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EXPORT LICENSING REQUIREMENTS FOR FOREIGN NATIONALS

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I. INTRODUCTION.

In today's heightened security environment, the U.S. government is increasing its scrutiny of foreign nationals working for U.S. companies. Of particular concern are the "deemed export" regulations. They provide that giving controlled technology to a foreign national located in the United States is deemed equivalent to exporting that controlled technology to a foreign country. Immigration lawyers should ask whether the immigrant will have access to controlled technology. If that question is not asked, the visa is likely to be delayed and even worse, companies could be found in violation of the "deemed export" regulations administered through the Commerce Department and State Department.

In preparing visa applications, immigration counsel should be cognizant of the level of controlled technology to which a foreign national will have access, and to coordinate with the company's compliance personnel to determine whether an export license is required. Export license applications, if required, should be initiated as early as possible in the hiring and visa issuance process in order to avoid costly delays.

The main sectors where foreign national employees can require access to controlled technology are the defense and high technology industries, although industries

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as diverse as civilian aerospace, petrochemicals, specialty steel production, nuclear power, and consulting also can be affected by export licensing requirements.

A web of export controls governs exports to foreign nationals. Most technology used in the development, production, or use of commercial items is controlled under the Commerce Department's Export Administration Regulations ("EAR"), which control exports and reexports of a broad range of technical information, for both national security and foreign policy reasons. The State Department's International Traffic in Arms Regulations ("ITAR") control exports of technology and services that relate to military items. For companies in the defense industry that are regulated by the Defense Security Service, employment of foreign nationals without appropriate safeguards in place can jeopardize a company's security clearances.

This article focuses on the deemed export rule under the Commerce Department's EAR, which govern exports of non-military technology. While there are some significant differences between the EAR and ITAR, the deemed export concept, as noted above, is increasingly important under both regimes and the basic concepts are the same under both regimes. In addition, domestic transfers of technology to foreign nationals raise issues under U.S. sanctions and anti-terrorism regulations as well as traditional export controls.

II. THE "DEEMED EXPORT" REGULATIONS ARE BROAD.

A deemed export occurs when a company releases information that falls within the definition of technology to a foreign national, including one of its employees, in the United States. Once such information is released to a foreign national, it is deemed to have been exported to that person's country of nationality. Under both the EAR and the ITAR, the deemed export rule applies to technology (and, in some cases, software) transfers to a foreign national, if the technology (or software) to which the foreign national is exposed relates to the development, production, disposal, or use of items controlled under either the EAR or the ITAR.

Under the EAR, the deemed export rule is derived from the definition of "export," which includes "[a]ny release of technology or source code subject to the EAR to a foreign national" in the United States. *See* 15 C.F.R. § 734.2(b)(2)(ii). This so-called "deemed export" rule presumes that any technology released to a foreign national in the United States ultimately will be exported to that national's home country. The same export controls that apply to a physical export of the technology to that country, therefore, apply to a release of the technology in the United States

A release of technology is defined under the EAR as including:

- (1) Visual inspection of U.S.-origin technology by a foreign national;
- (2) Oral exchange of information in the United States or abroad; or
- (3) Application to situations abroad of personal knowledge or technical experience acquired in the United States. *See* 15 C.F.R. § 734.2(b)(3).

A release of technology is defined under the ITAR as “[d]isclosing (including oral or visual disclosure)” ITAR-controlled technical data to a foreign national in the United States. *See* 22 C.F.R. § 120.17(4).

Both the EAR and ITAR focus on the fact that a transfer of technology can occur with the mere inspection or discussion of technology. Accordingly, immigration counsel should ask whether a foreign national employee could be exposed to controlled technology, including internal company research material, staff meetings, telephone calls, e-mail and other modes of communication. If so, a license may be required.

For dual-use items, deemed export licenses are processed by the Commerce Department’s Bureau of Industry and Security (“BIS”), the Bureau primarily responsible for enforcing the EAR. A company must submit a deemed export license application on a standardized form, which must be accompanied by a letter of explanation detailing the type of technology to which the foreign national will have access. Additional information regarding the background of the foreign national also must be submitted to BIS, including a current resume. Additional requirements for technology license applications are found at 15 C.F.R. § 748, Supp. 2. BIS has issued guidance for deemed export license applications, including information about standard licensing conditions that are generally attached to export licenses. *See* www.bis.doc.gov/DeemedExports/foreignnationals.pdf.

III. CERTAIN FOREIGN NATIONALS, DUAL NATIONALS AND EMBARGOED COUNTRY NATIONALS MAY NEED LICENSES.

The export license requirement reaches foreign nationals who are not lawful permanent residents (or in a protected class), dual nationals, and embargoed country nationals.

