



STEPTOE OUTSIDE COUNSEL

Keeping compliant in cross-border intracompany transfers

US companies with overseas operations regularly need to share technical information or software within the company, but across national borders. For reasons ranging from sales support and product repairs to addressing compliance questions, intracompany communications and data conveyances are frequent. Yet many companies are not aware that US export control laws apply to these business activities and that controls may apply. This is true also for non-US companies (re-)exporting items which include US-origin components or US controlled technology because US controls apply to US-origin products wherever located.

Even if the sharing is only within your company, US export controls apply if you are sharing technical information or software outside of the United States in any manner (including by email or download from a remote computer server). Generally, these controls can apply to transmissions to both US and foreign citizen employees.

Export controls

The US Department of State, Directorate of Defense Trade Controls (“DDTC”) has primary responsibility for regulating

defense items under the International Traffic in Arms Regulations (“ITAR”), while the US Department of Commerce, Bureau of Industry and Security (“BIS”) has primary responsibility for regulating commercial items under the Export Administration Regulations (“EAR”).

If your product falls under the ITAR, you probably need a license to share related technical information overseas, even within your own company. The ITAR contains only limited exceptions to this licensing requirement. Companies can apply for “DSP-5” licenses from DDTC to share ITAR-controlled technology overseas. Where companies have overseas operations that require sharing of more than simply “static” technical data such as a blueprint, DDTC has special licensing regimes – technical assistance agreements (“TAAs”) and manufacturing license agreements (“MLAs”) – that can authorize broader intracompany sharing of ITAR-controlled technical data and related services.

If your product is regulated under the EAR, a different set of rules applies. The EAR provide additional flexibility for transfers of technical information in some circumstances, but the rules are technically complex. The EAR specify

that certain limited categories of technical information – including “published” information, “fundamental research”, and information disclosed in patents or open (published) patent applications – are not regulated under the EAR (in other words, they are not “subject to the EAR”). These carveouts should be reviewed carefully before they are relied on. Many items (including technical information) that are “subject to the EAR” also do not require a license where they are not “controlled” for the relevant destination (country), end-user or end-use, or may require a license only for exports to a limited number of countries.

Where a license is required, Part 740 of the EAR includes license “exceptions”, commonly referred to by three-letter acronyms, that authorize sharing of technology or software across borders in some circumstances. The most relevant exceptions include:

- Technology and Software Under Restriction (“TSR”) authorizes the export of certain software or technology controlled only for national security reasons to specified destinations that the US has decided pose relatively low national security risk (e.g., the United Kingdom);
- Technology and Software Unrestricted (“TSU”) authorizes certain exports of operation technology and software, sales technology and software, software updates, and mass market software subject to the EAR General Software Note;
- Encryption Commodities, Software, and Technology (“ENC”) authorizes certain exports of items controlled only for encryption reasons; and
- Strategic Trade Authorization (“STA”) authorizes the export of a number of specified items that would otherwise require a license to 36 countries considered to be close US allies.

Each of these exceptions could enable transmissions of technical information or software to employees overseas in some circumstances. However, do remember that reliance on a license exception requires compliance with the recordkeeping and reporting obligations associated with the specific exception. ■

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