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Identifying and Licensing "Deemed Exports" When Employing Foreign Nationals

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In the almost two years since the September 11 attacks on the World Trade Center and the Pentagon, various government agencies and departments have engaged in evaluations of systems, programs, and enforcement activities in order to identify and remedy loopholes and weaknesses which contribute to the vulnerability of the United States to terrorist attack. Of particular interest have been those systems and programs involved with controlling the entry and stay of foreign nationals in the United States and the export of technology and capital from the United States, either of which could lead to circumstances enabling a terrorist organization to further exploit the inherent vulnerabilities of open societies that favor the free movement of people and commerce. Two goals represented by these systems—keeping terrorists out of the United States and keeping U.S. technology out of the hands of terrorists—intersect in the often-overlooked area of export controls prohibiting "deemed exports."

I. Identifying Deemed Export Scenarios

In today's globalized business environment, it is impossible to conduct business without export or deemed export activity, even when it seems a company's activities are entirely domestic. Many everyday events give rise to deemed export concerns. For instance, a company dealing with potentially sensitive information or technology should recognize the potential for deemed export violations in the following scenarios: a foreign

national visits a U.S. factory; vendors are permitted access to technology in the course of providing goods and services; a U.S. company enters into a joint venture with a foreign company; employees of a U.S. company's French affiliate is permitted access to the company's intranet; a U.S. company's employees collaborate with foreign national colleagues of the company's foreign affiliate; a company in the United States employs a foreign national. These are just a handful of cases in which companies run a high risk of exposing foreign nationals to controlled technology. In each of these scenarios, companies should consider the possible application of regulations prohibiting deemed exports prior to exposure of foreign nationals to the controlled technology. In order to properly evaluate the need for licensing deemed exports, a company must take into account foreign nationals such as foreign visitors, customers, subcontractors, co-located employees of joint venture partners, and vendors, who may be exposed to controlled technology in the course of their normal activities at the company. However, in practical terms, deemed export licensing is most commonly invoked when employing foreign nationals in the U.S. workplace.

II. Why Focus on Deemed Exports Now?

Since the inception of the War on Terror, various government agencies have turned their attention as well as their enforcement resources toward keeping technology out of the hands of potential terrorists. A September 2002 General Accounting Office (GAO) Report found that the Department of Commerce's current deemed export enforcement procedures fail in their basic goal of managing the degree to which controlled technology is accessed by foreign nationals employed with U.S. companies.[2]

A. Department of State Memo to Consular Posts

In August 2002, Secretary of State Colin Powell issued a memorandum to all Consular Posts worldwide specifically drawing the attention of all consular officers to the national security concerns represented by export control violations, specifically in the context of deemed exports.[3] According to the Powell memorandum, consular officers should utilize the visa issuance process as a further check on deemed exports to prevent foreign nationals from entering the United States to violate laws prohibiting the export of goods, technology or sensitive information from the United States.[4] Consular officers, therefore, have been instructed to pay closer attention to technology controls when screening applicants for U.S. employment-authorized visas. In many more cases consular officers will be required to obtain advisory opinions from various government agencies prior to issuing visas to foreign nationals working in close proximity to potentially controlled technology.[5] From the U.S. State Department's perspective, it seems the days of lackadaisical enforcement are over, and the days of stricter scrutiny have begun.

B. GAO Report Finds Enforcement Deficiencies, Recommends Action

The September 2002 GAO Report noted significant deficiencies in the Department of Commerce's current procedures for determining when an export license is required for U.S. companies hiring foreign nationals.[6] Foreign nationals outside the United States who have been approved by the Bureau of Citizenship & Immigration Services for employment in the United States must typically apply for their U.S. visas at a U.S. Consulate or Embassy abroad. Through this application process, the Department of Commerce is given the opportunity to screen applications when the employment opportunity appears to involve controlled technology. The Department is thus alerted to employment situations which may involve exposure to controlled technology and thus

require export licenses. The Department may then provide input into the visa issuance process at the U.S. Consulate and help prevent the exposure of foreign nationals to controlled technology in the absence of any required export license.

Despite the Department's efforts to screen applicants abroad, the GAO Report noted that no procedure currently exists for screening applicants already present in the United States who seek to change their nonimmigrant status to an employment-authorized status.[7] Because many foreign nationals apply for and obtain employment authorization while already in the United States, the current procedure for screening applicants is insufficient to identify all foreign nationals seeking employment in positions utilizing controlled technology.[8] By neglecting to screen foreign nationals changing their nonimmigrant status in the United States, the Department leaves a gaping hole in the enforcement of current regulations prohibiting deemed exports.

