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CHECKLIST OF COMPLIANCE ISSUES UNDER THE INTERNATIONAL TRAFFIC IN ARMS REGULATIONS

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The following is a Checklist of key issues for companies to consider in assessing compliance under the International Traffic In Arms Regulations (“ITAR”). This is intended as a tool for evaluating the most common compliance risks for U.S. and foreign companies. In evaluating ITAR issues companies should also consider issues raised under the Export Administration Regulations (See Section 37 below).

Introduction: Export Control Reform and the Export Administration Regulations. Under the Obama Administration Export Control Reform, certain provisions of the U.S. Munitions List (“USML”) are being revised and transferred to the jurisdiction of the Department of Commerce under the Export Administration Regulations (“EAR”). These changes are becoming effective for various categories of the USML on a rolling basis starting in late 2013 and throughout 2014. Companies analyzing requirements under ITAR should also analyze requirements that arise under the EAR in their compliance assessments.

1. Jurisdiction and Classification

- (a) Has the company properly determined if its products being exported are on the U.S. Munitions List (“USML”) and subject to ITAR? Are any items listed as “Significant Military Equipment” and therefore subject to heightened ITAR requirements? If the company is not certain of the jurisdiction of a particular product it can submit a commodity jurisdiction request to DDTC.
- (b) If a product is not subject to ITAR, has the company determined the proper classification for the product under the Export Administration Regulations (“EAR”)? This could be under the 600 Series on the Commerce Control List (“CCL”) under Export Control Reform, under another CCL category or EAR99.
- (c) Has the company maintained adequate records of the basis of its classification for each of its products?
- (d) If the company has items listed on the USML, has the company checked to see if jurisdiction for the item has been transferred to the Bureau of Industry and Security (“BIS”) under Export Control Reform?

2. Export Licenses For Exports of Defense Articles

- (a) If an export license is required for a transaction, has the company obtained the license (eg, DSP-5, DSP-6, DSP- 73, DSP-74)?

- (b) In exporting a defense article under an export license, has the company complied with the terms, conditions and provisos set forth in the license?

3. ITAR – Controlled Technical Data and Software

- (a) Has the company sent or taken ITAR-controlled technical data (including drawings, specifications, models, brochures, e-mails, memoranda) or software out of the U.S. without a license or applicable exemption?
- (b) Has the company disclosed ITAR-controlled technical data to Foreign Persons in the U.S. (including to employees) without a license or applicable exemption?
- (c) Has the company transferred technical data regarding ITAR-controlled items without a license or applicable exemption to:
 - (i) Foreign sales agents or marketing intermediaries?
 - (ii) Foreign prospective customers as part of marketing proposals?
 - (iii) Prime or subcontractors, suppliers, program partners?
 - (iv) Persons in trade shows, marketing presentations?
- (d) Has the company transferred ITAR-controlled technical data to company employees who are Foreign Persons other than as specifically authorized in the company's Technical Assistance Agreements or other DDTC authorizations? (This includes in both foreign offices and in U.S. offices.)
- (e) Have company employees taken ITAR-controlled technical data in overseas travel, including in documents, laptop computers, PDA's, iPhones, iPads and similar devices without obtaining a license?
- (f) Has the company posted ITAR-controlled technical data or software on websites, chat rooms or transferred such items to Foreign Persons through e-mails, text messages, e-mail attachments, faxes, videos, telephone calls or other electronic communications?

4. Defense Services

- (a) Has the company performed any services for Foreign Persons related to any items on the USML, or items within the definition of Defense Services, without entering a Technical Assistance Agreement ("TAA") or other applicable agreement approved by DDTC? (This includes services performed in the U.S. and overseas.)
- (b) If the company has entered a TAA or other agreement approved by DDTC, were the services performed by the company within the terms, conditions and provisos of such agreement?
- (c) Has the company performed services for a foreign military organization or foreign defense industry company in connection with an item regulated under the EAR?

5. Imports of Defense Items

- (a) Has the company imported any items (i) on the USML in temporary import transactions; or (ii) on the U.S. Munitions Import List in permanent import transactions, without obtaining a license?
- (b) If the company obtained a license, were all aspects of the import transaction within the terms, conditions and provisos of such license?

6. Registration

- (a) Is the company registered with DDTC as a manufacturer and/or an exporter?
- (b) Has the company notified DDTC within 5 days of changes of information set forth in its Registration Statement?
- (c) Does the company engage in brokering activities that require the company to register as a broker?

