



KPMG SMART PRACTICE

Don't forget about ITAR: It's not just for the defense industry

A significant number of changes have been made to commercial/dual-use export control regulations over the past few years, and more are likely on the way. In the US, the Department of Commerce, Bureau of Industry and Security ("BIS") has implemented increased controls on China, through its Entity List, an expanded military end-user/end-use rule, and new controls on emerging technology. In the EU and other regions, governments expanded dual-use related regulations to cover new emerging technology. With all of the changes to commercial and dual-use regulations, it's easy to forget that other regulations could have a substantial impact to commercial companies.

In particular, the US International Traffic in Arms Regulations ("ITAR") can reach an unsuspecting commercial company – it could find that it has an ITAR product that requires a State Department export license, meaning it would be unable to sell the product in significant markets, including China. Outside the US, acquiring ITAR-controlled components or even performing joint-development with US companies could lead to a non-US made product that is subject to US export

control requirements. In these scenarios the business and compliance impacts could be monumental.

Consider, for example, the automobile industry. Today, carmakers are developing technologies that can provide autonomous vehicle control systems with the ability to sense obstacles and avoid collisions. Similar technologies include the detect, sense, and avoid ("DSA") radar systems commonly used in general aviation and the aerospace industry, including unmanned aerial vehicles ("UAVs"). As this industry is truly global, self-driving vehicles with these DSAs will be sold outside the US and operated and repaired by non-US persons.

Here the question is whether a DSA radar system, manufactured by an automaker, is controlled under the ITAR. As neither commercial passenger vehicles nor commercial UAVs are inherently military, an automaker could assume that the ITAR does not apply. However, certain types of DSA radar systems are listed on the ITAR's US Munitions List ("USML") under Category XI. It would be particularly important to educate engineering teams on the technical criteria that could make the radar potentially subject to the ITAR and, to the

extent possible, avoid designs that trigger controls.

Similar risks can arise when manufacturers or developers of consumer products develop, adapt, or modify commercial goods for use in and with items subject to ITAR or for a defense-related customer or application. Here the company may think that the commercial nature of the original product means that the product would not be controlled under the ITAR, or under the EAR's "500 series" or "600 series" Export Control Classification Numbers ("ECCNs") for specially designed parts, components, accessories or attachments of military or space items. Export compliance teams should keep in mind that the product could be controlled under the USML or EAR 500 or 600-series ECCN, even if it was adapted from a purely commercial item. Developing a classification checklist can help flag products that require a closer look to determine if they meet ITAR and EAR criteria for defense and space applications. A process can then be developed to ensure they are routed to the appropriate personnel for a final assessment.

Avoiding an ITAR violation requires putting aside the perception that the ITAR only pertains to defense-products or services. An initial step is to deliver an enterprise-wide training on the ITAR tailored to the type of products the company produces. In conjunction with this, export compliance should develop a process for analyzing each product vis-à-vis the USML – especially focused on the parts of the USML that could potentially apply to the business. This often requires teaming closely with engineers to dissect product capabilities against the USML. It is through formalizing an engineering review that critical information about the product can be identified. Not only is this step required by the ITAR and EAR classification process, known as the "Order of Review", but it can also uncover product features that may impact classification. In thoroughly researching products, export compliance can implement controls to effectively apply the ITAR and avoid an unforeseen and large-scale impact to the company. ■

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