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U.S. GOVERNMENT RAISES THE BAR ON “DEEMED EXPORTS” AND CONTINUES OTHER TRADE RESTRICTIONS

Conan P. Grames and Terry L. Fund***

Recently, the U.S. Government has taken a number of steps to tighten its regulations on so-called deemed exports, a pitfall for companies who may not even be in the export business. A company can be engaged in a deemed export if it allows certain foreign employees, who work in the U.S., to have access to restricted technologies such as micro-processors and high-tech computers.

Many companies are not aware that the U.S. Commerce Department regulates the export of certain types of micro-processors, computers and computer software. The restrictions on such exports are higher for some countries than others. In addition, a U.S. company may have no exports at all, but if it allows employees from countries such as China, Iran and India to have access to restricted technology, the company is deemed to have exported that technology to the employee's country unless the employees are U.S. citizens or permanent residents (green card holders).

The Department of Commerce's Office of the Inspector General issued a report last year in which it suggested additional changes to increase national security, and the Bureau of Industry and Security is currently reviewing and

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taking comments on this report.¹ The report suggested, among other things, that an individual's *birth citizenship* be considered for "deemed export" purposes.² Current standards require an employer to verify the current citizenship or permanent residency of an employee before granting access to restricted technology.

If the suggested changes are implemented, an employer could be "exporting" restricted technology if it allowed an Iranian-born Canadian national employee to have access to that restricted technology. However, this restriction would likely not apply when the foreign born national has been granted U.S. citizenship or permanent residency.³ A much-heightened level of scrutiny will be required of employers, using or producing restricted technology, if the regulations are passed.

For example, participants in the developing commercial spaceflight industry are facing significant challenges from such regulations since much of the technology involved is restricted. A subcommittee of the U.S. House of Representatives Science Committee recently held a hearing on these challenges and heard testimony from principal players in the industry.⁴ Even London-based Virgin Galactic officers testified that "uncertainty about licensing requirements has prevented Virgin Galactic from viewing ... designs for the commercial space

¹ Export Licensing, 70 Fed. Reg. 15607 (Mar. 28, 2005).

² *Id.*, at 15608.

³ Update on Recent Foreign Trade Controls Developments: Syria, Interdiction Software, Deemed Exports, Mandatory AES and other Regulatory Changes, Covington & Burling Foreign Trade Controls Practice Group Newsletter, April 2005 (on file with author).

⁴ Douglas Jacobsen, *Commercial Spaceflight Industry Facing Export Control Issues*, (April 25, 2005) at <http://www.djacobsenlaw.com/tradelawnews.html>.

vehicle that it intends to use [and has] prevented Virgin Galactic from placing a formal order ... for the vehicles.”⁵

Even for experienced exporters, the regulations on exports to certain countries can represent a shifting minefield. For example, in light of recent developments, the sanctions against Iraq and Libya are now virtually gone, with limited restrictions remaining against trading with or investing in those countries. However, sanctions against Cuba, Iran, Sudan and Syria prohibit practically all exports. In fact, the Treasury Department’s Office of Foreign Assets Control recently published Syrian Sanctions Regulations.⁶ These regulations expand on and reinforce the prohibition on exports and reexports already in place, in part by making some prohibitions applicable regardless of whether the transaction involves a U.S. person. Limited sanctions are also in place against Angola, Burma (Myanmar), Colombia, Liberia, Sierra Leone and the former Yugoslavia.

In spite of the removal of some Indian and Pakistani names, the list of Specially Designated Nationals (SDN) has grown to around 6,000. The SDN list contains names of individuals and entities that are known to be engaged in or supportive of international terrorism, weapons trade, drug trade and other sanctioned activities. The penalties for doing business with any SDN are severe and often catch companies by surprise. For example, a French bank issuing a letter of credit on behalf of an overseas purchaser could be on the list if it had

⁵ *Id.*

⁶ 31 C.F.R. pt. 542.

deposits from an SDN in a third country. Any company engaged in foreign trade is advised to confirm that its transactions do not involve an SDN.

Not surprisingly, the Arab boycott of Israel is still alive and well. Companies involved in foreign trade with Arab League nations must establish a compliance program to ensure that no prohibited language occurs in any trading documents. Commonly, letters of credit from those nations contain statements that would restrict the parties from dealing with Israel. Accepting such language can result in criminal and tax penalties for U.S. companies and their subsidiaries.

Finally, U.S. companies, executives and employees must continue to be vigilant in avoiding violations of the U.S. Foreign Corrupt Practices Act. A payment of “grease” or bribes overseas, even if made by an agent or distributor, can result in criminal fines and imprisonment for U.S. “persons.” In the event an employee or officer is found personally guilty of a violation, the company cannot pay the criminal fines on his or her behalf.