

COVID-19 Mitigation May Trigger New Tech Export Restrictions

By **Francesca Guerrero, Scott Diamond and Joyce Rodriguez**

While the COVID-19 pandemic is first and foremost a major global public health challenge, the outbreak has disrupted nearly all fields of global commerce. Companies around the world are exploring ways to protect the health and safety of workers, customers and others through changes to how they operate.

Many of these changes involve basic protective measures including social distancing, use of face masks or other equipment, and frequent sanitation. However, some businesses are considering the use of more advanced technology such as thermal cameras to detect people with fevers.

As companies prepare to reopen with additional protective measures, they should be aware of trade restrictions that may impact their plans.

Export Controls on Dual-Use Items

Some of the more advanced technology used to mitigate the spread of COVID-19 may be subject to heightened U.S. export control requirements. Infrared cameras and scanners, for example, have received attention after their apparently successful deployment in Taiwan, the United Kingdom, multiple international airports and other locations.

Entertainment venues, museums, public transportation, malls and other places that attract large groups of people may find these technologies to be useful components of their COVID-19 playbook.

Depending on the specific item, these infrared cameras and scanners may be controlled under U.S. export regulations. Some, for example, fall under U.S. Department of Commerce Export Control Classification Number 6A003, which has relatively tight controls.[1]

Non-U.S. governments have also been utilizing contact tracing, generally tied to a cellphone app. Although it is unclear whether governments in the U.S. will adopt this tool, several U.S. companies are reportedly involved in developing and deploying apps that facilitate contact tracing. Others are said to be developing technology to analyze the data generated.

The technology used for both of these activities may fall under export controls related to encryption, global positioning systems or even controls the Bureau of Industry and Security put in place in January of this year on software designed to automate the analysis of geospatial imagery.[2]

Facial recognition technology may also see increasing use during this pandemic. According to news reports, Russia has used facial recognition software to identify persons who violate quarantine orders.[3]

All the ways this technology may be used are still unclear, but there are many possibilities,



Francesca Guerrero



Scott Diamond



Joyce Rodriguez

including as an element of contact tracing. Facial recognition software could be subject to current export controls, but it is also directly tied to artificial intelligence and the anticipated new export controls on emerging technologies.

How Can a Company Enhance Its Compliance With Export Controls?

Know export classifications.

It is important for companies that are users of export-controlled items to obtain item classifications to understand their compliance obligations.

An item on the Commerce Control List, such as a controlled thermal scanner, may require an export license if a company wants to send it to its global facilities in certain countries.

It is critical for companies that produce or export these items to determine the export control classification numbers of the products. Sales to certain customers or countries may be restricted, depending on the export control classification number.

Conduct due diligence on end users and end uses.

In a pandemic situation, it may be difficult to conduct inquiries into end users and end uses as middlemen see opportunities and become active. However, export rules impose an obligation on exporters to take reasonable care that their items do not fall into prohibited hands.

This includes not only customers on lists of restricted parties, but also end users in countries for which a license would be required. It is important that companies engaged in exporting items conduct proper screening of party and entity names against the various U.S. government denied/restricted/prohibited party lists.

Consider foreign national access and deemed exports.

Even if a foreign person is in the U.S., it is considered a deemed export if they access controlled technology. This is especially relevant for companies active in developing technology, as foreign-national employees and contractors are more likely to access the underlying technology and not only the item or software.

However, companies utilizing third-party products may still have access to the technology. A company integrating a contract tracing app or other AI technology into its own software might have access to the underlying technology, which could separately be controlled and require an export license.

Depending on an employee's nationality, a license may be required for their work before they can legally access and work on any related projects.

Maintain records of export compliance efforts.

While recordkeeping is a part of any company's business practices, export control laws and regulations require U.S. companies to maintain for a minimum of five years all records related to export transactions, including due diligence and screening records, information regarding export control classification number determinations, and files surrounding and supporting export license applications and interactions with relevant government agencies.

Export Restrictions on Critical Supplies

In April, the Federal Emergency Management Agency issued a temporary final rule[4] that allows it to halt individual exports of certain scarce resources used to combat the spread of COVID-19 and direct their use for the government or other domestic purposes.

Covered items include certain categories of personal protective equipment such as respirators, surgical masks and gloves. The rule was issued pursuant to the Defense Production Act[5] and a presidential memorandum[6] in which President Donald Trump directed the U.S. Department of Homeland Security to take action to prevent diversion of the necessary materials overseas.

FEMA also announced that certain exports are exempt from the rule, including intracompany transfers by U.S. companies from domestic facilities to company-owned or affiliated foreign facilities.

