

DOE Issues the Part 810 Final Rule: Summary and Compliance Steps for Industry

By James A. Glasgow and Elina Teplinsky

Today, the U.S. Department of Energy (DOE) issued the final rule amending its regulations at 10 C.F.R. Part 810 on “Assistance to Foreign Atomic Energy Activities” (“Part 810”). The rule takes effect on March 25, 2015. The rulemaking to amend Part 810, which the DOE has been undertaking since it published in the Federal Register a notice of proposed rulemaking (NOPR) seeking to amend Part 810 on September 7, 2011, constitutes the most substantial change to these foreign nuclear assistance regulations since 1986 and, arguably, in the history of Part 810.

A review of the final rule amending Part 810 (“Final Rule”) reveals very few substantive changes to the supplemental notice of proposed rulemaking published by the DOE on August 2, 2013 (“SNOPR”). The SNOPR contained fairly significant changes to the NOPR, such as new general authorizations for certain deemed exports and operational safety activities, as well as clarifications regarding the scope of Part 810. In the explanatory text to the final rule, the DOE addresses all of the comments received in response to the SNOPR, but declines, with accompanying rationales, to adopt most of the commenters’ proposed changes to the SNOPR.

Overview of Key Issues and Amendments

1. Changes to Restricted Country List

The Final Rule maintains the replacement, in the NOPR and SNOPR, of the list of countries subject to specific authorization (“Restricted Countries List”) with a list of countries to which exports of U.S.-origin nuclear technology can take place under a DOE general authorization (i.e. no license required) (“Generally Authorized Countries List”). With the exception of Russia, China and India, the Generally Authorized Countries List includes the countries that have Section 123 agreements for cooperation with the United States. Five destinations that were previously on the Restricted Countries List—Croatia, Kazakhstan, Ukraine, the United Arab Emirates (UAE) and Vietnam—have been moved to the Generally Authorized Countries List, meaning that Part 810-controlled assistance involving these countries (except for transfer of

sensitive nuclear technology and other sensitive activities listed in §810.7) no longer requires DOE's specific authorization. Kazakhstan, Ukraine, the UAE and Vietnam were generally authorized because these countries executed Section 123 agreements with the United States. Croatia was generally authorized because it became a member of the European Union in July 2013.

Bangladesh, Thailand and Peru—countries originally included on the Generally Authorized Countries List in the NOPR—have been removed from that list in the final rule because Section 123 Agreements with these countries have expired. The DOE retained Norway on the Generally Authorized Countries List despite the expiration of the U.S.-Norway 123 Agreement because the U.S. and Norway are negotiating a renewal of that agreement.

Finally, the Final Rule maintains the limitation on generally authorized activities in Chile and Mexico to activities within the scope of the trilateral IAEA project agreements with those countries.

2. New Reporting Requirements for Activities in Ukraine

Although the Final Rule generally authorizes Part 810-controlled activities in Ukraine, the DOE has added a new advance notification requirement at 10 C.F.R. §810.14 for these activities, stating that “transfers of nuclear technology and assistance to areas that are not under control of the Government of Ukraine could present a proliferation risk.” Companies and individuals planning to engage in generally authorized activities in Ukraine are now required to file a report within 10 days of commencing these activities. The DOE could then determine that the activities are subject to specific authorization, requiring the licensee to obtain specific authorization before engaging in the activities.

In addition, 10 C.F.R. §810.14 requires companies and individuals completing a generally authorized activity in Ukraine to provide to DOE within 10 days of the original technology transfer a written confirmation that such transfer was completed.

3. New Deemed Export General Authorization

The Final Rule retains the new general authorization at §810.6(b), proposed in the SNO PR, for providing access to Part 810-controlled technology to individuals at U.S. nuclear facilities who have been granted unescorted access authorization in accordance with NRC requirements. The DOE did not accept the suggestion, offered in several public comments, that this general authorization be extended to individuals who have access to safeguards information or have completed other types of security checks. Further, the DOE maintained in the Final Rule the rigorous reporting requirements proposed in the SNO PR for companies using the §810.6(b) general authorization.

4. New General Authorization for Operational Safety Activities

The Final Rule also retains the new general authorizations at §810.6(c)(2) and §810.6(c)(3) for “operational safety” activities. The Final Rule maintains the distinction, proposed in the SNO PR, between activities in the United States and activities overseas: generally authorized activities involving operational safety technologies in the United States include assistance to proposed and new-build civilian nuclear facilities, while generally authorized operational safety activities overseas are limited to assistance to existing plants. The rationale provided by the DOE for this distinction is that “providing information during the design and construction of a new facility in a destination requiring specific authorization constitutes a much higher proliferation risk.” The use of the general authorizations under §810.6(c)(2) and §810.6(c)(3) are subject to a written notice and approval requirement.

5. Dual and Multi-Country Nationals

The explanatory text of the Final Rule clarifies that the DOE will continue to consider all countries of citizenship of foreign nationals who are potential recipients of Part 810-controlled technology and make nationality determinations for purposes of Part 810 on a case-by-case basis.

6. Steam Generator Technology

The DOE clarified in the Final Rule that technology for steam turbine and generator equipment in Boiling Water Reactors (BWRs) is excluded from the scope of Part 810. Such technology will continue to be controlled under the Commerce Department's Export Administration Regulations (EAR). In supplemental guidance to the Final Rule, the DOE clarified that technology for steam generators in Pressurized Water Reactors (PWRs) will continue to be subject to Part 810 controls.

7. Widely Available Technology

The DOE declined to exclude from the Scope of Part 810 or to provide a fast-track specific authorization for the export of widely available Light Water Reactor (LWR) technologies, as suggested by some commenters. However, the DOE noted that it will address technology determinations and transfers as part of its Process Improvement Program (PIP), being developed in parallel to the issuance of the Final Rule.

Next Steps for Compliance

As a result of the reorganization of the country lists, certain generally authorized activities will become subject to specific authorization. In accordance with §810.16, companies engaging in such activities have 180 days to request specific authorization and may continue their activities until DOE acts on the request. Companies who have not reported activities that are generally authorized under the current version of Part 810 should do so as soon as possible. Companies who filed specific authorization requests for activities that will become subject to general authorization under the Final Rule must withdraw such requests.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

James A. Glasgow [\(bio\)](#)
Washington, DC
+1.202.663.9200
james.glasgow@pillsburylaw.com

Elina Teplinsky [\(bio\)](#)
Washington, DC
+1.202.663.9009
elina.teplinsky@pillsburylaw.com

About Pillsbury Winthrop Shaw Pittman LLP

Pillsbury is a full-service law firm with an industry focus on energy & natural resources, financial services including financial institutions, real estate & construction, and technology. Based in the world's major financial, technology and energy centers, Pillsbury counsels clients on global business, regulatory and litigation matters. We work in multidisciplinary teams that allow us to understand our clients' objectives, anticipate trends, and bring a 360-degree perspective to complex business and legal issues—helping clients to take greater advantage of new opportunities, meet and exceed their objectives, and better mitigate risk. This collaborative work style helps produce the results our clients seek.

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2015 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.