Rulemaking, Outreach, Feedback: a 360 Degree Process

A Case Study on the Deemed Export Rule

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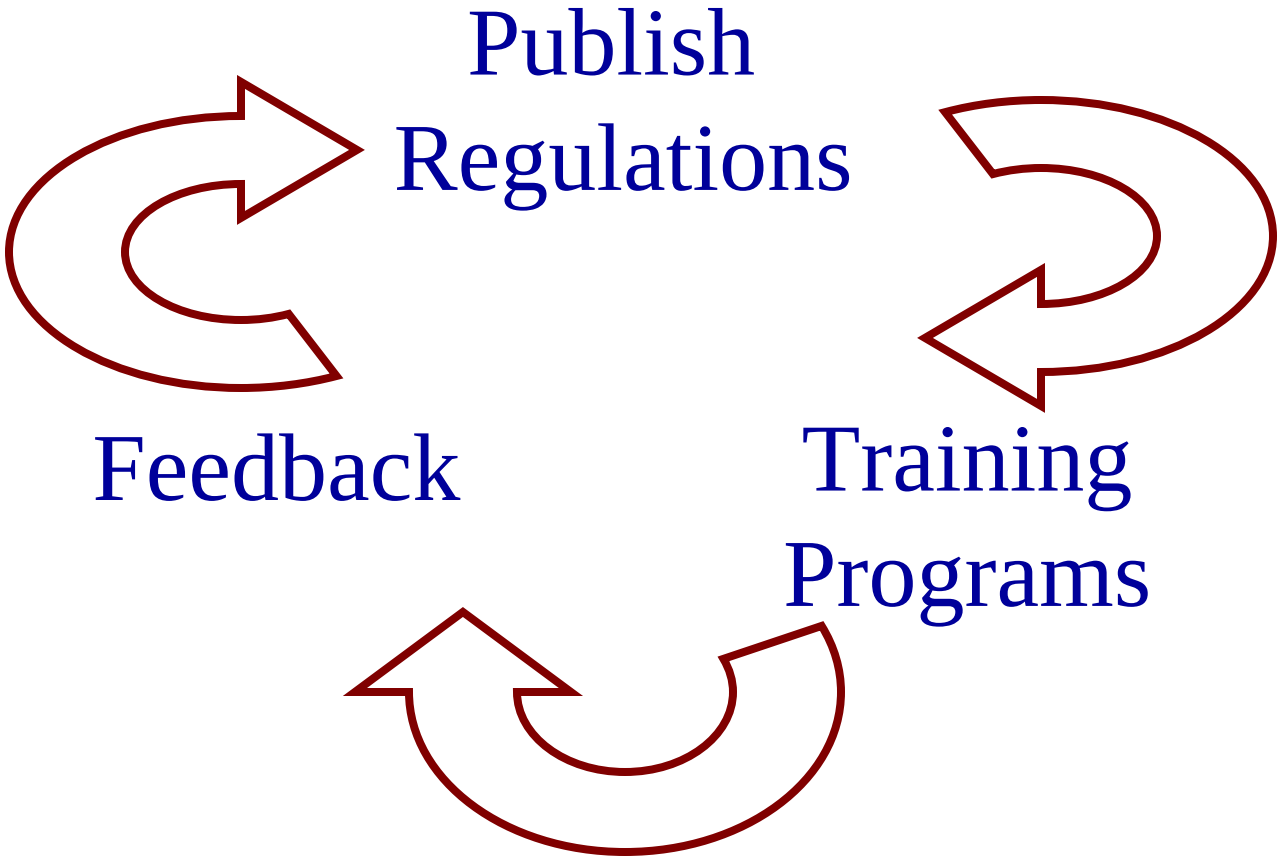
A 360° Model



An Ongoing Issue
Recently Re-stated

"U.S. firms, universities, national laboratories, and even sensitive government facilities employ the services of foreign workers. A small number of these employees come with both the skills and the intent to illegally acquire U.S. technology for transfer to their home countries."

Source: Report of the Office of the National Counterintelligence Executive, 2005

Industry Concerns: What is an Export?

- A transfer of technology within the United States with the *knowledge* it will be exported. (Export Administration Act)

- Industry wanted “bright line” to clarify their obligations.

Regulatory Response

Round 1

- BIS modified the definition of “export” in 1994 to “clarify” exiting rules.

- An export of technology is "deemed" to take place when it is released to a foreign national within the United States. It is deemed to be an export to the national’s home country. (Export Administration Regulations, 1994 revision)

Potential Deemed Export Scenarios

Situations that could involve release of technology or software include:

- Foreign national employees involved in certain research, development, and manufacturing activities.
- Foreign students or scholars conducting research in U.S. universities.
- Hosting of foreign scientist.

Guidance, Impact and Feedback

- Guidance posted on agency website.
- License requests increased from a handful to hundreds.
- Business community increasingly critical of policy and process.
- Enforcement actions on rise.

A Review of the Data

- 300,000 H-1B visas evaluated annually by the Department of Homeland Security.
- <1,000 deemed export license applications submitted annually.
- Is this the correct relationship?
- Applications concentrated among very few firms.

Report by the Commerce Department Office of Inspector General (March 2004)

- The Bureau's regulations and policies could enable foreign nationals to access otherwise controlled technology.
- Expanded efforts to raise awareness could be enhanced by refocusing outreach and clarifying information.

Implementing a 360° Approach

- Heightened awareness of the issues
  - Published proposed rule
  - Developed new partnerships
- Expanded guidance
  - Posted clarifying information on agency website
  - Conducted numerous training sessions
- Institutionalized feedback from stakeholders
  - Establishment of Advisory Committee

Another Round of Proposals

Round 2

- BIS published Advanced Notice of Proposed Rulemaking on March 28, 2005 with requests for comments.
- Received over 300 comments. More than for any previous rule.
- Academia, trade associations very engaged in ensuing discussion.

New Audience, New Challenges

Familiar with Concept

- Companies in defense-related sectors
- Traditional export firms

More Challenging

- Technology companies with no “internal walls”
- “Domestic only” businesses
- Universities and research institutes

New Partnerships

Developed partnerships with academia, government research organizations:

- American Association of Universities
- Council on Government Research
- National Council of University Research Administrators
- National Academies
- Office of Science and Technology Policy

Expanded Guidance

- Posted additional clarifying interpretations on website.
- Conducted over 120 training programs in each of the last two years.
  - Universities
  - Government research institutes, laboratories
  - Business community
- Enforcement actions publicized
  - “Don’t Let This Happen to You!”

Institutionalized Feedback

Round 3

- Withdrawal of March 28, 2005 Proposed Rule
- Creating Federal Advisory Committee
  - To conduct comprehensive 12-month assessment of the national security, technology, and competitiveness dimension of rules.
  - To recommend improvements to policy and process.

Institutionalized Feedback

- Federal Advisory Committee
  - 12 members to have diverse backgrounds and perspectives.
  - Open selection process. Notice seeking candidates published in Federal Register.

Final Thoughts

- Increased opportunity at each round for involvement of affected communities.
- Better appreciation of the affect of potential new rules.
- Expectations
  - more effective rules.
  - more knowledgeable audience.
  - improved compliance.