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# Techlaw e-Alert

December 14, 2007 by Stephanie Chandler and Margaret Hopson

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## Deemed Export Rule

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Did you know that just by sharing technology with a co-worker or giving a tour of your facilities, it is possible to export technology? Without ever shipping to a foreign country, it is possible to violate the United States export laws. Export of technology is deemed to have taken place when it is released to a foreign national within the U.S. This little known rule, found in the Export Administration Regulations (the EAR), is called the deemed export rule and can be quite significant for companies that deal with technology that may be controlled for export.

When technology is released to a foreign national, it is deemed to be exported to the home country of that foreign national. To prevent inadvertent exportation of technology, it is important to understand the terms used in the deemed export rule.

#### When is technology "released" to a foreign national?

Release of technology is defined as (1) visual inspection of U.S. origin equipment and facilities by foreign nationals, (2) oral exchanges of information which take place in the U.S. or abroad, or (3) making technology available by practice or application to situations abroad under the guidance of persons with knowledge or experience acquired in the U.S. It is also a violation of the deemed export rule to release technology to a person with the knowledge that a violation is about to occur. Something as simple as giving a tour of your facilities to a new employee or sharing technical specifications, plans, or blueprints with an employee or co-worker may trigger the deemed export rule. Even if the transfer happens by your company outside the U.S. (for example, by an overseas satellite office) to a foreign national, you may be subject to the deemed export rule. Technology is also released if it is shared with a foreign national over the phone, via fax, or when a company is collaborating with foreign nationals employed by another company. Such sharing of technology is equivalent to shipping that technology to the foreign national's home country.

#### Who is a foreign national under the deemed export rule?

Under the deemed export rule, a "foreign national" does not include (1) any person lawfully admitted for permanent residence in the U.S., (2) any person who has been granted U.S. citizenship, or (3) any person protected by the Immigration and Naturalization Act. This means that people in the U.S. as tourists, students, businesspeople, scholars, researchers, technical experts, airline

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personnel, military personnel, and diplomats are subject to the deemed export rule.

### **What technology is subject to the deemed export rule?**

The deemed export rule does not affect all technology. Rather, "technology" is defined as specific information necessary for the development, production, or use of a product. The EAR regulates the export of technology or source code, but does not regulate object code and applies to software only if the source code is released. The definition of technology does not include finished products or publicly available information. Even if the deemed export rule is triggered, the technology may not require an export license for export. Only technology which requires an export license for export can violate the deemed export rule. If the technology does not require an export license or if it is eligible for a license exception, export of that technology will not trigger the deemed export rule. If the technology does require an export license for export, a deemed export license must be obtained before releasing the technology to a foreign national.

### **Does the deemed export rule apply to your technology?**

To determine if your technology requires a license for exportation, it is necessary to look to the regulations and lists available from the Bureau of Industry Security (the BIS). The BIS regulates and controls export through the EAR and publishes and updates the Commercial Control List (the CCL). The CCL is a list of all items subject to export controls. If your technology can be found on this list and is regulated by the EAR, then you may be dealing with "controlled technology." You must then determine whether a license is required for the technology to be exported to the home country of the foreign national to whom you intend to transfer the technology. If you determine you must have an export license to share your controlled technology with the foreign national, you must obtain the license by the time of transfer.

### **How can employers comply with the deemed export rule?**

In order to comply with the deemed export rule, a company that employs foreign nationals must know the national origin of its employees and possibly restrict or deny that foreign national employment if the export license is denied or if the employer company cannot acquire a deemed export license. This may cause some complications in complying with laws intended to protect employees from discrimination based on national origin, such as Title VII. One approach to dealing with the apparent conflict in law when dealing with potential new employees is to make an offer for employment contingent on obtaining the necessary export licenses and include a "tear-off" portion of the application, where the information regarding national origin may be removed from the hiring process. During the four to six month period while the employer does not yet have the deemed export license, the foreign national must not be exposed to technology in a way that may trigger the deemed export rule. All applicants for employment should be notified that export licenses may be necessary before the potential new employee is exposed to controlled technology and that denial of an export license may mean termination or reassignment for the new employee.

Additionally, if a company faces a violation of the deemed export rule with current employees, there exists another potential conflict of laws. In such a situation, the employer company should first identify any controlled technology which may require a license for export. If any controlled technology is identified, then *all* employees working with that controlled technology should be screened and made aware that the screening process is for the purpose of complying with the deemed export rule. If the company finds that it has violated the deemed export rule, the violation should be disclosed to the BIS and the company should file an application for a deemed export license. Any report of a deemed export rule violation may trigger an enforcement response, but self-disclosure may prove to be a mitigating factor.

The deemed export rule is a little known rule that can have a big impact. Anytime controlled technology is released to a foreign national, such release is deemed to be an export to the foreign national's country of origin. Companies must be sure to have the appropriate export licenses and implement controls and limits on foreign national's access to controlled technology if the company does not or cannot obtain a deemed export license.

For more information regarding the deemed export rule or other technology licensing or export assistance, please contact **Stephanie Chandler** (Technology) at [schandler@jw.com](mailto:schandler@jw.com) or 210.978.7704 or **Margaret Hopson** (International Business) at [mhopson@jw.com](mailto:mhopson@jw.com) or 210.978.7765.

Summer Associate, Lisa Miller, who will be joining Jackson Walker in Fall 2008, contributed to this article.

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