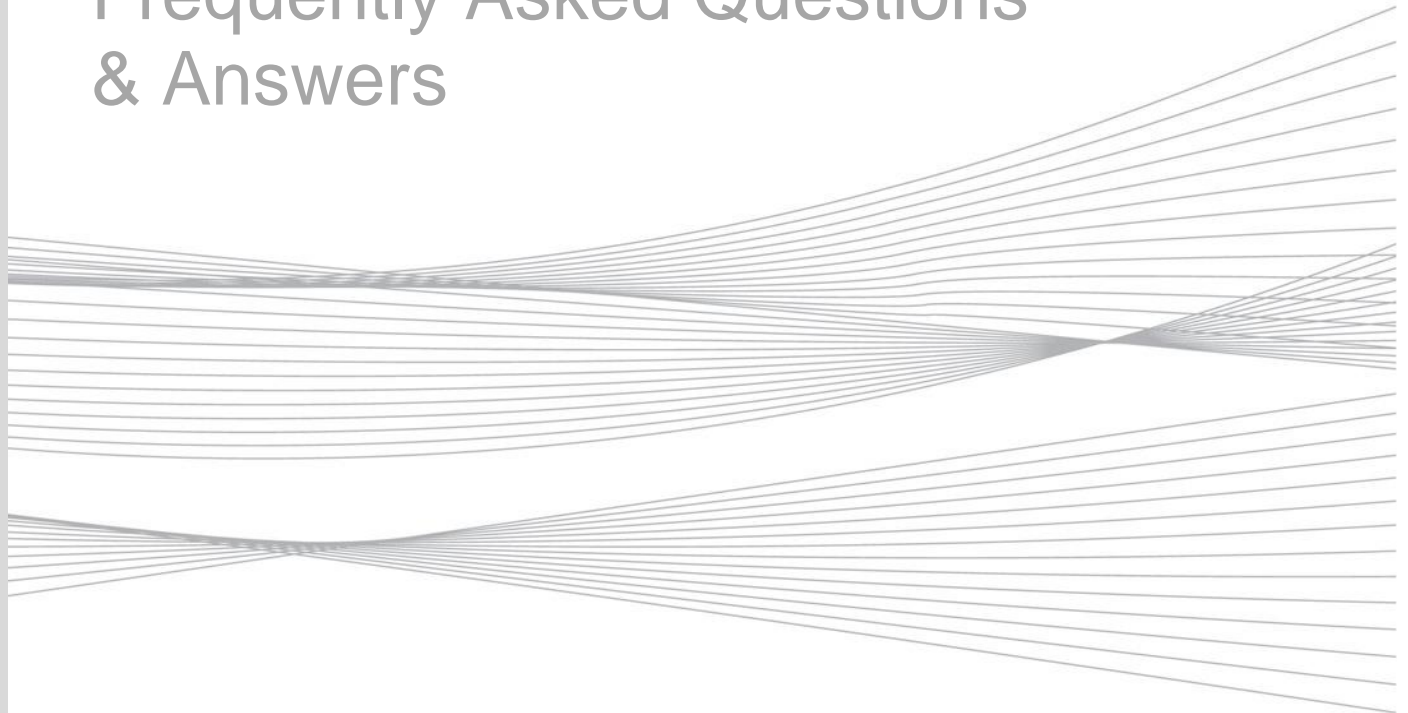




Exporting Software

Frequently Asked Questions & Answers



Exporting Software



The Virginia Economic Development Partnership's (VEDP) International Trade division is tasked with promoting exports of Virginia companies with the goal to grow jobs and increase the state's tax base.

The growth in internet usage and the digitalization of business practices has led to software innovation in all sectors. Software has become more advanced and accessible, and global demand for software solutions has grown rapidly in the recent decade.

To assist Virginia's software companies to expand globally with new customers and business opportunities, this guide is intended to answer the most common questions that surround software exports.

Q: Who and where in the world purchases software?

A: Identifying target export markets for software can be challenging, since software is a broad category with many applications. In addition, because most software is now purchased and/or delivered via digital download, instead of through a physically shipped hard copy, tracking all software exports is nearly impossible.

