ITAR COMPLIANCE PROGRAMS:
IT'S ELEMENTARY MY DEAR COMPANY

On December 5, 2022, the U.S. Department of State, Directorate of Defense Trade Controls ("**DDTC**") published new compliance program guidelines, the "International Traffic in Arms Regulations (ITAR) Compliance Program Guidelines" ("**ITAR CPG**"). The 63-page ITAR CPG, available [here](), provides a useful overview of an effective ITAR Compliance Program ("**ICP**"), as well as an introduction to defense trade controls and the various parts of the ITAR.

DDTC caveats its ITAR CPG with the usual health warning that the document is a "foundation" and not intended to be "exhaustive," reminding companies that any ICP must be tailored to the company taking into consideration its "activities, risk factors, and size." Those with existing export compliance programs may find the ITAR CPG to be familiar, as it closely mirrors the Export Compliance Guidelines document published by the U.S. Department of Commerce, Bureau of Industry and Security ("**BIS**") in January 2017. Nonetheless, the ITAR CPG is a helpful compliance roadmap and a clear and fairly comprehensive articulation of DDTC expectations for ITAR compliance.

Persons and entities engaged in ITAR-related activities, including the manufacture or export of defense articles or technical data, the performance of defense services, or arms brokering, should take careful note of the ITAR CPG. By publishing these guidelines, DDTC is effectively putting the public on notice of its ITAR compliance expectations. Failure to adequately implement any of the noted elements will likely result in, at a minimum, increased scrutiny if not increased fines or penalties, in any enforcement action for ITAR violations.

The ITAR CPG breaks down an effective ICP into eight distinct elements:

- Management Commitment;

- DDTC Registration, Jurisdiction and Classification, Authorizations, and Other ITAR Activities;

- Recordkeeping;

- Reporting and Addressing Violations;

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- Training;

- Risk Assessment;

- Audits and Compliance Monitoring; and

- Export Compliance Manual.

Additional detail on each element is provided below.

Element 1: Management Commitment

The ITAR CPG states that "management commitment is one of the most important factors in creating a deep-rooted culture of ITAR compliance within organizations." Here management is broader than senior management but includes managers at all levels. In order to embed a culture of ITAR compliance the ITAR CPG states that management should incorporate compliance into employee performance plans and evaluations and additionally, to reward employees who speak up when they identify potential ITAR issues. To further reinforce the message that "ITAR compliance is everyone's responsibility," there should be clear disciplinary procedures and consequences for addressing compliance misconduct.

Management's commitment can be demonstrated by the following three steps: (1) creating and maintaining an ICP; (2) providing sufficient resources for an appropriately functioning compliance organization; and (3) maintaining an Export Compliance Management Commitment Statement ("**Commitment Statement**"). DDTC expects that the Commitment Statement will be personally signed by the CEO or President or other senior executives and communicated to all employees at least annually with the employee (and if appropriate contractors) to read and sign. The ITAR CPG provides a list of what the Commitment Statement should include.

Element 2: DDTC Registration, Jurisdiction and Classification, Authorizations, and Other ITAR Activities

The ITAR CPG includes an overview of ITAR compliance requirements related to among other things, ITAR registration requirements, jurisdiction and classification determinations, brokering, Part 130 payments, licenses and authorizations, and restricted party screening. As these are highly specific to an organization and require technical compliance, companies should carefully review this Element of the ITAR CPG, including the lists of suggestions provided by DDTC designed to help companies reduce the risk of ITAR violations.

Element 2 also includes guidance relating to cybersecurity and encryption, although DDTC acknowledges that the ITAR does not explicitly include a requirement that companies implement cybersecurity/encryption measures. The ITAR CPG states, however, that "DDTC expects organizations to take steps to protect their technical data from cyber intrusion and theft." DDTC includes a number of specific suggestions for companies to improve cyber security measures, including policies, training, and a number of technical steps companies can take to secure their data.

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Element 3: Recordkeeping

The ITAR CPG states that companies should develop written policies and procedures to ensure that the company meets its ITAR-related recordkeeping requirements. Those policies and procedures should clearly allocate responsibilities and recordkeeping should be incorporated into employee training. Associated with recordkeeping, DDTC suggests that companies who possess technical data or employ foreign persons should also create and maintain a Technology Control Plan ("**TCP**").

