ITAR Compliance: How U.S. Export Controls May Affect Your Business

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Nicholas L. Townsend
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5 Lessons Learned from Private Practice

- Examples of common ITAR problems
- Misconceptions about the ITAR that lead companies (small and large) into trouble
- Steps you can take to improve compliance and protect your company
Lesson 1: Know What Game You’re Playing at the Start

- Getting the jurisdiction and classification (J/C) correct at the outset is essential
  - If J/C is wrong, you can keep making mistakes each time an item is exported and when it is retransferred abroad
  - Need to consider not just your product, but also your supply chain (e.g., contact OEMs about J/C of items they sell you)

Lesson 1 (cont'd): Rule of thumb for identifying ITAR-controlled items

- Goods and technology designed, developed, configured, adapted, or modified for a military application (e.g., to kill people or defend against death in a military setting)
- The past matters
  - Items originally developed for missiles may be ITAR controlled even if used in commercial applications
- Intended use not relevant to determining whether item is ITAR-controlled
  - E.g., Tank exported to serve as a museum piece remains ITAR-controlled
Lesson 1 (cont’d): How to Determine Whether Your Technology is ITAR-controlled

- Self-classification
- Outside consultant or counsel review
- Official determination by the State Department – Commodity Jurisdiction (CJ) process

Lesson 2: DDTC’s Super Power is X-ray Vision

- See-Through Rule means that an item will be ITAR-controlled if it has a single ITAR widget in it
  - Applies even if the one ITAR part only accounts for a small percentage of the dollar value of a much larger item
- Rule is different under the EAR than the ITAR
Lesson 3: Beware the Taint

- Integrating items derived from ITAR controlled technology into a purely commercial product can create risk of becoming ITAR controlled
  - E.g., your development of a military product results in improvements to your underlying technology that could have commercial applications
- Businesses that do both commercial and military work should be careful to track and separate development of commercial and military items

Lesson 4: “Exports” Take Many Forms

- ITAR exports include more than just putting a box of missiles on a boat and shipping them overseas
  - Technical data
  - Defense services
  - Deemed exports
- Companies often have robust processes around physical exports, but they trip up on the non-tangible exports above
Lesson 4 (cont'd): Technical Data

- Information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles
- Includes information in the form of blueprints, software, drawings, photographs, plans, instructions and documentation
- Excludes basic marketing information on function or purpose or general system descriptions of defense articles
- Excludes information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the “public domain”
- Regulates written and oral transfers of technical data, including conversations in the U.S. with non-U.S. persons about technical data

Lesson 4 (cont'd): Defense Services

- The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;
- The furnishing to foreign persons of any technical data controlled under ITAR (see 120.10), whether in the United States or abroad; or
- Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice.
Lesson 4 (cont'd): More on Defense Services

- Can Be Based Solely on Public Domain Information
- Does not Require U.S. Defense Articles
- Subjective and Open to Interpretation
- Most Training of Foreign Militaries and Military Training Subject to this Provision
- Exchanging and Discussing Technical Data with Foreign Subsidiary Generally Triggers Defense Services Requirements

Lesson 4 (cont’d): Deemed Exports

- Meetings with non-U.S. persons at which ITAR-controlled technical data is shared
- Giving a non-U.S. person access to a computer system on which ITAR-controlled technical data is stored
- Hiring non-U.S. person employees who will have access to ITAR-controlled hardware and technical data
Lesson 5: Where You Sit Matters for Research

- Circumstances of a foreign national’s work can impact whether an activity falls under ITAR jurisdiction
  - Research at a university or academic institution may be covered by the Fundamental Research Exclusion (FRE)
  - However, that same foreign national could do the exact same research right across the street for a private company and be subject to the ITAR

How should the entrepreneur handle the ITAR?

- Classify the hardware and technical data you create – “export matrix”
- Develop a compliance plan
- Develop a shipping procedure that identifies license requirements and obtains licenses before shipment
- Develop procedures to avoid deemed exports
- Training
When should I consider ITAR in a new project?

- Right away! But why?
- Need to be registered with State Department if manufacturing or exporting defense articles
- Need to avoid inadvertent unauthorized exports
  - Conversations or meetings with non-U.S. persons
  - Hiring non-U.S. persons to work on the project
- Need to know licensing requirements when exporting
- Need to mark documentation as ITAR-controlled

Additional Points to Remember

- U.S. export control law is not always intuitive:
  - State Department has jurisdictional authority under the ITAR regardless of directions from other agencies
  - Companies have received guidance from the Department of Defense to use exemptions that the State Department later determined to be ineligible; reliance on DoD guidance would have resulted in a violation
- Government agencies and their contractors (Justice, Armed Services, DOE, NASA) have been cited for export violations
- Salutary purposes are not sufficient by themselves; must follow regulatory requirements
Conclusion

- ITAR is very complicated
- ITAR does not treat guessing kindly – it is a strict liability regime
- Advisable to have trade compliance professionals to assist your compliance efforts

Contact information

Nicholas L. Townsend
202-942-5249 or nicholas.townsend@aporter.com

John P. Barker
202-942-5328 or john.barker@aporter.com
Questions & Discussion