Any product that is physically shipped across borders is identified by a Harmonized System (HS) code, which are used by customs authorities around the world to identify products and apply duties and taxes. Software that is physically shipped is often classified in heading 8523 of the Harmonized System. In general, software is classified based on the medium (i.e. optical disk) in which it is reproduced.¹

Though Virginia exporters physically shipped more than \$30.3 million in software in 2015,² the most common method in which software is exported is via digital download or a similar medium that doesn't require shipping hard copy.³

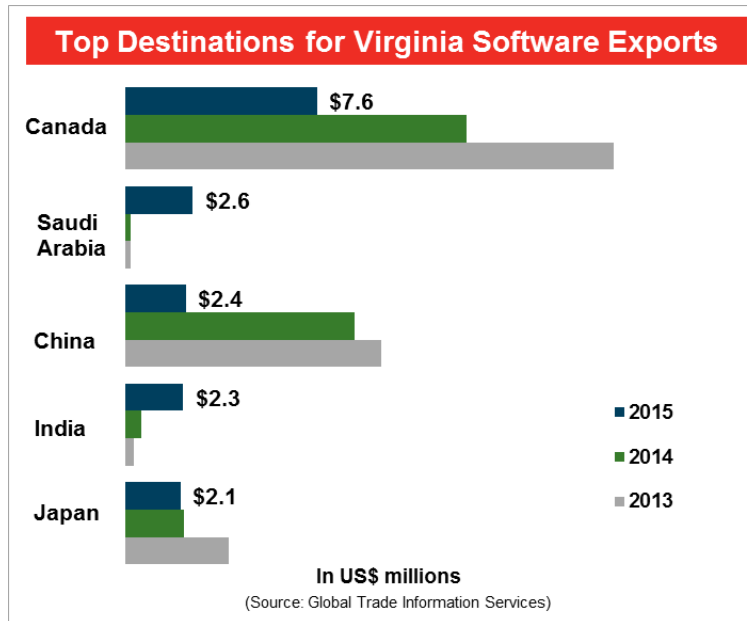
¹ (U.S. Office of Technology and Electronic Software, n.d.)

² (Global Trade Atlas)

³ (Jeffrey Richardson, 2016)



The chart below shows the top destinations for physically shipped Virginia software exports in 2015:



Q: How should my company select a target market for our software?

A: Because all industries are becoming more software dependent, the first step to narrowing down where to sell your company's software is to evaluate whether your software is industry-specific, or applicable across multiple sectors.

In addition, because software is a high-involvement purchase (especially for custom software solutions), it is helpful to evaluate barriers you will face in various overseas markets, including:

Language & Translation

» *Does your company's software interface need to be translated and adapted into a language other than English?*

Even in countries where most executives speak English, consider the language capabilities of the individuals that would interact with the software regularly.

» *If your company's domestic business model includes after-sale service, does your current staff have the language capabilities to provide support to overseas customers?*

This may impact your company's business model overseas and impact whether it is necessary to form a partnership with a local representative to provide this support.

Pricing

- » *Who can afford your company's software?*

For expensive software solutions, consider whether a market is developed enough to have the demand and ability to purchase your company's solutions. If the software is a mass-market or consumer model, your company's first step should be to evaluate other options in the market to determine whether your company is price-competitive.

Sales and Support

- » *What business model will your company use to generate leads overseas?*

Your company may need an in-country representative to effectively generate leads, especially in highly competitive markets. It is important to consider what the ideal type of representative would be, whether it is a partner that offers complementary products or services or a company entering a new market segment.

Q: Which business model should your company use to enter an international market?

A: Selling directly to end-users is the preferred business model for many software companies, often due to concerns about protecting intellectual property and educating an outside sales force about complex software offerings.

However, selling directly to the end consumer is often not a workable model when entering international markets due to language, cost, time, and market intelligence issues. If your company is unable or unwilling to partner with a local representative, your company should carefully evaluate the costs of using domestic staff for lead generation and sales activities overseas.

Q: Will my software require a license for export?

A: All U.S. exports, including software, are regulated by the U.S. Federal Government. Prior to exporting, your company must determine which government agency has jurisdiction over its exports, and if those exports require a license. The need for an export license for software is determined by the application of the software, the country that the buyer or end-user is in, and the level of software encryption.

Most exports fall under the [Export Administration Regulations](#) (EAR), administered by the U.S. Department of Commerce. EAR regulates the export of most commercial goods and dual use items.⁴

A smaller percentage of exports are governed by the [International Traffic in Arms Regulations](#) (ITAR), overseen by the U.S. Department of State. ITAR governs exports of

⁴ (U.S. Department of Commerce, 2016)

products designed for military applications, which includes items, technical data, software, or services related to an item on the U.S. Munitions List.⁵

More detailed information about export regulations is available on ExportVirginia.org.

VEDP recommends that exporters consult an attorney if they have questions about which export regulations govern their product or service and to develop an export compliance program. Your local [International Trade Manager](#) can provide a list of attorneys with expertise in export compliance procedures.

Q: How can my company protect its Intellectual Property when exporting?