The ITAR CGP lists 11 specific "suggestions" from DDTC around recordkeeping, which should be consulted and used as guidance when developing or enhancing recordkeeping policies and procedures.

Element 4: Reporting and Addressing Violations

DDTC states that "early detection, reporting, and rapid corrective action are essential," and that a company's policies and procedures should be designed to "detect, top, investigate, confirm, report, and remediate any suspected ITAR violations immediately." The ITAR CPG includes a specific recommendation that companies have in place mechanisms for employees to report suspected ITAR violations anonymously and confidentiality, that employees are empowered to speak up, and that employees are assured that there will not be retaliation for raising concerns.

Regarding investigations, the ITAR CPG states that companies should ensure that investigations are "independent, objective, thorough, and properly documented," and adds that companies should consult in-house and outside ITAR experts, where appropriate. DDTC includes recommendations for what company's should include in policies and procedures that guide investigations of potential ITAR violations. The policies should also include guidance around disclosures to DDTC.

DDTC reiterates that companies should ensure that employees understand the range and seriousness of potential consequences for the company and individual employees for ITAR violations.

Element 5: Training

The ITAR CPG describes the basic premise for training programs as "tailored, dynamic, up-to-date, and adequately resourced." DDTC states that a company should hire knowledgeable and experienced trainers.

The ITAR CPG includes a diagram reflecting that the approach to training should be tiered and based on each employee's functions, starting at the bottom with "all personnel," and then moving to more tailored and comprehensive training for "senior management," "positions with export functions," and "export compliance team."

DDTC recommends underscoring the commitment to compliance by making ITAR training a specific requirement in employee performance plans and reviews.

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Element 6: Risk Assessment

DDTC states in the ITAR CPG that "risk assessments are essential tools for building an effective ICP," and provides a list of potential risk factors that companies should consider when tailoring their risk assessments, which include: (1) nature and scope of the organization's commodities; (2) the organization's customers, suppliers, freight forwarders, partners, or other third parties involved in its activities; (3) the organization's physical and cyber security infrastructure; (4) Any foreign parents, subsidiaries, or affiliates; (5) structure of the organization's product development, engineering, and sales activities; (6) any foreign person employees; and (7) geographic regions that the organization operates in or exports to.

The ITAR CPG cautions that there is "no one-size-fits-all" approach to updating risk assessments, but that DDTC expects that they are conducted with a frequency that adequately accounts for the potential ITAR compliance risks at any given time.

The ITAR CPG also contains a helpful list of "common ITAR risk areas," which will give a company a starting point for framing its risk assessment.

Element 7: Audits and Compliance Monitoring

The ITAR CPG includes audits as separate from risk assessments, noting that "comprehensive, independent, and objective audits, performed regularly" assist companies in assessing the effectiveness of their ICP by identifying any deficiencies. DDTC states that audits should consist of: (1) interviews with relevant functional area personnel, as well as the compliance team and senior management, as appropriate; (2) document collection and review; (3) access to IT systems; and (4) site visits, as appropriate.

In addition to risk assessments and audits, DDTC further recommends as part of ongoing compliance monitoring, that companies review their ICPs and make any amendments to their compliance policies and procedures in response to any changes to the ITAR or DDTC guidance (i.e., companies should be reviewing their ICP in response to the ITAR CPG), lessons learned from violations or "close calls" both by the company or by other companies, and any changes in risk factors or vulnerabilities identified in audits. The ITAR CPG includes several pages of detailed "audit checklists" which should assist those conducting audits.

Element 8: Export Compliance Manual and Templates

DDTC states that companies should develop an ITAR Compliance Manual ("**ICM**") and make it available to all employees. The ITAR CPG includes a list of what should be considered for inclusion in an ICM that to be effective, should be well organized and easy to understand. Like the ICP and related policies and procedures, a company should update its ICM when the same triggers appear.

The ITAR CPG provides a wealth of information, guidance, suggestions, and recommendations for companies and a strong reminder that ITAR compliance requires careful attention, frequent updates, and that companies will be judged by how well they adapt and respond to such DDTC guidance.

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