

## A LETTER FROM THE EDITOR

JOE D. WHITLEY

I will not often burden you with editorials about political decisions; but, after the release of the Pan Am 103 bomber by the British recently, I wrote an editorial filled with dismay and some passion about the step backwards this release posed for our struggle with terrorism. My editorial, on page \_\_\_ of this newsletter, was not published, but it echos the words in a letter that the Director of the FBI Robert Mueller sent to British authorities condemning the release. (See <http://www.fbi.gov/pressrel/pressrel09/mueller082209.htm>). The Director's letter was a highly unusual display of pique by an otherwise buttoned down Director.

The reason for taking up this amount of space in the Newsletter reminding the readers about "old news" is to share unceasing sense of urgency that many people including the Director feel about the risk of future attacks on the United States and U.S. interests by our enemies.

Are we complacent? Are we prepared for more terrorist attacks? The answer is partially "yes" to complacency and partially "yes" to preparedness. I was reminded of the balancing act the President and many other U.S. leaders engage in daily as I was reading Governor Tom Ridge's new book, entitled *Test of Our Times*. Governor Ridge points that there are no absolutes in American life.

At page 270 of the Ridge book, which happens to be the number of people who perished at the hands of the Pan Am 103 terrorist Megrahi, Governor Ridge says the following:

"Do I think America will ever celebrate a Victory over Terrorism Day when we can say with confidence and pride that we vanquished our extremist foes? No.

Do I think there are philosophical and financial limits to the measure we should take to secure ourselves against this threat? Yes.

Do I think America is willing to accept a certain level of risk of future attacks? I'm not certain.

Should we accept some risk and get on with our lives? Yes!"

Looking ahead we are pleased that the 5<sup>th</sup> Annual **Homeland Security Law Institute** will be held March 3 and 4, 2010 at the Washington Convention Center. We hope this year's program will be better than the 2009 Institute which set a high standard of excellence. Invitations are being extended to numerous well regarded speakers and panelists. We hope you can join us.

In this edition of the Newsletter, we have included an outstanding piece on **Deemed Exports**. I encourage you to take a look at this informative piece.

Next, I would be remiss if I did not mention again a new ABA publication, **Homeland Security: Law and Policy**. In one easy to read volume the breadth and complexity of this new discipline and practice of law dealing with our nation's security is concisely captured for quick subject by subject access. I hope you will add a copy to your bookshelf in the near future. Ordering information is set forth in the following pages.

Finally, I need your help continuing to make our Newsletter better for you and our readers. Your writing about Homeland Defense and Security topics is solicited. Please contact David Goodwin at 202-533-2307 or at [goodwind@gtlaw.com](mailto:goodwind@gtlaw.com) with your ideas and suggestions about articles for the Newsletter.

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## DEEMED EXPORTS COMPLIANCE PROTECTING U.S. NATIONAL SECURITY WITHIN YOUR BUSINESS

**Kara Bombach, Renee Latour and Jennifer Maki**

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Export Controls Practice Group

Does your company employ foreign nationals, or count foreign national companies among its business partners or customers? Does your business utilize an open-architecture system, or email communications? Does your facility offer plant tours or visits to manufacturing areas?

If you answered "yes" to any of the following questions, then your company needs to take "deemed exports" compliance to heart. Civil and criminal penalties for violations are great - and companies in the business of protecting U.S. national security have little excuse for such oversight.

(Continued from Cover Page...)

A deemed export, loosely stated, is the release of technology or source code to a foreign national or person, either within the United States or abroad. The technology or source code is “deemed” to have been exported to the foreign person’s home country. This is sometimes referred to as the “deemed export rule.” For example, if technology is shared with an Indian national in the United States, the transfer is “deemed” to be an export to India, even though the actual transfer and related activities took place in the United States.

Surprisingly, businesses, many of whom are otherwise vigilant in their export-control compliance efforts, are often unaware of the issues raised by deemed exports. For those who may be unfamiliar, or are just in need of a refresher, this article explains the deemed export regulations, as well as provides guidance on how U.S. companies can enhance compliance and minimize the risk of unintentional export violations.