A. Foreign Nationals with a Foreign Permanent Resident Status and Dual Nationals Are Subject to the Deemed Export Rules.

For purposes of the EAR deemed export rule, a foreign national is any person who is not a U.S. citizen, lawful permanent resident, political asylee, refugee, or another member of a limited class of “protected individuals.” *See* 15 C.F.R. § 734.2(b)(2)(ii)(citing 8 U.S.C. § 1324b(a)(3)). Workers employed in the United States under employment-based visas generally are considered foreign nationals for purposes of the deemed export rule. The holders of “H” visas are the largest class of individuals that may need export licenses.

The EAR does not directly address the question of how to treat dual nationals or persons holding the equivalent of permanent residency in a country other than their country of citizenship. For deemed export purposes, the Commerce Department has issued an informal interpretation indicating that it considers the last permanent resident

status or citizenship obtained by such an individual as his or her nationality. *See* <http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html>. For example, if a citizen of India were to have subsequently obtained permanent resident status in the United Kingdom, she would be considered a United Kingdom national for purposes of the deemed export rule.

B. Embargoed Country Nationals Generally Need Licenses.

Nationals of countries subject to U.S. embargoes or subject to anti-terrorist controls pose additional issues from the perspective of deemed export controls, as the release of virtually any EAR-controlled technology to them will likely require an export license. Additional compliance issues may arise with respect to economic sanctions regulations maintained by the Treasury Department's Office of Foreign Assets Controls ("OFAC") against Cuba, Iran, Libya, or Sudan. A broad range of controls, including those prohibiting exports of any U.S.-origin technology, generally applies to such countries, as well as, in some cases, their nationals.² Immigration counsel should consult with compliance professionals when a company contemplates employing a national from one of the embargoed countries, as licensing policy may disfavor the granting of a license, or there may be a statutory provision that prohibits granting a license for the technology in question.

IV. IMMIGRATION COUNSEL SHOULD ASK ABOUT SERVER ACCESS.

The lion's share of controlled technology is stored in some electronic form, and computer networks provide numerous opportunities for deemed exports to occur.

A. Inquire Whether the Foreign National Has Unrestricted Server Access.

Both technical personnel and information technology support personnel may require licenses if they have unrestricted access to controlled data.

Immigration counsel should ask whether the company has password protection for individual documents, protected databases, and other computer security. Companies employing foreign nationals that have significant amounts of controlled technical data stored on their computer systems are at risk unless they segregate controlled technology within the server network. A company using best practices may require a compliance person to be responsible for granting access to restricted servers.

² While deemed exports to embargoed country nationals are not specifically prohibited in the economic sanctions regulations maintained by the Treasury Department's Office of Foreign Assets Control ("OFAC"), at least one interpretation in OFAC's Iranian Transactions Regulations characterizes the release of technology to a foreign national as an export. *See* 31 C.F.R. § 560.418.

B. Ask Whether Foreign National Computer Support Personnel Have “Master” Access.

A deemed export compliance issue that has become increasingly important is the granting of “master” access to information technology (“IT”) support staff over computer systems containing controlled technical data. Master access is granted to IT personnel to enable them to maintain and troubleshoot computer systems, implement access controls, and conduct backup and recovery operations. Even though IT personnel may not be technically trained in the relevant substantive field, the EAR recognizes no such distinctions when it comes to controlled technology.

Simply having access to the entire system creates the possibility that IT personnel could visually inspect controlled technical data — enough for a deemed export to occur. Master access by IT personnel also can present significant risks when IT support is outsourced. Some IT support providers have operations overseas, and U.S. companies may have no control — or even any idea — of the nationality of computer support personnel who might gain access to the system through remote proxy or on-site support visits. Companies that have controlled technical data stored on their computer systems should be sure that any grant of master access to its own or outsourced computer support personnel complies with its policies and procedures on deemed exports.

V. ALLOW ABOUT THREE MONTHS FOR OBTAINING A “DEEMED EXPORT” LICENSE.

In determining whether a license is required, it is important to focus on whether the technology is controlled due to its listing on the EAR’s Commerce Control List or the ITAR’s Munitions List. Release of ITAR-controlled technology requires a license to virtually all foreign nationals, with very limited exceptions. For EAR-controlled technology, the combination of the level of technology involved and the foreign national’s home country will determine whether a license is required. The release of highly sensitive technology, such as nuclear and missile technology, is tightly controlled and virtually all foreign nationals will require a license. The release of less sensitive EAR-controlled technology, however, often does not require a license for many foreign nationals, such as nationals of the European Union, Australia, Japan and other close U.S. allies.