7. Debarred Party List Review

- (a) Has the company conducted reviews of all parties to its transactions involving ITAR-controlled items to verify that such parties are not listed on DDTC's Debarred Parties List?

8. Export Clearance Requirements

- (a) Has the company complied with the export procedures for its exports of ITAR-controlled hardware, including:
 - Depositing license (DSP-5's, etc.) and license documentation with Customs and Border Protection ("CBP") at U.S. port of export
 - Decrementing licenses based upon the value of each export transaction
 - Electronic filing of export information under the Automated Export System ("AES")
 - Applying destination control statement to documents under 22 CFR § 123.9(b)
 - Obtaining required documentation including End-Use Statements, DSP-83 Nontransfer and Use Statements (if required), etc.
- (b) Has the company complied with the export procedures for exports of ITAR-controlled unclassified technical data:
 - Retaining export license document in company's possession
 - Notifying DDTC of the export under 22 C.F.R. § 123.22(b)(3) (Form DS-4071)
 - Obtaining required export documentation (Form DSP-83, etc.)
- (c) Has the company complied with the export procedures for the performance of Defense Services:
 - DDTC approves TAA or other agreement
 - Foreign recipient executes TAA
 - Fully executed TAA is submitted to DDTC within 30 days after it enters into force
 - If agreement not executed within one year of approval, notify DDTC in writing

- Inform DDTC of initiation of export of technical data under 22 C.F.R. § 123.22(b)(3) (Form DS-4071)
- Advise DDTC in writing if agreement is not concluded
- Advise DDTC of impending termination of TAA not less than 30 days prior to termination

9. Reexports and Retransfers

- (a) If an ITAR-controlled item was properly exported (including ITAR-controlled technical data), was proper authorization obtained for reexports or retransfers of such items?

10. License/Agreement Administration

- (a) Has the company followed the requirements for proper administration of licenses and agreements? Examples of such requirements include:

- Returning expended, expired or unused licenses to DDTC
- Modifying TAA's and other agreements in accordance with DDTC provisos
- Executing TAA's and providing copies to DDTC
- Amending agreements as required due to changes such as scope, value, parties, etc. and submitting amended agreements to DDTC
- Maintaining temporary export and import licenses and related shipment records
- Filing annual reports under Manufacturing License Agreements and Distribution Agreements

11. See-Through Rule

- (a) Has the company exported, reexported or retransferred an item that incorporates ITAR-controlled parts, components, attachments or accessories or is based upon ITAR-controlled technical data? If an item contains a part or component that is ITAR-controlled, under the DDTC "See-Through Rule" the entire end-item thereafter becomes subject to ITAR.

12. Services For Foreign Military Customers Related to Items Controlled Under EAR

- (a) Will the company be performing services for foreign military customers in connection with the sale of items subject to EAR? Such transactions involve a heightened level of risk for possible ITAR violations due to possibility that the company could also be performing defense services regulated under ITAR and companies should use an extra level of caution in such transactions.

13. Reports For Sales Commissions, Fees and Political Contributions

- (a) Has the company or its Vendors (as defined at 22 CFR § 130.8) paid or offered to pay sales fees or commissions in connection with the sale of ITAR-controlled items in excess of \$100,000, or political contributions in excess of \$5,000? If so, determine if the company is

required to file the requisite reports with DDTC and comply with the other requirements under 22 CFR Part 130.

14. Receipt, Tracking, Marking And Security For ITAR-Controlled Items

- (a) Does the company properly mark all ITAR-controlled products, technical data and software within the company's facilities to provide adequate notice that such items are ITAR-controlled?
- (b) Does the company provide adequate security within its facilities to prevent unauthorized access to ITAR-controlled items (including access by Foreign Persons)?
- (c) Does the company provide adequate notice to customers and other parties to which the company transfers ITAR-controlled items that such items are ITAR-controlled, through the use of destination control statements and other forms of notice such as under 22 CFR § 123.9(b)? This includes transfers in the U.S. as well as transfers to overseas parties.

15. Processing, Handling or Forwarding of ITAR-Controlled Items

- (a) Does the company track ITAR-controlled items if it receives them within its facilities? Even if a company merely receives, processes, stores, or otherwise handles USML items without providing any other value-added functions, ITAR requirements will arise. Companies should review their supply chain operations and inventory to determine if ITAR-controlled items are received, stored or otherwise handled by the company in its operations and take protective measures including marking, securing and controlling such items.

