

Technology Control Plans: Export Controls, Trade Secret Protection, Counter-Espionage

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Technology Exports

- Types of Exports:
 - Physical Shipments of Tangible Media, Including Hand-Carries and Mail Shipments
 - Transmissions Via Email, Fax, Web Download, etc.
 - Deemed Exports: In-Country Releases (Oral/Visual) to “Foreign Nationals”
 - Deemed Reexports: Similar to Deemed Export but Applies to Releases to a Third-Country National in a Second Country, e.g., Release in Canada to a Russian National
- *Note: No Sale is Required for an “Export” to Occur*

Export and Reexport Controls: EAR

- Main Regulations: U.S. Export Administration Regulations (EAR)
- Commerce Department’s Bureau of Industry and Security (BIS): <http://www.bis.doc.gov/>
- Focus = Export/Reexport of “Item”: Commodity, Software, or Technology
- Strict Liability for Most Civil (Administrative) Violations
- Penalties: \$250,000 Maximum Civil Monetary Fine (Per Violation); Possible Denial of Exporting Privilege

Export and Reexport Controls: ITAR

- International Traffic in Arms Regulations (ITAR)
- Apply to Defense Articles (Including Technical Data) and Defense Services; Otherwise the EAR Generally Apply
- Articles/Services On United States Munitions List or Those Specifically Designed, Developed, Configured, Adapted, or Modified for a Military Application
- Administered by US State Department's Directorate of Defense Trade Controls (DDTC) (www.pmddtc.state.gov/)
- Strict Liability for Most Civil (Administrative) Violations
- Penalties: \$500,000 Maximum Civil Monetary Fine (Per Violation); Possible Debarment (ITAR Export Privilege Denial)

Corporate Espionage & Global Security: Protecting Your Business Interests

EAR Licenses and Authorizations

- “Matrix” of Sensitive/Non-Sensitive Items and Destinations
- License Exception May Apply
- Relatively Few Items are Controlled, and Most Exports of Controlled Items Do Not Require Licenses (Because of Non- or Less-Sensitive Destinations and License Exceptions)
- Regardless of Item/Destination License Requirement, A License is Generally Required if Export/Reexport Involves:
 - Restricted End-User (A Person Named on One of the “Restricted Parties Lists”)
 - Restricted End-Use (Item to be Used in Association with the Design, Development, Production, or Use of Missiles, Nuclear Explosive Devices, or Chemical or Biological Weapons)



ITAR Licenses and Authorizations

- Prerequisite = Registration
- Broad and Strict Licensing Requirements, Narrow License Exemptions
- All Persons in Chain of Custody Must be Authorized
 - KEY RISK: Retransfer; Reexport
- List of “Debarred Parties”

Special ITAR Risks For Deemed Exports and Reexports

- ITAR Definition of “Export” Includes Providing Potential Access to Technical Data or Defense Service to Foreign Person in United States
- Reexport Includes Providing Potential Access to Technical Data or Defense Service Outside of the United States to a Third-Country Foreign Person or Dual Foreign Person
- DDTTC Nationality Policy for Foreign Persons: Current Citizenships or Nationalities, Past Citizenships or Nationalities, Current and Past Permanent Residencies, and Country of Birth
 - Differs from BIS Rule Under the EAR = Last in Time
 - Does Not Apply if Currently a U.S. Citizen or Permanent Resident, Because Such a Person is Not a “Foreign Person”



Espionage Exports (1)

- Does Espionage Result in Export:
 - If Collector is Located Outside U.S.?
 - If Collector is Located Inside U.S.?
- If an Export:
 - EAR License Needed? Integrity of End-User and End-Use Screening?
 - ITAR License Needed?



Espionage Exports (2)

- Espionage Victim as Unwitting Exporter
 - Collector Causing a Violation by the Victim
 - Civil (Administrative) Liability for Violation?
- Espionage Victim Engaging in Domestic Transaction with Subsequent Illegal Export by Collector
 - Civil (Administrative) Liability for Domestic Transaction?

Technology Control Plan

- Not Required by Export Control Law but Encouraged
- Sometimes Required in EAR or ITAR License Condition/Proviso; Increasing?
- Existence and Quality Reviewed in Export Enforcement Cases?
- TCP Itself Often an Element of Broader Export Compliance Program
- Rules for Handling Classified Information in National Industrial Security Program Operating Manual
- New Guidance/Rules for Government Contractors and Subcontractors (Flow Down)

TCP: Foundational Programmatic Elements

- Commitment to Control/Culture of Control
- TCP Personnel
- IT Infrastructure
- Written Customized Policies, Procedures, Work Instructions
- Training
- Annual Certifications
- Cradle-to-Grave Export Control License Management
- Handling Third Parties
- Due Diligence and Post-Acquisition Integration
- Auditing the TCP
- Handling Issues and Possible Law Violations



TCP Programmatic Elements (1)

- With Respect to Technology:
 - Identify
 - Assess (Value/Control Status)
 - Mark/Tag
 - Segregate



TCP Programmatic Elements (2)

- With Respect to Technology:
 - Control Access
 - Monitor Integrity (in Absence of Removal/Export)
 - Monitor/Prevent Removal/Export



Straining the TCP: Economic Cycles

- During Better Economic Times, Strains Occur Mainly Due to Rapid Growth and Management Haste
- During a Recession, Strains Occur Mainly Due to Desperation and Lack of Resources

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