In addition to the DPA, the administration could also utilize an existing but rarely used export control restriction known as short supply controls under the Export Administration Regulations.[7]

While authorizing export controls of medical-related equipment and supplies under this provision of the Export Administration Regulations would be unprecedented, U.S. companies should understand that the regulatory framework already exists — beyond any temporary FEMA efforts — to control such exports from the U.S., if it becomes necessary.

Similarly, over 70 foreign governments have introduced export restrictions on critical medical supplies, equipment and medicines. As the COVID-19 crisis will remain with us for the foreseeable future, it is possible that these export restrictions will continue, or be altered or expanded.

In addition to considering export controls on the use of advanced technologies to detect the virus, companies must also stay aware of the potential for supply shortages and resulting export restrictions.[8]

How Can a Global Company Prepare for Export Restrictions on Basic Items?

Companies with global operations should consider taking steps to maintain flexibility to ensure that their locations are able to access the supplies they need, despite a patchwork of export restrictions.

Some steps to consider include:

Consider supply chain diversity.

Due to restrictions on exports by various countries, companies may need to seek multiple sources for critical supplies or advanced technology to protect employees and mitigate the spread of COVID-19 at company facilities.

Rethink inventory and shipping.

As U.S. companies potentially face needing authorization either for certain exports or for obtaining items controlled by foreign governments, they may need to address, and possibly consider altering, both their inventory needs and appropriate supply chain logistics.

Until the pandemic recedes, "just-in-time" inventory and shipping business methods may need to be adjusted for any critical protective medical supplies and equipment.

Consider foreign/free trade zones or bonded warehouses.

The FEMA restrictions and many other global export restrictions do not apply to items that have not entered the U.S. for consumption. Some companies that need to acquire significant quantities of medical equipment and other supplies but may need to send them to facilities around the world are considering using bonded warehouses or foreign trade zones for storage.

Create an export compliance team.

With export restrictions and deemed export issues now potential concerns as some companies consider deploying COVID-19 protective measures that use more advanced technologies, exporters of these products may need to implement a compliance team composed of procurement, sales, engineering, human resources and IT personnel who convene to discuss and determine potential compliance exposure.

The team would assess possible export control restrictions, conduct classification analyses and, when necessary, prepare and file for an export license.

These are extraordinary times and the medical experts indicate that the COVID-19 virus will be a global public health challenge for many months to come. Companies should be planning now to protect the health and safety of their workers and customers as part of any plan for resuming operations in the midst of this crisis.

While a variety of business issues must be considered and prioritized as companies prepare to reopen and operate in this new environment, the potential for export controls and restrictions on critical supplies should be a discussion topic for many.

The increasing use of advanced technologies may present regulatory export control considerations, and the potential for supply shortages due to export restrictions may present practical challenges.

Francesca M.S. Guerrero is a partner at Thompson Hine LLP.

Scott E. Diamond is a senior legislative and regulatory policy adviser in the international trade practice group at the firm.

Joyce Rodriguez is an associate at the firm.

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[1] In January 2017, the Department of Commerce settled an enforcement action against Milwaukee Electric Tool Corp. for exporting on 25 different occasions certain thermal imaging cameras to various countries without a license from the Bureau of Industry and

Security. The matter settled with a \$301,000 civil penalty and a two-year period of probation for the corporation.

[2] <https://www.federalregister.gov/documents/2020/01/06/2019-27649/addition-of-software-specially-designed-to-automate-the-analysis-of-geospatial-imagery-to-the-export>.

[3] <https://www.bbc.com/news/av/world-europe-52157131/coronavirus-russia-uses-facial-recognition-to-tackle-covid-19>.

[4] 85 Federal Register 20,195 (Apr. 10, 2020); Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources for Domestic Use.

[5] 50 U.S.C. §§ 4511 and 4554. See also "The Defense Production Act (DPA) and COVID-19: Key Authorities and Policy Considerations"; Congressional Research Service, Mar. 18, 2020.

[6] Presidential Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use, Apr. 3, 2020.

[7] 15 C.F.R. Part 754. Currently, only certain petroleum products, unprocessed western red cedar and horses for export by sea are restricted for export under this section of the Export Administration Regulations.

[8] The World Trade Organization reports that medical supplies account for 5% of the world merchandise trade, totaling \$2 trillion, and are concentrated among a small number of exporters, with Germany, the U.S. and Switzerland representing 35% of the global market for medical products, while Germany, the U.S. and China comprise 40% of the global market for personal protective products.