16. Controls In Company IT System

- (a) Does the company maintain adequate controls in its information technology system to protect against unauthorized access, disclosure and transfer of ITAR-controlled technical data and software, including:
 - Adequate security processes to limit access by Foreign Persons to ITAR-controlled technical data and software
 - Procedures for prominently marking ITAR-controlled technical data and software such as in e-mails, attachments, Word documents, PowerPoint slides, spreadsheets, electronic drawings
 - Limitations on the transfer and copying of ITAR-controlled technical data and software stored in the company's IT system

17. Manufacturing License Agreements and Distribution Agreements

- (a) Is the Company licensing ITAR-controlled technical data to permit the manufacture overseas of an item on the USML? If yes, the Company will most likely be required to enter into a Manufacturing License Agreement ("MLA") approved by DDTC unless an exemption applies. See 22 CFR Part 124.
- (b) Is the Company establishing a warehouse or distribution point abroad for defense articles exported from the U.S. for subsequent distribution to entities in a sales territory approved by DDTC? If yes, the Company will most likely be required to enter into a Distribution

Agreement (“DA”) approved by DDTC unless an exemption applies. See 22 CFR Part 124.

- (c) If the company is a party to an MLA or DA, has it operated within the terms and conditions set forth in such agreements?
- (d) Has the company filed its annual reports with DDTC related to operations under the MLA or DA?
- (e) Has the company maintained records related to its manufacturing of ITAR-controlled products as required under the MLAs and DA’s?

18. Brokering

- (a) Has the company engaged in “brokering” activity as defined at 22 C.F.R. Part 129? If so, has it registered as a broker with DDTC?
- (b) If the company retains third parties to engage in “brokering activity” on behalf of the company as defined in § 129.2(a) and (b) have such third parties registered with DDTC under 22 CFR Part 129?
- (c) If a party is engaged in brokering activities, has it obtained the requisite licenses, filed its annual reports and complied with the other requirements under 22 CFR Part 129?

19. Recordkeeping

- (a) Has the company complied with the ITAR recordkeeping requirements as set forth at 22 CFR § 122.5?

20. Use of ITAR Exemptions

- (a) Has the company relied on exemptions from requirements under ITAR? If so, has it complied with all of the applicable conditions for use of such ITAR exemptions? For example, in many instances use of exemptions under ITAR is not permitted in transactions: (i) involving “proscribed destinations” set forth at 22 CFR § 126.1; (ii) for which Congressional notification is required pursuant to 22 CFR §123.15; (iii) involving items designated as Significant Military Equipment (See 22 CFR §120.7); (iv) involving persons who are ineligible under 22 CFR § 120.1(c); (v) involving the establishment of offshore procurement arrangements or producing defense articles offshore; and (vi) by parties that are not registered with DDTC under 22 CFR Part 122. See 22 CFR §§123.16, 125.4, 125.6 and 124.3.
- (b) If the company has relied on exemptions, has it maintained adequate records of its reliance on the exemptions in specific transactions as required under ITAR?

21. Section 126.1 Proscribed Countries; Significant Military Equipment, Major Defense Equipment

- (a) Has the company engaged in any unauthorized transactions involving ITAR-controlled items with any of the “§ 126.1 Proscribed Countries”? If yes, the company is required to report such transactions to DDTC.

- (b) Note that special heightened restrictions exist under ITAR for transactions involving: (i) the “proscribed countries” set forth at 22 CFR 126.1, including China (and will be subject to a policy of denial for license applications); (ii) items that are designated on the U.S. Munitions List as “Significant Military Equipment” (See 22 CFR 120.7); (iii) Major Defense Equipment (See 22 CFR § 120.8); and (iv) classified technical data and services (See USML Category XVII – Note for classified technical data the Company will be subject to requirements under ITAR as well as under NISPOM).

22. Foreign Military Sales

- (a) If the company is relying on the exemption for Foreign Military Sales transactions set forth at 22 CFR § 126.6 (c), has the company complied with all of the conditions applicable to the use of such exemption? If not the company will be required to obtain a license or other authorization from DDTC unless another exemption applies.

23. Classified Defense Articles and Technical Data

- (a) Have the company’s exports of classified defense articles and technical data complied with the provisions of 22 CFR § 125.3 and 125.9, including use of DSP-85, as well as the NISPOM? Note that classified articles, technical data and defense services not otherwise enumerated are listed on the USML under Category XVII.

24. Transactions With Affiliates

- (a) If an export license is required for a transaction, the company will be required to obtain a license even if the shipment is to foreign subsidiaries or foreign offices of the company unless an exemption applies.

