

DEEMED EXPORTS:

How you can violate export regulations without shipping any product outside the United States

Many companies recognize that United States law prohibits the export of many products or technologies to foreign countries. Some businesses try to avoid improper exports by not shipping their goods overseas.

Yet, businesses often do not realize that they can unwittingly export a product or technology even though the product may never physically leave the borders of the United States. For example, a software company that employs a foreign national may be exporting its technologies when that individual is privy to the source code or technical specifications of the software. In such cases, the company may be required to obtain export licenses for the technologies in question, and the licenses must be obtained prior to the foreign national's exposure.

These unwitting exports occur as a consequence of the "deemed export" rule promulgated by the Bureau Of Industry and Security ("BIS") of the United States Department of Commerce. See 15 CFR § 734.2(b)(2)(ii). This rule essentially provides that an export of technology or source code (except encryption source code) is "deemed" to take place when it is released to a foreign national within the United States. A "release" of technology occurs when it is provided to foreign nationals for visual inspection or when the technology or code is discussed orally. For example, this can occur when the individual in question has been given technical specifications, plans, blueprints, or copies of source code. The technologies covered by the Export Administration Regulations ("EAR") encompass a wide range of items and are broadly defined as information necessary for the development, production, or use of products.

A foreign national is subject to the deemed export rule unless he or she has been granted permanent resident status and possesses what is commonly known as a "green card." Temporary skilled workers, such as those who enter the United States with H1b visas, foreign national employees brought to work at a U.S. branch, and alien trainees who come to the U.S. for specialized training are among the categories of foreign nationals who are subject to the deemed export rules. The deemed export rules do not apply to foreign nationals who are considered "protected persons" under 8 U.S.C. § 1324b(a)(3). The most common examples of protected persons are temporary visitors to the United States such as tourists, students, scholars, researchers, and diplomats. Protected persons also include political refugees and political asylum holders.

Compliance with the deemed export rules is a delicate matter. Businesses must identify foreign nationals to whom the deemed export rule might apply; however, companies must avoid running afoul of prohibitions on discrimination on the basis of national origin. Having identified a foreign national, the company then must determine whether it is feasible to isolate the individual from technologies subject to export regulation or whether the company will acquire the necessary export licenses to permit the foreign national to see or use the technology. Acquiring the export license can take time, so

creation of a process that will make a timely determination as to what ECCN number applies and whether a license application must be filed is critical if you are to avoid costly delays. These issues must be considered as part of project planning.

Multinational corporations should also be aware of the “deemed reexport” rule promulgated by the BIS. See 15 CFR §734.2(b)5. This rule essentially creates U.S. jurisdiction over a U.S. product or technology that may have been lawfully exported to another country only to have it released or exported to a foreign national of a third country within the country of import. For example, if a license was required and obtained for technology exported to France and upon arrival in France a Chinese National was part of a discussion group exposed to that technology the company has unwittingly re-exported that technology to China and in so doing, violated the deemed re-export rule.

Because of the complexities and consequences of the deemed export rule and the deemed reexport rule, a company seeking to employ a foreign national or to retain a foreign national as a consultant should seek advice from a professional familiar with the export control regulations, the applicable immigration laws and the relevant employment laws.

If you have any questions about this article or any issues in the fields of government contracts and technology, software or employment law, please contact Ken Weckstein at 202/861-1860 (email kweckstein@ebglaw.com), Howard Wolf-Rodda at 202/861-1899 (email hwolf-rodda@ebglaw.com), or Marian Ladner at 713/750-3173 (email mladner@ebglaw.com).