



A Resource on Strategic Trade Management and Export Controls



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Controls Tangible / Intangible

The United States and other key supplier countries control the transfer of "technology" not in the public domain that is necessary for the development, production, or use of controlled commodities in the same ways that controls are maintained on transfers of the commodities themselves. Furthermore, the United States makes no legal distinction between "tangible" and "intangible" transfers of controlled technology, the form that the technology takes and the means of transfer is not relevant.

The international nonproliferation regimes and arrangements cover transfers of technology. For example, the Wassenaar Arrangement has a general technology note stipulating that exports of technology required for development, production, or use of items on the munitions list are controlled as munitions items. It goes further to stipulate that munitions technology remains controlled even when it is applicable to an uncontrolled item. Other regimes and U.S. laws and regulations contain similar provisions for technology controls.

In U.S. law, the authority to control certain technology is contained in the relevant pieces of export control legislation, and is elaborated upon by implementing regulations. The Arms Export Control Act (AECA) cover the technology relating to defense articles, and the international traffic in arms regulations specifically numerates technical data as a type of controlled defense article. The Export Administration Act and Export Administration Regulations cover technology relating to dual-use goods. Controls on nuclear-related technology are specified in the Atomic Energy Act and the Nuclear Nonproliferation Act.

These controls cover any non-public domain technology required for the development, production or use of controlled items, regardless of the form it may take. Controlled technology includes, but is not limited to, instructions (written or recorded), working knowledge, design drawings, models, operational manuals, skills training, and parts catalogues. These controls also cover all forms of transfer, including e-mails, faxes, and face-to-face conversations. Under U.S. law, providing controlled technology to a foreign person, whether within the U.S. or not, is deemed to be equivalent to physically exporting that technology to the country of the person's nationality.

Enforcement of these controls is obviously complementary to a company's efforts to protect its proprietary information. Nonetheless, especially intangible transfer of controlled technology, especially over the internet, poses a significant enforcement challenge. An important component of export enforcement efforts is education of U.S. industry -- and government scientific personnel who may work on controlled projects -- on the law and compliance measures.

The U.S. Government conducts outreach program with these technical experts to explain the law and closely reviews activities of its own experts to ensure they do not unwittingly transfer controlled technology in the course of their work. In addition, U.S. export enforcement officials receive special training on a regular basis on topics such as how to detect, seize, and recover computer evidence.

Procedures for investigating, prosecuting, and penalizing violations related to transfers of technology are the same as for illicit commodity transfers.

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