Recognizing a deemed export can be challenging. Most people easily recognize a traditional export - the physical, electronic, oral, or written shipment or transmission of an item out of the United States. Deemed exports, however, are slightly more difficult to pin down, particularly because the two sets of governing regulations, the *Export Administration Regulations*<sup>1</sup> (“EAR”), as administered by the Department of Commerce, Bureau of Industry and Security (“BIS”) and the *International Traffic in Arms Regulations*<sup>2</sup> (“ITAR”), as administered by the Department of State, Directorate of Defense Trade Controls (“DTC”), treat them somewhat differently.

**First, the basics.** Under the EAR, an export is defined as “any release of technology or source code subject to the EAR to a foreign national.”<sup>3</sup> The deemed export rule applies to releases or transfers to any foreign national, except one who (1) has been granted permanent residence (i.e. is a “Green Card” holder), (2) has been granted U.S. citizenship; or (3) has been granted “protected person” status under 8 U.S.C. 1324b(a)(3).

Under the EAR, the deemed export rule only applies when the transfer occurs within the United States. When EAR-controlled technology is released outside of the United States, the EAR treats the transfer as a traditional export.

In contrast to the EAR, the ITAR does not provide an actual definition of a “deemed export.” Instead, the ITAR, which governs the export of “defense articles,” (those on the United States Munitions List (“USML”), “defense services,” and related technical data, includes deemed exports conceptually within its definition of “export.” The ITAR defines “export” as [d]isclosing

(including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad.”<sup>4</sup> Such releases, nonetheless, are subject to ITAR licensing requirements.

**Who is a foreign national?** Another key difference is the manner with which BIS, which administers the EAR, and DTC, which administers the ITAR, foreign nationals determine whether someone is a foreign national, and if dual national, which applies for purposes of the deemed export rule. For example, DTC may rely on the country of birth of a foreign national to determine whether to approve or deny authorization, while BIS generally considers the individual’s current citizenship when making licensing determinations.<sup>5</sup>

**What situations give rise to deemed exports?** Deemed exports are relevant to U.S. companies with any sort of international business operations, not just those who employ foreign persons. Companies active in the Homeland Security and Defense Industry, both those who contract directly with the U.S. Government and those active in the private sector, may be affected.

Dealings with foreign companies or affiliates are ripe with potential deemed export violations. For example, U.S.-based meetings are the typical context of technology deemed exports. Likewise, U.S. companies should take caution in any dealings with foreign governments or agencies, as these situations may lend themselves to unauthorized disclosures as well. Any U.S. company that employs independent contractors must be doubly cautious: 1) if the independent contractor is a foreign person, the proper authorization must be in place before any controlled technology or technical data is released to him or her; and 2) the independent contractor must not likewise engage in unauthorized disclosures of technology it receives from the U.S. company to its non-U.S. employees or customers.

However, because deemed exports can occur in almost any conceivable business or operational situation, U.S. companies must exercise increased vigilance. For example, a deemed export can occur in any of following:

- Meetings in the U.S. with foreign nationals;
- Electronic transmission of data, including internet and electronic mail;
- Trade shows;
- Plant tours;
- Telephone calls;
- Facsimiles;
- Remote access to software and technical data; and
- Joint development or marketing projects.

***Is your technology controlled and do you need***

**an export license?** After determining that a release may occur to a foreign national, you must determine whether the technology to be released is controlled for export. Technical data for the development, production, or use of a defense article listed on the USML will be controlled for export under the ITAR, and require a license prior to release to any foreign national. Technology for the development, production, or use of a commodity on the EAR's Commerce Control List ("CCL") is also controlled for export, but may or may not require a BIS license for export. Once the Export Control Classification Number ("ECCN") of the technology has been identified, you must use the EAR's Country Chart to determine licensing requirements, based upon end-use destination.

Some technology will not be controlled for export. Not all deemed exports require authorization from the U.S. Government.