A: For many software companies, the largest risk in selling overseas is protecting Intellectual Property (IP). The most important thing to remember is that intellectual property rights are territorial, not global. In addition, IP protections and enforcement vary by country. Protecting your company's IP in the U.S. is the first step, but in many cases, additional protections will be needed to secure IP in each new country your company exports to.

In the United States, software source code, user interfaces, and related code can be copyrighted. Algorithms performed by the software can be patented, if the software or algorithm meets several requirements, such as a high level originality. Copyrights have narrower scopes than patents, and may be available if software cannot be patented.⁶

There is no such thing as an "international copyright" or "international patent." However, most countries offer protection to foreign works under conditions outlined in international copyright treaties and conventions, such as the Berne Convention.⁷ In addition, the U.S. is a member of the Patent Cooperation Treaty, which allows for U.S. applicants to seek protection in up to 146 countries when submitting a patent application to the U.S. Patent and Trademark Office.⁸

More information about IP protection is available on ExportVirginia.org. If your company has concerns about protecting Intellectual Property overseas, it is recommended that you speak to an attorney with experience in international intellectual property protection. Your local [International Trade Manager](#) can provide a list of attorneys in this discipline.

Q: How do data privacy laws in other countries affect my software exports?

A: Data privacy has become a hot button issue around the world as personal data collection becomes more commonplace. Most developed countries have frameworks or legislation that governs the collection and use of personal data.

⁵ (U.S. Department of State, 2016)

⁶ (Saper Law, 2007)

⁷ (United States Copyright Office, 2016)

⁸ (World Intellectual Property Organization, n.d.)

If your company engages in the collection of personal data, it is important to become familiar with data privacy and collection requirements for all countries in which it does business.

The regulation and enforcement of personal data protection regulations varies by country and region. [DLA Piper](#) provides a map of countries with data protection frameworks, as well as a rating system on the level of regulation and enforcement.

[Information Shield](#) provides a list of privacy laws for more than 50 countries. In addition, a number of [international privacy standards](#) and frameworks also exist, such as the European Data Protection Directive.

Q: What is Safe Harbor, and why does it matter to software companies?

A: *Safe Harbor* was a framework intended to bridge the differences between the U.S. and EU's citizen privacy standards. However, in October 2015, the European Court of Justice declared that the U.S. – EU Safe Harbor Framework was not a valid mechanism to comply with EU data protection requirements when transferring personal data from the EU to the United States.⁹

In July 2016, the European Union announced the approval of the EU – U.S. Privacy Shield Framework, which replaced Safe Harbor. Similar to Safe Harbor, Privacy Shield is designed to provide companies in the U.S. and EU with a mechanism to comply with EU data protection requirements when transferring personal data from the EU to the U.S. in support of transatlantic commerce.¹⁰

Privacy Shield Principles lay out a set of requirements governing the use and treatment of personal data received from the EU. U.S. companies that join Privacy Shield commit to comply with these principles, which are enforceable under U.S. law.¹¹

Eligible companies can join Privacy Shield through the following steps:

- » Develop a conforming privacy policy
- » Identify an independent recourse mechanism
- » Self-certify through the Privacy Shield website

By joining Privacy Shield, U.S. companies are deemed to provide “adequate” privacy protection, which is a requirement to transfer personal data outside of the EU.¹²

Privacy Shield applies only to the EU and U.S. Countries outside of the European Union may have different data privacy laws and regulations.

⁹ (Export.gov, 2016)

¹⁰ (Export.gov, 2016)

¹¹ (Privacy Shield Framework, n.d.)

¹² (Privacy Shield Framework, n.d.)

Q: How does a server location impact my company's exports?

A: Because server location is frequently associated with legal jurisdiction, the location of the servers that host data is an important consideration when doing business overseas, even if storing data in a “cloud.” For example, if your company collects data on a server hosted outside of the U.S., the laws of the foreign country in which the server is located may govern the data.¹³

For companies collecting consumer data, the consumer privacy laws of the country in which the server is located will govern the collection and use of the data. Server location can also impact government surveillance rights, because the laws of the country in which a server is located may grant a foreign government comparatively easy access to the data.¹⁴

This guide is intended to help evaluate whether your company is ready to export and highlight key considerations related to market entry strategy. After working through this guide, the next step is determine which countries to target to expand your company's international sales. It is important to focus on a narrow scope of international markets due to the complex nature of laws and regulations governing software, which vary by country.

To help target markets, regulatory requirements, and next steps for your company to begin pursuing international sales, contact your local [International Trade Manager](#).

¹³ (IT Law Group, 2011)

¹⁴ (IT Law Group, 2011)

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