25. Foreign Travel By Company Employees

- (a) Employees should avoid taking defense articles and ITAR-controlled technical data and software in foreign travel on laptops, iPhones, iPads, other PDA’s, flash drives and other devices unless a license is obtained or an exemption is available.

26. Obligations In Working With Subcontractors and other Program Partners

- (a) Will the Company be working with subcontractors, teaming partners or other independent parties in the transaction? If yes, the company should coordinate with such parties regarding ITAR compliance in performing the transaction. Prime contractors are advised to verify that subcontractors are conducting their operations involving the transaction in compliance with ITAR requirements, including complying with registration requirements, obtaining licenses and TAA’s, reporting and recordkeeping requirements.

27. Congressional Notification For Defense Articles and Agreements

- (a) Has Congressional Notification been provided in connection with exports of defense articles that exceed the threshold amounts set forth at 22 CFR § 123.15, or major defense equipment as defined at 22 CFR § 120.8? Has Congressional Notification been provided for TAA’s and MLA’s for manufacturing abroad defense items classified as Significant Military Equipment as set forth in 22 CFR § 124.11?

28. Parts and Components – Definition of “Specially Designed”?

- (a) For parts, components, attachments and accessories that are still covered under USML “catch-all” provisions following Export Control Reform, do such items fall within the definition of “Specially Designed” as set forth at 22 CFR § 120.41?

29. ITAR Items Acquired In Mergers and Acquisitions

- (a) A common entry point for ITAR-controlled items into a company is through mergers and acquisitions. If a company acquires another company and the target company has items in its possession that are on the USML (including in the form of finished products, parts and components, research and development, inventory, or other items elsewhere in its supply chain), upon consummation of the acquisition the acquiring company will own the USML items and be subject to ITAR controls. This can occur regardless of whether the acquisition is structured as the purchase of stock, purchase of assets or merger. (In addition, if the target company has committed ITAR violations prior to the acquisition, the acquiring company could step into the target company’s shoes and become liable for such violations if proper precautions are not taken.) Companies undertaking acquisition transactions should conduct detailed ITAR due diligence review of the target company prior to the acquisition to ascertain if there will be any impact on the acquirer related to ITAR following the completion of the acquisition transaction.

30. Procedure To Limit Illegal Diversion, Transshipment and Reexports

- (a) Does the company face the risk of illegal diversion, transshipment, reexport or retransfer in its transactions? Under such transactions, a U.S. exporter will lawfully export an item to a foreign party, and the foreign party without the knowledge of the U.S. exporter will then transfer the item to a prohibited country, prohibited party or use it for a prohibited or unauthorized end-use. (In certain instances, U.S. exporters can have liability in such transactions for violations under U.S. export control laws.) The company should consider adopting a compliance procedure to reduce the risk of illegal diversion, transshipment, reexport or retransfer. For further information regarding such procedure, See “Illegal Diversion Emerging as Top Export Issue” at www.williamsmullen.com/printpdf/42787.

31. ITAR Compliance Program; ITAR Training

- (a) Has the company adopted an ITAR Compliance Program? Does it contain all of the recommended components including appointment of a compliance manager, written policies and procedures, risk assessment, employee training, recordkeeping, annual compliance audits, procedure if a violation is discovered, updating for changes in the law?

32. Annual Compliance Audits

- (a) Has the company conducted its annual ITAR compliance audits for identification of weakness in the compliance processes, updated for new business risks and continual process improvement in its compliance activities?

33. Proper Resources For ITAR Compliance; Compliance Program

- (a) Has the company dedicated the proper level of resources to ITAR compliance including sufficient personnel, technical support and support by senior executives?

- (b) Has the company adopted an ITAR Compliance Program?
- (c) Has the company conducted annual ITAR compliance training for senior executives?
- (d) Has the company conducted annual ITAR compliance audits?