**Are there any alternatives to getting a deemed export license?** Good news - licensing exemptions do exist. Both the ITAR and EAR exempt certain types of information and software from export control. Specifically, the ITAR excludes information that is in the "public domain" from export control, while the EAR excludes information that is "publicly available" from export controls. Information in the "public domain" includes, for example, information available through sales at news stands and bookstores, or through subscriptions which are available without restriction to any individual who desires to purchase them.

Under the EAR, "publicly available information" is defined as "information that is generally accessible to the interested public in any form."<sup>6</sup> The EAR also defines "publicly available technology and software" to include technology or software that is already published or will be published, arises during or result from fundamental research (discussed below), is educational or is included in certain patent applications. Publications that are artistic or non-technical in nature (e.g., books, newspapers, sheet music, etc.) are also considered publicly available. For practical purposes, information, technology, or software that qualifies as "publicly available" under the EAR does not require a deemed export license in advance of its release to a foreign national.

Certain types of research are also excluded from export licensing requirements. Both the ITAR and EAR contain exemptions for information that results from basic and applied science and engineering research.<sup>7</sup> This research must be conducted at an accredited institution of higher education located in the United States (typically, a university), and must be ordinarily published and shared broadly within the scientific community. Both the ITAR

and EAR place additional restrictions on meeting the eligibility criteria for the fundamental research exemptions, which include whether or not restrictions on publication are accepted and whether the research is funded by the U.S. Government. Provided that all criteria are met, fundamental research may be shared with foreign nationals without obtaining prior authorization from BIS or DTC.

Universities and institutions of higher learning most frequently avail themselves of these licensing exemptions. In certain circumstances, other organizations, such as those with research and development initiatives, may also utilize the exemptions.

***So you need an export license...now what?***

Initially, it is critical to determine the proper classification of the technology or technical data classified for export. That is to say, whether it is controlled under the ITAR, and subject to the licensing jurisdiction of the Department of State, DTC, or, instead, controlled under the EAR, and subject to the licensing jurisdiction of the Department of Commerce, BIS. If the classification is unknown or questionable, a company should seek official confirmation from the U.S. Government, or customer, or supplier.

***Licensing mechanics:***

i. ***ITAR Licensing:*** As with most exports subject to the ITAR, licensing requirements are burdensome, and license exemptions - if any - are few. On the upside, however, it is an easy determination to make: If ITAR-controlled technical data is released to a foreign person, an ITAR license is required.

The ITAR provides several different methods by which a company may obtain DTC authorization for a deemed export. Traditional means for obtaining such authorization include Technical Assistance Agreements ("TAA") or Manufacturing License Agreements ("MLA") between the U.S. and foreign parties. As MLAs and TAAs tend to be lengthy, and include detailed procedures to ensure the proper treatment of the ITAR-controlled technical data, they are typically utilized for large-scale projects involving more than a few foreign persons.

For deemed export situations involving a smaller number of foreign persons, DTC allows applicants to obtain DSP-5 licenses, which are less cumbersome to prepare than TAAs or MLAs and frequently are processed more quickly by DTC. In fact, DTC encourages applicants to use DSP-5s to license transfers of ITAR-controlled technical data to foreign persons.

Note that applicants will not be able to receive licenses for deemed exports to foreign nationals of countries subject to arms embargos, such as China.

ii. *EAR Licensing:* In contrast to DTC's black-and-white licensing requirements, BIS licensing requirements are shades of gray. Under the EAR, deemed export licensing requirements vary depending on the classification of the technology in question and the intended destination. Highly-sensitive technology, such as technology for the development or production of aircraft parts or components, is subject to strict control under the EAR. Accordingly, a deemed export license will likely be required for the export of such technology to any foreign national. In contrast, controlled technology that is less sensitive may not require a license, particularly if the destination country is a close ally of the United States.

For authorization to release technology related to dual-use or commercial items, a company must submit a deemed export license application to BIS via the Simplified Network Application Program Redesign ("SNAP-R"), the BIS electronic licensing system.