In concluding its somewhat scathing report, the GAO recommended: 1) that the Secretary of Commerce use existing U.S. immigration data to identify foreign nationals who could be subject to deemed export licensing requirements, and 2) that the Secretary of Commerce consult with the Secretaries of Defense, State, and Energy to establish a more comprehensive, risk-based program to monitor compliance with deemed export license requirements.[9] While the Department of Commerce objected to some of the GAO findings,[10] the Department nevertheless agreed to develop a better system for ensuring that companies comply with export license requirements and restrictions.[11] Additionally, the Department revealed plans to consult with immigration authorities to develop a more thorough means for screening applications by foreign nationals seeking employment authorization while already present in the United States.[12]

C. Civil and Criminal Liability for Deemed Export Violations

Given recent efforts to increase enforcement of export controls, companies must assess their potential exposure to penalty under the current laws and must further act to prevent unlicensed deemed exports. Under current export regulations, any person that knowingly violates or conspires or attempts to violate any export regulation prohibiting actual or deemed exports may be fined up to the greater of $50,000 or five times the value of the exports involved, and may be imprisoned up to five years.[13] Criminal violations may result in corporate fines of up to the greater of $1 million or five times the value of the exports involved.[14] Penalties for noncompliance may also include denial of export privileges and exclusion from other government programs, including possible debarment from hiring certain foreign nationals.[15]

Penalties for recent export violations have run the gamut of those provided for by law. Silicon Graphics, Inc. was fined $1 million in January of 2003 for the illegal export of high performance computers to a Russian nuclear laboratory.[16] In December of 2002, Realtek Semiconductor Corporation was fined $44,000 and **denied export privileges for a period of two years** for violating export control regulations while under a denial order imposed for earlier infractions.[17] Other companies have been denied export privileges for years, with penalties varying based on the nature of the violation. The government has also demonstrated a willingness to impose criminal fines and imprisonment, sentencing an employee of Multicore, Inc. to two years of imprisonment in 2001 for illegally exporting commercial and military aircraft parts to Iran.[18] The government's enforcement arsenal is substantial indeed, and its incentive to prosecute export control

violations has never been greater. Therefore employers of foreign nationals should be attuned to circumstances which may require an export license.

III. What Exactly Are "Deemed Exports?"

The concept of "deemed exports" concerns the release of U.S.-controlled technology or source code to foreign nationals, whether present in the United States or on foreign soil when exposure to controlled technology occurs. While multiple U.S. government departments have regulatory authority over certain types of exports and deemed exports, the U.S. Department of Commerce Bureau of Industry and Security (BIS) is responsible for enforcing the deemed export controls pursuant to the Export Administration Regulations (EAR). Under the EAR, a release of technology or source code can occur via visual inspection by foreign nationals, verbal exchange of information, or application of U.S.-acquired knowledge or technical expertise abroad.[19] An export of controlled technology to the foreign national's home country is "deemed" to have occurred, because it is presumed the foreign national will return to his or her home country and make the technology available, whether to the government or to private entities.

IV. When is an Export License Required?

Whether a deemed export requires an export license depends on both the nature of the technology subject to exposure and the foreign national who will have access to the technology; therefore, a prospective employer must evaluate both the specific technology to which the foreign national will be exposed as well as the foreign national.

A. Is the Technology Covered by EAR?

As a threshold matter, it is necessary to evaluate the technology which may be exposed to a foreign national in order to determine if it may be controlled technology. The Commerce Control List contains the broad categorizations and the specific sub-classifications of technology subject to the EAR. The EAR applies mainly to dual-use items, such as civilian technologies which have military applications, but may also apply to technology which has only civilian applications. The broad categories of controlled technology include: nuclear materials, facilities, and equipment; materials, chemicals, micro-organisms, and toxins; materials processing; electronics; computers; telecommunications and information security; lasers and sensors; navigation and avionics; marine technology; propulsion systems, space vehicles and related equipment.[20] If a foreign national will have access to technology which may be classified under these categories, then it is necessary to determine whether the technology in question is controlled for exposure to that foreign national's home country.

