

Practicing in an International World: The Importance of U.S. Export Control Compliance for Clients

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Globalization has substantially expanded the world of our clients. Many U.S. companies now have subsidiaries abroad and employ foreign nationals overseas and in their U.S. offices. Clients transfer software and technology around the globe daily and share information across borders with the click of a button.

This increase in global networking creates a number of export issues and triggers certain licensing requirements that many clients are not always aware of. To further complicate matters, the U.S. government is currently revising export compliance laws and has increased enforcement measures and violation penalties, making compliance more critical than ever.

Export Regulations

The three major directives that regulate export compliance in the United States are (1) the International Traffic in Arms Regulations (ITAR), which are administered by the U.S. Department of State and govern defense articles and services; (2) the Export Administration Regulations (EAR), which are administered by the Department of Commerce and govern the export of items that can be used for both military and commercial purposes (dual-use items); and (3) certain economic and trade sanctions, which are administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) and generally block all trade with particular countries or parties that are engaged in terrorism, international narcotics trafficking or activities related to the proliferation of weapons of mass destruction. These regulations aim to ensure that exports are not transferred outside of the United States without proper export licenses and diverted to improper end-users.

What makes compliance with these export regulations difficult is the broad and complex definition of controlled "exports." An export can be the transfer of goods, services or technical data by a U.S. person to (1) a foreign person in a foreign country, (2) a U.S. person in a foreign country, or (3) a foreign person in the United States. A foreign person is defined as any person who is not a U.S. citizen or a U.S. green-card holder.

Although clients can easily identify certain transactions as controlled or prohibited exports, such as the shipment of weapons to Pakistan, there are many less obvious export activities that clients may perform without realizing that they require a license. Many companies, therefore, violate export laws inadvertently. Unfortunately, the strict liability standard for compliance does not excuse such violations and noncompliance penalties can carry a civil fine of up to \$500,000 per violation, jail time of up to 20 years and suspension or revocation of export privileges.

This article discusses a few of the less-obvious export activities that clients may not be aware of, including activities by foreign subsidiaries, deemed exports to foreign persons in the United States, and software and technology transfers.

Foreign Subsidiaries Are Not Always Safe

Many U.S. companies operate globally and have foreign subsidiaries. Although the activities of these subsidiaries occur overseas, they are not always exempt from U.S. export laws.

U.S. export controls apply to goods, software and technology originating in the United States even where U.S. persons are not involved in the transaction. Foreign persons must, therefore, comply with U.S. export laws when they re-export certain defense and dual-use items that originate in the United States. In addition, the export of products manufactured abroad that contain more than a certain percentage of U.S. content is subject to the jurisdiction of U.S. export laws. As such, foreign subsidiaries of U.S. companies may need to comply with U.S. export laws when they re-export certain items manufactured in the United States or export foreign-made items that contain a certain percentage of U.S. content.

In addition, the activities of foreign subsidiaries may be bound by certain U.S. export laws where a U.S. person "facilitates" the operations of the foreign subsidiary. This issue becomes especially critical where foreign subsidiaries transact business with certain sanctioned end-users or countries, such as Iran, Cuba or Sudan. Facilitation may include, without limit, ownership or control of the foreign subsidiary, approval of transactions or participation in contract negotiation, and furnishing any kind of transactional support, financing or management of the subsidiary's operations. As an example, guaranteeing a loan of a foreign subsidiary that trades with Iran may subject the subsidiary's trade activity to U.S. export law, require a U.S. export license and impose a penalty for failure to obtain such a license. As such, U.S. companies that facilitate the transactions of their foreign subsidiaries must determine whether U.S. export laws apply to their subsidiaries' activities.

Deemed Exports — Exporting on U.S. Soil

The transfer of goods, services and technical data to foreign persons in the United States (deemed exports) is subject to many of the same export regulations as transfers to foreign countries and may require export licenses. By way of example, deemed exports can include:

- The transfer of goods to a foreign person in the United States or to the U.S. branch of a foreign company.
- Providing services in the United States for the benefit of a foreign person. A service can include

consulting or providing training or support. As such, consulting or training a foreign person who either works in the United States or is visiting from a foreign branch office may be considered a deemed export. Training or consulting a foreign customer may also be a deemed an export.

- Transferring or disclosing technical data (visually, electronically or in any other medium) to foreign persons in the United States. For example, a U.S. company may provide access to a software system that contains blueprints of a controlled product to an employee who is an Indian national. Although the product never leaves the United States, the company may be deemed to export the product to India because it electronically and visually discloses the technical data to a foreign person.

As such, companies that do not trade abroad are not safe from export violations. Companies that provide access to goods, services or technical data controlled for export purposes to foreign nationals must carefully examine whether an export license may be required for transfers to foreign nationals.

Software and Technical Data

Many companies transfer software and technical data to their employees, their foreign branches or to servers in or outside of the United States. These companies may not recognize that the disclosure of software and technical data to a foreign national by any means, including visual disclosure, and in any place constitutes an export.

Although the definition of software for export purposes is relatively straightforward, technical data can include information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of products in the form of blueprints, drawings, photographs, plans, instructions and documentation.

E-mailing technical data to a foreign national in the United States or electronically transferring software to another country may constitute an export and require a license. Hand-carrying technical data outside of the United States or traveling with a laptop that contains certain technical data or software outside of the United States can also be an export. Even transmitting technical data from the United States to a cloud server outside of the United States by a U.S. or foreign person or transmitting technical data from a cloud server in the United States to a foreign person in the United States or outside of the United States is considered to be an export and may require an export license.

As such, companies should not authorize the export of any technical data or software that is not in the public domain unless they have made an export license determination.

A Minefield of Violations

Many companies are not aware of the U.S. export control laws or their applicability to their business activities. Unfortunately, U.S. export control laws can be a minefield of violations if not properly navigated. Routine business activities, such as providing blueprints to a foreign national employee or carrying technical data abroad for a business trip, may require an export license even when a company's products do not leave the United States. Noncompliance can carry hefty civil fines, jail time and may result in the revocation of a company's export privileges. The U.S. government has also increased enforcement of export compliance in recent years and is conducting audits of companies that do business abroad. As such, it is critical to make clients aware of their responsibilities and to provide them with proper training in order to protect them from inadvertent violations and to assure their compliance with the evolving U.S. export laws in a rapidly growing global market. •

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