As a standard condition to most deemed export licenses, BIS may also require the applicant to implement a Technology Control Plan ("TCP"). TCPs are company-specific plans which set forth the procedures in place to prevent against unauthorized disclosure of the subject EAR-controlled information to foreign nationals.

iii. *Recordkeeping:* Both the ITAR and EAR contain specific recordkeeping requirements for export licenses. As a general rule, exporters should maintain all documentation associated with any export license, including records of any individuals authorized under deemed export licenses, for a period of five (5) years. Although the documentation may be retained electronically, it must be kept in a searchable form that allows for exact reproduction upon request by BIS or DTC.

**What are the risks for unlicensed deemed exports?** U.S. Government penalties for deemed export violations can be significant. Individual violators face maximum civil monetary fines of up to \$250,000 per violation or twice the value of the underlying transaction (whichever is higher). Violators may also face maximum criminal fines of up to \$1,000,000 per violation and up to 20 years imprisonment, as well as denial of export privileges and debarment from U.S. Government contracts. Furthermore, violations of these laws and regulations could seriously damage a company's reputation and image, among many companies' most valuable assets.

On Wednesday, July 1, 2009, John Reece Roth, a University of Tennessee professor, was sentenced to 48 months in prison for conspiring to illegally export, and

actually exporting, ITAR-controlled technical information relating to a U.S. Air Force (USAF) research and development contract. Specifically, Roth was convicted of illegally exporting to the Chinese technical data relating to military information pursuant to a contract with the USAF to develop specialized plasma technology for use on an advanced form of an unmanned air vehicle (UAV), also known as a drone. This work did not fall under the fundamental research exemption. Furthermore, the exports were made to China, which is subject to an arms embargo.

In 2007, BIS assessed a criminal penalty of \$339,000 against a California company for unauthorized disclosure of controlled technology to Chinese nationals. BIS also assessed administrative penalties of \$275,000 against the company; \$187,000 against its former president; and 20 years denial of export privileges against both the company and its former president.

**How do I comply?** Preventing against unauthorized deemed exports is not an insurmountable task. Any U.S. company that works with export-controlled technology must have comprehensive internal facility security procedures in place. These procedures should explicitly address issues such as foreign visitors and facility site visits.

Additionally, U.S. companies should also maintain and implement export compliance policies and procedures for the handling of export-controlled technology and technical data. Export compliance procedures should also include specific direction and employee training regarding physical segregation and restrictions on electronic access to export-controlled technology and technical data. Export compliance personnel must work closely with Human Resources to ensure hiring and staffing is undertaken in a way that any required authorizations are obtained before a foreign national employee is granted access to any controlled technology.

Licenses obtained must not be allowed to expire, and any necessary renewals must be submitted with adequate lead time. In addition, companies must comply with recordkeeping and reporting requirements.

Increased vigilance is also part of the equation. Companies should be aware of any foreign persons, whether employees, visitors, customers, suppliers, business partners or foreign government officials with potential access to controlled technology or technical data, as well as any red flags. Additionally, annual export compliance training should be required for all employees, with intensive training for new hires. Finally, a designated export compliance officer or employee should

be easily accessible to all employees. This appointed individual should serve as the point-person for all export-compliance inquiries, as well as to receive any violation reports.

Good business practice calls for all companies to be attuned to deemed exports compliance. For companies active in international business, particularly those in defense-related industries who contract with the U.S. Government, and employ or contract with foreign nationals, deemed export compliance is essential. The risk of noncompliance is significant - including debarment from U.S. Government contracts. For companies who count among their mission, protection of U.S. national security, deemed export violations are paradoxical and counterproductive. Take these compliance measures to heart and you will further your goals both as a successful business and good corporate citizen.

<sup>1</sup> 15 C.F.R. Parts 730-774 (2009).

<sup>2</sup> 22 C.F.R. Parts 120-130 (2009).

<sup>3</sup> 15 C.F.R. § 734.2(b)(ii).

<sup>4</sup> 22 C.F.R. § 120.17(a)(4).

<sup>5</sup> An interagency initiative is under way to bring consistency to the this issue. In particular, the National Security Council is reviewing and we expect, will offer some guidance in the coming months.

<sup>6</sup> 15 C.F.R. Part 772

<sup>7</sup> See 22 C.F.R. §120.11(a)(8) and 15 C.F.R. § 734.8.

