Exporting Without Leaving the United States

The Wonder Widget Company, or WW as it likes to be called, is the largest exporter in the United States. As part of its sales promotion, WW often invites its foreign customers to visit its facility in York, Pennsylvania, to view its production process. WW also likes to invite foreign university faculty and post-graduate engineering students to work at its facility temporarily to assist in the creation of new product lines. While WW considers itself to be a responsible exporter that follows all export laws and regulations, it is not aware of the "deemed export" rule which states that an export of technology is "deemed" to take place when it is released to a foreign national within the United States. §734.2(b)(2)(ii) of the Export Administration Regulations (EAR). This covers all technology produced by WW which requires an export license under the EARs. For example, certain materials, chemicals, electronics, computers, telecommunications and information security equipment, among other categories, require export licenses under the EAR.

Technology is "released" for export when it is available to foreign nationals for virtual inspection, when technology is exchanged orally, or when it is made available by practice or application under the guidance of persons with knowledge of the technology. §734.2(b)(3) of the EAR. When WW's foreign customers or foreign university faculty or research students read technical specifications, plans or blueprints, discuss the widget research or watch a demonstration of the production process, WW may be required to obtain an export license before any of these actions occur. This is because technology required for the development, production or use of a controlled product remains controlled. Under the "deemed export" rule, WW has to apply for an export license if (1) it intends to transfer controlled technology to foreign nationals in the United States; and (2) transfer of the same technology to the foreign national's home country would require an export license.

All foreign nationals are subject to the "deemed export" rule except a foreign national who (1) is granted permanent residence, as demonstrated by the issuance of a permanent resident visa (also known as a Green Card); or (2) is granted U.S. citizenship; or (3) is granted status as a "protected person" under 8 USC 1324b(a)(3) (which applies to political refugees and political asylum holders). Thus, if the person is a naturalized citizen or permanent resident of the United States, the "deemed export" rules do not apply. For individuals that are citizens of more than one foreign country, or have citizenship in one foreign country and permanent residence in another, as a general policy, the last permanent resident status or citizenship governs.

For example, if a Chinese national becomes a citizen of the United Kingdom, but retains his Chinese citizenship also, having dual-citizenship, the person's most recent citizenship in the U.K. governs and the release of technology would be viewed as a release to the U.K. If WW is not sure about the status of a foreign national, it can ask the Bureau of Export Administration ("BXA"), to determine where the stronger ties exist based on the facts of the specific case. BXA may also look at the foreign national's family, professional, financial and employment ties in making a decision.

WW may also be subject to the "deemed re-export" rule which is a term used to indicate the transfer of controlled U.S. technology to a foreign national overseas. For example, if WW transfers its controlled proprietary technology to ABC Widgets ("ABC") in the U.K., and ABC, in turn, employs a Chinese national who is not a permanent resident of the U.K., nor of the United States, and who will need the controlled proprietary technology to perform his duties, WW is responsible for obtaining any required deemed export license as if it were transferring the technology to China. §734.2(b)(4) of the EAR.

Generally, the types of technology subject to the EAR are those which are in the United States or of U.S. origin, in whole or in part. Most are proprietary. Technologies which tend to require licensing for transfer to foreign nationals are also dual-use (civil and military applications). Foreign technology that is commingled with even a *de* minimus amount of U.S.-origin technology is subject to the EAR. While the Bureau of Industry and Security ("BIS") is responsible for implementing and enforcing the EAR, which regulate the export and reexport of most commercial items, other government agencies regulate more specialized exports. Defense articles are under the jurisdiction of the State Department and the International in Traffic Arms Regulation and technology related to the production of nuclear material is under the jurisdiction of the Energy Department. *See* Supplement No. 3 to Part 730 of the EAR.

The deemed export rule highlights the fact that sending technology, or even an item, out of the United States can be done in ways that most of us would not consider to be an "export." For example, in addition to a foreign person viewing technology, as is described above, one can export technology by mail, by facsimile, hand-carry on an airplane, uploading or downloading on an Internet site, e-mail or even in a phone conversation. The technology does not have to be sold, it can be a gift, and it can only leave the U.S. temporarily.

Enforcement has increased in the past few years, and today it is not unusual for a single civil violation to result in a $250,000 civil fine or twice the amount of the transaction upon which the penalty is imposed. Criminal violations can result in a penalty up to $1,000,000 per violation and/or up to 20 years of imprisonment. If the person making the illegal transfer is not a U.S. citizen, she or he can face removal proceedings. For example, in 2008, a manufacturing company in California paid a $31,500 fine for allowing an employee, a national of Iran, to access technology related to aircraft parts. Later that year, a retired professor from the University of Tennessee was convicted of export control violations for allowing two foreign graduate students to access information about a military defense project. In 2009 he was sentenced to 4 years in prison.

To protect itself, WW and all U.S. exporters, should have an export compliance plan. The plan should be detailed, setting-up internal export procedures and designating responsible individual(s) for carrying out the procedures. While the plan will not protect a company from civil or criminal liability under the EARs, it is normally useful for obtaining mitigation of any penalty.

Cozen O'Connor's international trade and business immigration attorneys work regularly with clients in drafting export compliance plans and assisting them in determining whether their products are subject to EARs. For more information, please contact Marcela B. Stras (Washington, D.C., 202.912.4875, mstras@cozen.com).