opportunity for the nuclear industry to perform export compliance audits, to determine if there are any unreported Part 810 activities and, if there are, to voluntarily disclose them now.

'Operational safety'

The DOE also has added a new quasi-general authorisation intended to speed up the authorisation for U.S. persons to support certain foreign commercial reactor activities in countries that otherwise would require a specific authorisation. We refer to it as a quasi-general authorisation because it requires the U.S. person to provide prior notice to the DOE and it gives the DOE a veto over the proposed support. The revised Part 810 will grant a general authorisation for furnishing 'operational safety' information or assistance to an *existing* foreign commercial reactor that is under International Atomic Energy Agency ('IAEA') or equivalent safeguards, provided that DOE is notified in writing and approves the activity in writing within 45 days of the notice. 'Operational safety' is narrowly defined in the regulations to include assistance related to, among other things, compliance with standards and limiting worker exposure to radiation. This new provision will *not* make it easier for vendors to support new reactor construction in specifically-authorised countries.

Links and notes

1 Assistance to Foreign Atomic Energy Activities, 78 Fed. Reg. 46829, 46830 (Aug. 2, 2013)
2 10 C.F.R. § 810.2(a)
3 Id. § 810.2(a)(2)
4 Id. § 810.2(d)
5 Assistance to Foreign Atomic Energy Activities, 80 Fed. Reg. 9359, 9367-68 (Feb. 23, 2015)
6 10 C.F.R. § 810.2(c)
7 Id., § 810.2(c)(6)
8 Id., § 810.6(b)
9 Assistance to Foreign Atomic Energy Activities, 80 Fed. Reg.at 9364
10 10 C.F.R. § 810.14
11 Ukraine still has the 10-day notification requirement found in 10 C.F.R. § 810.14
12 10 C.F.R. § 810.16
13 Id., § 810.12(g)
14 80 Fed. Reg. at 9363

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