## SAVE THE DATE!

**5<sup>TH</sup> ANNUAL ABA ADMINISTRATIVE LAW  
AND REGULATORY PRACTICE SECTION**

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**MARCH 3-4, 2010**

## I CAN'T FORGET THE PEOPLE WHO PERISHED ON PAN AM FLIGHT 103

JOE D. WHITLEY

I can't forget the photographs. I can't forget the horror. I can't forget the people who perished on Pan Am Flight 103 at the hands of Libyan terrorists.

At the time of the bombing, I was working for Attorney General Richard (Dick) Thornburgh, along with current FBI Director Robert (Bob) Mueller.

The Attorney General invited me to walk across to the FBI building from Main Justice for a meeting with then FBI Director William (Bill) Sessions. I was told we would get a briefing on the shocking murder of all the people aboard Pam Am 103. I had seen horrible things before as a state prosecutor, but I was not prepared for what I saw in the photographs that day. I was horrified to see what happens to someone's body after it has fallen 30,000 feet. Were any of them conscious as they made this final plunge? What about the families and friends of the 270, both on the plane and on the ground in Lockerbie, Scotland, who would never gaze again upon their faces?

They were all gone in an instant -- but I have not forgotten them, nor have their children, spouses, parents, brothers, sisters, relatives, friends and business associates. No holiday passes without tears being shed.

For me, the people who died that day were no different than the innocent men, women and children who died on 9/11. The only difference is that the perpetrators of 9/11 would likely have faced the death penalty had they lived, whereas Abdel Baset al-Megrahi, the Lockerbie Bomber, was shown compassion and released for the flimsiest of reasons, his alleged ensuing death from prostate cancer. The fact of his freedom is, however, more important than any debate over the death penalty -- he quite simply forfeited his freedom years ago when he orchestrated the mass murder of 270 innocent people. Abdel Baset al-Megrahi's payback was light by any measure, about 14 days per victim.

Now Abdel Baset al-Megrahi is safely in a place where his fellow fanatics can celebrate his accomplishments and shower him with affection during his final days -- they can say goodbye -- not something the 270 could do.

Looking back, I am proud that the United States decided to not pursue Abdel Baset al-Megrahi at the

potential cost of hundreds of innocent people. You see, we knew where Abdel Baset al-Megrahi was located well before his capture. We could see him and his family -- from up above -- from those wonderful spying and prying satellites. The next step in some societies might have been to lock on a laser-guided missile to Abdel Baset al-Megrahi's exact position and eliminate him from the face of the earth. We did not choose to act in this way in the 1980's and 90's.

Now things have changed. Americans and the British, whose countries have been bathed in the blood of their countrymen in the 21st century, are perhaps no longer as tolerant of murder and mayhem as this unfortunate release suggests. There may have been a time when compassion to Abdel Baset al-Megrahi mattered -- but that time has passed for me and most citizens of America and Great Britain.

Some crimes are so egregious that the wrongdoers should be executed or at the very least incarcerated for life. The release of Abdel Baset al-Megrahi is an insult to the victims of his atrocity, and is a painful reminder to the friends and relatives of the passengers, flight attendants and pilots on Pan Am Flight 103 that they never got to their final destination, much less to receive a hero's welcome, as Abdel Baset al-Megrahi sickeningly received.

I can't forget. Now, hopefully, the British people will make plain to their government that they will not forget what happened in the skies over Lockerbie, Scotland.

Joe D. Whitley served as the first General Counsel of the U.S. Department of Homeland Security (DHS) from 2003 through 2005. He is a veteran of the U.S. Department of Justice and served as the Acting Associate Attorney General, the third-ranking position in the Department of Justice, in the George H.W. Bush administration. He has also served as the U.S. Attorney in the Middle and Northern Districts of Georgia. He is now in private practice in Washington, D.C. and Atlanta, GA.

