KPMG **SMART PRACTICE**

ITAR: five common mistakes and how to avoid violations

For exporters and re-exporters of items controlled by the International Traffic in Arms Regulations ("ITAR"), a common observation is that knowing the regulations and effectively administrating them are separate challenges. While most companies with ITAR-controlled items have policies to support compliance, the ITAR's complexities, coupled with speed of business, pose unique challenges. However, there are certain mistakes that commonly result in violations. Keeping them on your radar may help you identify and address early warning signs.

1. Insufficient export compliance programs

Here, the challenge arises in ensuring that the internal controls and approaches to risk mitigation stay relevant to the enterprise, effectively address risk, and support current business practices. As a company grows and evolves, the compliance controls must keep pace. If not, mistakes may occur because the internal policies and procedures no longer "fit" the company. Without clear, relevant guidance, informal procedures can develop and they may be insufficient to mitigate risk – resulting in violations.

2. Failing to properly determine jurisdiction and classification

Effective management of export-controlled commodities requires accurate jurisdiction and classification determinations, as these determinations will drive nearly every export-related decision that follows – a mistake here can lead to cascading violations.

For example, assume that a company has determined the products that it manufactures are on the CCL and are therefore subject to the EAR. Relying on this determination, the company implements controls to ensure only EAR-authorized exports occur. However, if one of the products was actually described on the USML, and subject to the ITAR, those controls may potentially be insufficient. In this case, the company faces at least one ITAR violation, as it manufactures defense articles, and such manufacturers must register with DDTC. Further, if the ITAR-controlled product was or is exported without the required approvals from DDTC, the company will face additional ITAR violations.

3. Not obtaining licenses for EAR-controlled goods

Understandably, many companies whose products are ITAR-controlled are deeply focused on ensuring compliance with those requirements. However, this can be to the exclusion of other export control regulations – namely the EAR. Don't forget that items subject to the EAR may still require an export license.

4. Failing to properly manage licenses

Export license and agreement management generally has two components and the failure to accurately manage both may lead to a violation. The first is ensuring that the correct information is provided on the license itself. This requires an understanding of the product, its classification and how it will be used. Usually these hurdles are manageable; however, it is following the authorized license or agreement scope (including provisos) where companies can struggle. Monitoring the scope and provisos requires on-going knowledge of active authorizations, ability to track the controlled products' movements, and visibility into the technical interactions between company employees and the approved foreign licensee(s). If the export compliance group's involvement ends when a license is obtained, the likelihood of an unauthorized export increases.

5. Poor control of technical data

The dissemination of technical data remains one of the most challenging areas to control. Business must be conducted quickly, entailing a heavy use of email and virtual meetings. However, data must also be protected from unauthorized transfers, requiring some degree of communication restrictions. Reconciling these priorities is difficult. For companies without an entrenched culture of ITAR compliance, training employees to identify export-controlled technical data and control its release can be challenging. Violations may occur for companies who do not bridge this gap through enhanced awareness training, data marking procedures, and systems controls.

There are many reasons ITAR violations occur. However, through risk assessments and careful management of these issues, these challenges need not escalate into violations. ■

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