If a license is required, the company will need to submit a license application to either the Commerce Department or the State Department to obtain authorization to release the controlled technology to the foreign national in question.

A. Commerce Department Licenses Can Take 90 Days or Longer.

The Commerce Department attempts to process license applications within 60 days, but deemed export license applications often take longer. It is not unusual for processing to take 90 days or longer, particularly applications involving foreign nationals

from embargoed countries or countries of proliferation concern such as China, India, Pakistan, and Israel.³

B. State Department Licenses Typically Take At Least 60 Days.

For military items controlled by the State Department, licensing in the employment context generally is handled through a Technical Assistance Agreement (“TAA”). A TAA is an agreement between the company releasing the controlled technical data and the foreign national setting forth the parameters of the technical data to be disclosed and imposing limits on its use and re-transfer. TAAs are subject to very specific regulatory requirements and must contain certain clauses mandated by the ITAR. The State Department’s Directorate of Defense Trade Controls (“DDTC”) must approve the TAA prior to any transfer of controlled technical data. Subsequent amendments to the scope of technology involved also must be pre-authorized by DDTC. Requirements for TAAs can be found at 22 C.F.R. § 124. It is customary to include a current resume, as well as basic biographical information about the individual involved in the TAA. Gaps in employment history commonly lead to further inquiry by DDTC. Licensing times are generally 60 days or more for TAAs.

VI. ENFORCEMENT IS INCREASING.

Given the broad government concern about terrorists entering the United States, various government agencies are looking at foreign nationals and, consequently, deemed exports. BIS has made increased enforcement of the deemed export rule a priority for 2003. *See* Bureau of Industry and Security, Annual Report Fiscal Year 2002, at p. 14.⁴ Anecdotal reports have surfaced in the export community that indicate that BIS has begun to monitor applications for “H” visas more closely. BIS has conducted sporadic

³ The deemed export license application processing for nationals from embargoed countries (Cuba, Iran, Libya, Sudan) is significantly slower than 90 days. Processing for North Korea and Syria, which are considered terrorist-supporting countries but not subject to full embargoes, also is extremely slow. To put the timeframes into perspective, application processing times have recently taken almost a year in some Cuba cases.

⁴ In response to a request from Congress, the General Accounting Office (“GAO”) recently conducted a review of BIS enforcement of the deemed export rule. The report was generally critical of the Commerce Department’s enforcement efforts, citing a lack of post-license audits, as well as a large disparity between the number of H-1 visa holders working in potentially sensitive industries and the number of export licenses requested from and granted by the Commerce Department. *See* United States General Accounting Office, Export Controls: Department of Commerce Controls over Transfers of Technology to Foreign Nationals Need Improvement, GAO-02-972 (Sept. 6, 2002).

spot checks of foreign nationals granted “H” visas who have accepted employment in sensitive industries, including interviews with their employers.

At the end of 2001, Customs launched Operation Shield America designed to prevent international terrorist organizations from obtaining sensitive U.S. technology, weapons, and other equipment that could help them carry out attacks. As a result of Operation Shield America, Customs has stepped up its Export Enforcement Program and its focus on deemed exports. Companies are receiving visits from Customs officials inquiring about foreign nationals and there is increased emphasis on deemed exports.

Finally, the FBI also has become interested in deemed export issues because of the terrorism angle. It provides leadership through the Joint Terrorism Task Forces that are composed of various federal, state and local agencies (including the U.S. Office of Export Enforcement in the Commerce Department and various offices in the Department of Homeland Security) in order to provide a comprehensive response to terrorism. As part of its investigative activities, FBI agents have visited large, mainstream companies to inquire about particular foreign nationals, the projects on which these individuals have been working, and whether the foreign nationals are licensed.

VII. AVOID EMPLOYMENT DISCRIMINATION.

Compliance with export controls must not lead to non-compliance with applicable federal, state, and local employment discrimination laws. It is important for immigration counsel to work with human resources to be certain that eligibility to receive deemed exports of EAR-controlled technology is listed among the conditions of employment for key technical and IT job listings. It also must be made clear on all forms that any information collected regarding an employment applicant’s nationality or citizenship is solely for export control compliance purposes, and will not be used to unfairly discriminate in the hiring process.

VIII. CONCLUSION.

Immigration lawyers should advise their clients of the increased scrutiny that the U.S. government is giving foreign nationals in the United States. Checking for compliance with the deemed export regulations at the front end of the visa application process will save time and money in the long run.