Bureau of Information and Security Announces Final Penalty Guidance Rule and Deemed Export Violation Settlements

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The Department of Commerce's Bureau of Information and Security ("BIS") recently announced the settlement of two California cases investigated by its Office of Export Compliance ("OEE") which illustrate the application of its new penalty guidance rule and the range of civil and criminal penalties currently being assessed against individuals and companies which violate the "Deemed Export Rule".

Overview of Deemed Export Rule.

Under the provisions of the Deemed Export Rule codified in the Export Administration Regulations ("EAR"), U.S.-origin technology, software or technical data (not publicly available) "released" to foreign nationals in the United States will be considered an "export" to that *individual's home country* – subject to the license requirements of the Department of Commerce for "dual use" items exported to that country, or from the Department of State where a "defense article" or "defense service" is involved. In particular, the Deemed Export Rule has significant impact on entities which employ foreign nationals.

A "foreign national" is an individual who has not been granted a permanent residence visa (i.e. "Green Card) or who is not a "protected person" (e.g., political refugees and asylum holders).

Technology is "released" for export when it available to foreign nationals – whether employees or third parties - for visual inspection (such as technical specifications, blueprints or plans), or when technology is disclosed orally, or when technology is made available by practice or application under the guidance of persons with knowledge of the technology.

U.S. entities must apply for an export license under the Deemed Export Rule when (i) they intend to release or transfer controlled technologies [restrictively classified on the Commerce Control List or Munitions Control List]; and (ii) export of the same technology to the foreign national's home country would require a license or other government authorization.

Deemed Export Settlements and Penalty Assessment.

In the New Focus case settlement announced by BIS on April 7, 2004, a San Jose company paid a civil penalty in the amount of $200,000 for failure to obtain the required export licenses for shipments of amplifiers to the Czech Republic, Singapore, and Chile which were detained by U.S. Customs. During the ensuing internal investigation conducted with the assistance of outside counsel, New Focus discovered that it had also

failed to obtain export licenses under the Deemed Export Rule for two Iranian nationals and one Chinese national who, in the course of their employment in the United States, were exposed to manufacturing technology controlled by the EAR. New Focus voluntarily self-disclosed the deemed export violations and cooperated with the OEE investigation. It should be noted that OEE treated the self-disclosure of the deemed export violations as a "mitigating factor" under the new Penalty Guidance Rule resulting in a substantial reduction of penalties.

In October of 2000, a U.S. grand jury in San Jose indicted Silicon Telecom Industries, Inc., Suntek Microwave, Charlie Kuan and Jason Liao. Among other counts, the indictment alleged that Suntek and its President, Charlie Kuan, released controlled technology to three Chinese nationals which visited its Newark, California facility for the purpose of permitting those individuals to learn the technology and transport that technology to China in violation of of U.S. export regulations. In addition, BIS further charged that Suntek failed to obtain export licenses under the Deemed Export Rule for Chinese nationals who worked at Suntek and were trained in controlled manufacturing technology. "Aggravating factors" included the export of Suntek's detector log video amplifiers [which have military applications] to China under false end user statements and certifications. In September of 2002, Kuan pled guilty to the criminal charges and is awaiting sentencing. Suntek pled guilty to the criminal penalties in April of 2004 and was fined over $339,000. On May 6, 2004, BIS announced the settlement of the civil charges: Suntek agreed to a $275,00 penalty and a 20-year denial of export privileges, and Kuan agreed to a $187,000 penalty and a 20-year denial of export privileges. Because Kuan is unemployed and Suntek is not longer in operation, BIS agreed to suspend the monetary part of the civil penalty. Substantially all of Suntek's assets have been liquidated to pay the criminal penalties.

BIS Penalty Guidelines.

The final Penalty Guidelines announced by BIS on March 5, 2003 provide for three types of civil administrative sanctions: (1) civil (monetary) penalties which may be assessed for each violation; (2) denial of export privileges (may extend to all export privileges or limited to exports of specified items or to specified destinations or customers); and (3) exclusion from practice before BIS (applies to attorneys, accountants, consultants, freight forwarders or other person who acts in a representative capacity).

In determining appropriate sanctions, BIS will look to a number of general factors such as the "degree of willfulness", the destination involved (exports or reexports to countries subject to anti-terrorism controls will be considered particularly egregious), related violations, timing of settlement (early settlements – for example, before a changing letter has been served – are encouraged as such settlements have the benefit of freeing BIS resources to deploy in other matters), and related criminal violations. "Mitigating factors" which will be afforded "great weight" include voluntary self-disclosures of violations and the presence of an effective export compliance program which incorporates the principles set forth in BIS' Export Management System ("EMS") Guidelines.

Lessons Learned and Recommendations.

Companies or entities which have been contacted by BIS (or otherwise have reason to believe that an export violation has occurred) should immediately commence an internal investigation with the assistance of expert legal counsel with the objective of addressing all export control issues and making a self-disclosure, as appropriate.

Companies or entities which do international business or employ foreign nationals should design and implement comprehensive export compliance programs which incorporate EMS principles. This includes training of export/import personnel and preparation of a chart which accurately sets forth the export control classifications and restrictions applicable to all products and technology.

Newly hired "foreign nationals" must be effectively segregated and denied access to controlled technology until the appropriate export licenses and visas have been obtained. Hire letters issued by leading technology companies to foreign nationals frequently make continued employment of such persons conditional upon the company's ability to obtain necessary export licenses and visas.