MLA's International Trade Update

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The United States, the United Nations, and European Union Place Sanctions on Libya

On February 25, 2011, President Obama signed Executive Order ("EO") 13566. This EO took immediate effect and blocked the property and interests of the Gaddafi family, senior officials of the Libyan government, the Central Bank of Libya, and the government of Libya, its agencies, instrumentalities and controlled entities. Gaddafi's immediate family has also been added to the Office of Foreign Assets Control's ("OFAC") Specially Designated Nationals ("SDN") List.[1] OFAC has also issued three General Licenses. These Licenses authorize transactions with third-country financial institutions owned or controlled by the government of Libya, certain activities involving Libyan diplomats in the United States, and the provision of certain legal services to, or on behalf of, the Libyan government. Additionally, on February 26, 2011, the Directorate of Defense Trade Controls ("DDTC") suspended all export licenses (including the use of any license exemptions) for defense articles and technical data that have been issued under the International Traffic in Arms Regulations ("ITAR"). Further, on March 3, 2011, the Commerce Department's Bureau of Industry and Security ("BIS") indefinitely suspended all licenses that had been issued under the Export Administration Regulations ("EAR") for exports or re-exports to Libya.

Also on February 26, 2011, the United Nations Security Council adopted Resolution 1970, which freezes certain assets and restricts the travel of individuals associated with the Libyan government, imposes an arms embargo against Libya, and refers the actions of the Libyan government to the International Criminal Court. Just two days later, the Council of the European Union adopted a decision implementing Resolution 1970. These sanctions, however, are far less restrictive than those imposed by the U.S. and do not prohibit nearly all dealings with the Libyan government.

GAO Issues Report Concluding that Improvements are Needed in the Regulation of "Deemed Exports"

On March 7, 2011, the Government Accountability Office ("GAO") released a report[2] concluding that export controls relating to deemed exports need to be improved in order to prevent the release of unauthorized technology to foreign nationals. In this report, the GAO determined that certain factors may indicate the risk of unauthorized technology releases to foreign nationals. For example, one factor listed in the report is that according to intelligence and law enforcement sources, countries of concern use their foreign nationals in the U.S. to acquire controlled "dual-use" technologies for military purposes. As another example, the GAO noted that between fiscal years 2004 to 2009, the U.S. issued roughly one million specialty occupation visas in high-technology fields to foreign nationals from thirteen countries, while Commerce only issued deemed export licenses to about 3,200 foreign nationals from the same thirteen

countries. The second portion of the report focused on Commerce's and Immigration and Customs Enforcement's ("ICE") inability to implement previously recommended changes in the deemed export licensing process. For example, Commerce has not created an approach to provide information on deemed export requirements to employers, particularly small and midsized companies. Furthermore, the report stated that Commerce, ICE, and the Federal Bureau of Investigation have not addressed the lack of coordination between the agencies on export control investigations. Given the risk of unauthorized technology releases to foreign nationals and Commerce's failure to implement recommended changes to the regulation of deemed exports, the GAO issued two recommendations. First, it recommended that the Secretary of Commerce assess the extent to which foreign nationals who were issued specialty visas also should have been covered by deemed export license applications. Second, the GAO recommended that the Secretary of Commerce report to Congress the specific steps being taken to implement past GAO and Commerce Inspector General recommendations in the context of the current Export Control Reform Initiative.

Employers of Non-Immigrants Must Certify a Review of the Export Regulations on the New I-129 Form

Last month, the United States Customs and Immigration Service amended the I-129 nonimmigrant petition form. The new form requires the petitioning employer to certify that it has reviewed the EAR and the ITAR and has determined that either: (1) "a license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person"; or (2) "a license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary" and that the petitioner will restrict the beneficiary's access to the technology at issue or will obtain the proper authorization. The rule focuses on the "deemed export" rule under the EAR—and a similar definition of export under the ITAR—which makes it a violation to transfer/disclose controlled technical data to a foreign person (defined as someone who is not a U.S. citizen or permanent foreign resident) without proper authorization from the appropriate agency. The rule became effective on February 20, 2011.

Tips for compliance: Companies should work to understand the following four areas: (1) what it means to "export" technology or products to a foreign national; (2) the company's products and the proper jurisdiction/classification of those products on the United States Munitions List or the Commerce Control List; (3) the number of foreign nationals accessing the company's facilities (including outside vendors and foreign visitors); and (4) the controls necessary to restrict access to controlled-items/technology by foreign nationals (particularly with respect to data/email storage on company servers).

New ITAR Exemptions Proposed

On March 15, 2011, the Department of State proposed to add two new exemptions to the ITAR. The first proposal is to add the new section 123.28. This new section will contain an exemption eliminating a license requirement for the export of parts and components in systems or end-items previously approved for export to a government end-user by the exporter claiming the exemption. The use of the exemption, however, cannot: (i) enable the upgrade of capabilities of the end-item; (ii) exceed the type, amount, and frequency consistent with normal repair operations; and (iii) exceed the threshold amount that would trigger the Congressional notification requirements of ITAR. An exporter claiming the exemption must

have a copy of the original purchase order from the end-user and cite the license number of the original export in its Automated Export System ("AES") submission. The second proposal addresses, in part the “see through” rule, which has led to the classification of commercial end-items as ITAR-controlled if a subcomponent within the end-item is ITAR-controlled. The proposed new section 126.19 would avoid that result where the end-item is not used in a military application and the removal of the defense article component would result either in the destruction of the component or the end-item itself. Both proposed rules are open for comment until April 14, 2011. *See* 76 FR 12928 – 12931.

[1] The SDN List is made up of a group of individuals and companies owned or controlled by countries that have been sanctioned by OFAC. The assets of these individuals are blocked and U.S. persons are prohibited from dealing with them. For the U.S. consolidated screening list, please visit **http://www.export.gov/ecr/eg_main_023148.asp**.

[2] The report was dated February 2, 2011. The full report is available at **http://www.gao.gov/products/GAO-11-354**.