



Boston Concord Hanover Manchester

#### Author

Kerry T. Scarlott, Esquire

#### Practice Areas

International Law

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### What You Don't Know CAN Hurt You. Deemed Exports a Federal Enforcement Focus

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Since September 11, 2001, the U.S. government has intensified its efforts to prevent the disclosure of products, software and technical data to terrorists, terrorist organizations and "high risk" countries that might use the products, software or data against U.S. interests. The result is a renewed enforcement focus on the so-called "deemed export rule," as evidenced by several recent criminal enforcement actions and FBI statements that it considers enforcement of the deemed export rule a key tool in fulfilling its national security mandate. Accordingly, all companies with foreign national employees, consultants or contractors must be familiar with the legal implications associated with the deemed export rule.

Under the deemed export rule, the release of U.S.-origin products, software or technical data within the United States to a foreign national constitutes an "export" of that item to the home country of the foreign national, even if the item never actually leaves the United States. Such releases are subject to export licensing requirements, and an unauthorized release to a foreign national within the United States constitutes an export violation. The term "release" is broadly defined and can occur through visual inspection (including via computer networks), verbal exchanges, or the application abroad of personal knowledge or technical experience acquired in the United States. A "foreign national" is anyone who is not a U.S. citizen or permanent resident (i.e., aliens possessing a valid INS Form 1-151/555 or "green card"). Anyone holding a temporary visa (B, E, F, H-1B, H-3, J-1, L-1, etc.) is treated as a foreign national for these purposes. This includes foreign students seeking advanced degrees from U.S. universities.

In order to ascertain whether a deemed export license is required in a particular situation, or whether a release is precluded as a matter of law, one must determine on a case by case basis the correct regulatory classification of the product, software or technical data at issue, and then analyze the specific controls that apply to that classification in relation to the citizenship of the foreign national. In the process, reference must be made to appropriate portions of the Export Administration Regulations and the International Traffic in Arms Regulations. For example, an export license must be obtained prior to allowing any U.K. foreign national to work on products or technology that are produced according to military specifications. Moreover, an export license must be obtained in many situations involving the release of a wide variety of commercial products, software or technical data to foreign nationals working under the auspices of a student or work visa.

Most deemed export license applications are processed by the U.S.

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Department of Commerce's Bureau of Industry and Security (BIS). BIS recently improved its processes for issuing deemed export licenses. For example, the standard validity period for a deemed export license has historically been two years. Under BIS' improved processes, future deemed export license validity periods will be tied to a foreign national's visa expiration date if that expiration date extends beyond the standard two-year license validity period. This is particularly helpful with respect to the popular H-1B visa program, since an H-1B visa is typically valid for 36 months. In addition, BIS has indicated that it will expedite deemed export license applications that relate solely to upgrades to technology already authorized in an existing license.

Noncompliance with the deemed export rule is pervasive. The U.S. government has reported that just 24 businesses were responsible for submitting 80% of the deemed export license applications during FY2002, despite the fact that hundreds of U.S. companies conducted operations subject to the rule. In light of the U.S. government's renewed enforcement focus and the potential for severe penalties for violations (including substantial fines, imprisonment, and loss of export privileges), companies can no longer afford to ignore the deemed export rule.

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