## SOLICITATION OF ARTICLES FOR SPRING/SUMMER 2010 ISSUE

The ABA Administrative Law and Regulatory Practice Section's Committee on Homeland Security and National Defense would like to solicit articles for our Spring/Summer 2010 issue. This issue may address some of the following themes: 1) immigration, 2) money laundering and drug-trafficking security threats, 3) DOD influence within the information and intelligence gathering functions of government, and 4) the ramifications of private contracting of traditional military and security functions.

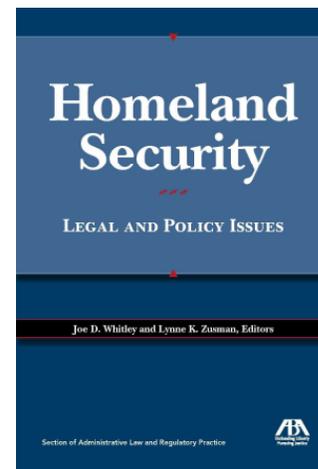
Articles should be approximately 1500 to 2000 words in length. Outlines of potential articles for publication in the Spring/Summer 2010 issue should be submitted no later than January 15, 2010.

If you are interested in submitting an article for the Spring/Summer 2010 newsletter, please contact either David Goodwin at (202) 331-3100 or Lynne Zusman at (202) 659-1971.

# AVAILABLE NOW

## *Homeland Security: Legal and Policy Issues*

Joe D. Whitley & Lynne Zusman, Co-Editors



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The concept of homeland security has evolved from a mostly academic proposal to the biggest reorganization of the federal government since the creation of a Defense Department in 1947. *Homeland Security: Legal and Policy Issues* draws upon the expertise of lead-ing practitioners in the emerging and expanding field of homeland security. This comprehensive resource looks at homeland security as a critical area of legal practice affecting homeland security as a critical area of

The book begins with an evaluation of the policy shifts and outcomes to date and looks ahead to the challenges that exist for the Obama Administration. It then seeks to familiarize you with 14 key and essential areas in the Homeland Security legal discipline such as state and federal emergency powers, the USA Patriot Act, information security, CFIUS and foreign investment and so much more. The expert authors have included easy references to additional authorities and information sites, making this publication a useful tool and lasting legal education sourcebook.

*To be well-informed on Homeland Security law this book is a must read.* ~ The Honorable Tom Ridge, Chair of Ridge Global, Former Secretary of the U.S. Department of Homeland Security and Former Governor of Pennsylvania

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*This book brings into clear focus the breadth and complexity of Homeland Security legal and policy issues.* ~ Judge Michael Chertoff, Partner at Covington & Burling, Former Secretary of the U.S. Department of Homeland Security

*I would encourage all lawyers who want to become better acquainted with the legal issues confronting Homeland Security policy makers to keep a copy of Homeland Security: Legal and Policy Issues in their library. This insightful book contains valuable information regarding this new discipline.* ~ Larry D. Thompson, Senior Vice President and General Counsel of PepsiCo, Former Deputy Attorney General with the U.S. Department of Justice

*Homeland Security: Legal and Policy Issues is that long overdue compendium for those who have watched this dramatic new legal discipline emerge in the wake of 9/11. Those who would serve their nation by interpreting and litigating the security legalities of this very new world will be well served to have this on their reference shelf.* ~ Admiral James M. Loy, USCG (Commandant, Ret), Former Deputy Secretary of Homeland Security and Administrator of the U.S. Transportation Security Administration

*This book provides a guiding compass for those who are challenged with navigating through the dynamic legal and policy currents of Homeland Security. It will keep you on course and off the shoals.* ~ Jay B. Stephens, Senior Vice President, General Counsel and Secretary, Raytheon Company, Former U.S. Associate Attorney General and U.S. Attorney

*In a single volume, these authors have succeeded in highlighting both the breadth of the recent changes in homeland security law and policy and the most critical legal challenges that the homeland security community is facing today.* ~ Kenneth A. Wainstein, Partner at O'Melveny & Myers LLP, Former Assistant to the President for Homeland Security and Counterterrorism, Former U.S. Attorney

To learn more about *Homeland Security: Legal and Policy Issues* visit, [www.abanet.org](http://www.abanet.org).

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