B. Evaluating the Foreign National

With some exceptions, deemed export regulations apply to foreign nationals who are not U.S. lawful permanent residents (green card holders).[21] Therefore, whether deemed export regulations apply to a particular foreign national depends on that foreign national's U.S. immigration status. If the foreign national is a U.S. lawful permanent resident, it may generally be assumed that the deemed export regulations do not apply; however, even lawful permanent residents can be subject to deemed export regulations when they fail to pursue U.S. citizenship in a timely fashion.[22]

Additionally, because export controls differ based on the foreign national's home country, it is necessary to determine his or her nationality. According to the Department of Commerce's current evaluation criteria, a person with dual nationality is considered a national of the country where nationality or citizenship was most recently obtained.[23] This would mean that a person born in Saudi Arabia who subsequently acquired Canadian citizenship would be considered a Canadian national for purposes of deemed export regulations. In the final analysis, if a foreign national will be subject to technology which is controlled for release to his or her country of nationality, an export license must generally be acquired.

C. Limitations and Exceptions

While the scope of deemed export regulation is quite broad, the EAR is limited to controlled technology and software and does not generally cover finished goods.[24] Additionally, information widely available to the public, such as general scientific principles, marketing information, or general system descriptions of defense items, are also outside the scope of the EAR.[25]

In addition to these limitations, certain exceptions may apply when an export license would otherwise be required. For instance, if the technology is regulated by the EAR, it may fall into the Technology and Software Unrestricted (TSU) exception. This exception involves certain mass-market software, operations technology, software patches, and other commonly available software.[26] Additionally, other limited exceptions may apply to obviate the need for an export license.

While these exceptions do exist, nationals of certain embargoed and known terrorist destinations as well as other restricted countries may not be able to take

advantage of these exceptions. Therefore, it is always important to consider each deemed export situation anew, without relying on knowledge of a general exception which may not apply to all nationalities.

V. Securing Export Licenses

Under the current regulatory framework, when an export license is required, it is generally readily obtainable. In Fiscal Year 2001, for example, the Commerce Department rejected only three out of 825 export license applications relating to deemed exports.[27] Despite the ease with which such licenses may be obtained, applications for deemed export licenses currently comprise only about 10% of all export license applications filed with the Department of Commerce.[28] The sheer number of foreign nationals currently employed in the United States would suggest that far fewer applications for deemed export licenses are being filed than circumstances warrant. The minimal annual number of deemed export license applications coupled with the Department's renewed interest in enforcement of deemed export controls suggests we may expect more stringent enforcement in the future. Because deemed export control violations can result in severe civil penalties and criminal liability, employers of foreign nationals must diligently seek to identify situations involving the possibility of deemed exports and should obtain and comply with all required licenses.

Because of the complex intersection of law in this area, a qualified immigration specialist should be consulted to ensure the company retains its privileges to employ foreign nationals and, more importantly, to continue exporting goods and services from the United States. With care and attention to the deemed export issues raised by a

company's interaction with foreign nationals, deemed exports scenarios can be identified, properly analyzed, and often, when required, successfully licensed.

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[2] *EXPORT CONTROLS: Department of Commerce Controls Over Transfers of Technology to Foreign Nationals Need Improvement* (General Accounting Office Report to the Chairman, Subcommittee on National Security, Veterans Affairs, and International Relations, Committee on Government Reform, House of Representatives), September 2002.

[3] State Department Memorandum *Posted on* AILA InfoNet at Doc. No. 03030449 (Mar. 4, 2003)

[4] *Id*. at 3.

[5] *Id*. at 3.

[6] *Supra*, n. 1.

[7] *Supra*, n. 1, at 3.

[8] *Supra*, n. 1, at 16.

[9] *Supra*, n. 1, at 17.

[10] *Supra*, n. 1, at 18.

[11] *Supra*, n. 1, at 17.

[12] *Supra*, n. 1, at 17.

[13] 50 U.S.C. app. §2410 (a) (1979).

[14] *Id*. §2410 (b).

[15] 15 CFR 764, 766.

[16] *Don't Let This Happen To You!*, Bureau of Industry and Security website, *at* http://www.bxa.doc.gov/enforcement/DontLetThisHappen2U.pdf (Feb. 2003).

[17] *Id*.

[18] *Id*.

[19] 15 CFR 734.2(b)(3)

[20] 15 CFR 774, supp.1.

[21] M. Beth Peters, David W. Burgett and Joy E. Sturm, *Foreign Nationals in U.S. Technology Programs: Complying With Immigration, Export Controls, Industrial Security and Other Requirements*, 00-10 Immigration Briefings (West Group May 2000), at 8.

[22] *Id*.

[23] *Id*.

[24] *Id*. at 7.

[25] *Id*. at 7.

[26] *Id*. at 10.

[27] *Supra*, n.1, at 2.

[28] *Supra*, n.1, at 2.