34. Special High Risk Issues For Foreign Companies

- (a) See-Through Rule - If a foreign company incorporates an ITAR-controlled part, component, attachment or accessory into the foreign company's product, the entire product becomes ITAR-controlled. Foreign companies in the defense industry must use great care to avoid incorporating ITAR-controlled parts, components, accessories and attachments into their end-products in order to avoid ITAR jurisdiction and regulation.
- (b) If foreign nationals are employed in the U.S. subsidiary of a foreign company, such persons will not be permitted to have access to defense articles or ITAR-controlled technical data unless a license is obtained or an exemption applies.
- (c) If foreign national executives of a foreign company travel to the U.S. subsidiary for management meetings, plant inspections and other purposes, such persons will not be permitted to have access to defense articles or ITAR-controlled technical data unless a license is obtained or an exemption applies.
- (d) If U.S. employees in the U.S. subsidiary of a foreign company travel to their foreign offices, they are not permitted to bring or discuss defense articles or ITAR-controlled technical data unless a license is available or an exemption applies.
- (e) If U.S. employees in the U.S. subsidiary of a foreign company communicate with foreign national employees in the foreign parent company through e-mails, telephone calls, internal memoranda, webex meetings, etc. the U.S. employees are not permitted to disclose ITAR-controlled technical data unless a license is obtained or an exemption applies.
- (f) If a foreign company manufactures an item that is listed on the USML, if the item is shipped to the U.S. it becomes subject to ITAR and the jurisdiction of the U.S. Department of State.
- (g) If a U.S. subsidiary of a foreign company stores ITAR-controlled technical data or software in its computer system in the U.S. (servers, "cloud resources," system work stations, laptops and other devices), the company must "firewall" the U.S. data system off from the computer resources of the foreign parent and other foreign affiliates.
- (h) Foreign companies will not be permitted to register with DDTC or apply for licenses and TAA's unless they form a subsidiary incorporated under U.S. law (some exceptions will apply such as in the case of applying for authorization for foreign country retransfers).
- (i) Special rules apply for dual and third country national employees of the parent company.
- (j) The above rules also apply in the acquisition by a foreign company of a U.S. company in the aerospace, satellite, electronics, communications, UAV, maritime and other defense industries.

35. ITAR Violations

- (a) A listing of violations under ITAR as set forth in 22 CFR §127.1 and §127.2 are provided on Exhibit A attached hereto.
- (b) Penalties for ITAR violations include up to 20 years imprisonment and financial fines of up to \$1,000,000 per violation for criminal violations, and lesser amounts for civil violations.

36. Voluntary Disclosures

- (a) If a violation or possible violation has occurred, has the company considered submitting a voluntary disclosure to DDTC to reduce or mitigate potential penalties and eliminate past compliance risks?

37. Regulation Under the Export Administration Regulations And Export Control Reform

- (a) Have any of the company's products been transferred from the USML to the CCL 600 Series under Export Control Reform? If yes, the company will be subject to regulation under the provisions of the Export Administration Regulations related to such products.
- (b) In addition, regardless of whether items have been transferred under Export Control Reform, companies should always consider compliance under the EAR when reviewing export compliance activities.

Please note: This memorandum is intended as a tool in assessing compliance under ITAR but does not attempt to address every requirement under ITAR. This article contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel. For more information, please visit our website at www.williamsmullen.com or contact Thomas B. McVey, 202.293.8118 or tmcvey@williamsmullen.com.

ITAR VIOLATIONS AS SET FORTH
IN 22 CFR §127.1 and §127.2

§ 127.1 Violations.

(a) It is unlawful:

(1) To export or attempt to export from the United States, or to reexport or retransfer or attempt to reexport or retransfer from one foreign destination to another foreign destination by a U.S. person of any defense article or technical data or by anyone of any U.S. origin defense article or technical data or to furnish any defense service for which a license or written approval is required by this subchapter without first obtaining the required license or written approval from the Directorate of Defense Trade Controls;

(2) To import or attempt to import any defense article whenever a license is required by this subchapter without first obtaining the required license or written approval from the Directorate of Defense Trade Controls;

(3) To conspire to export, import, reexport or cause to be exported, imported or reexported, any defense article or to furnish any defense service for which a license or written approval is required by this subchapter without first obtaining the required license or written approval from the Directorate of Defense Trade Controls;

(4) To violate any of the terms or conditions of licenses or approvals granted pursuant to this subchapter.

(5) To engage in the United States in the business of either manufacturing or exporting defense article or furnishing defense services without complying with the registration requirements. For the purposes of this subchapter, engaging in the business of manufacturing or exporting defense articles or furnishing defense services requires only one occasion of manufacturing or exporting a defense article or furnishing a defense service; or

(6) To engage in the business of brokering activities for which registration, a license or written approval is required by this subchapter without first registering or obtaining the required license or written approval from the Directorate of Defense Trade Controls. For the purposes of this subchapter, engaging in the business of brokering activities requires only one occasion of engaging in an activity as reflected in § 129.2(b).

(b) Any person who is granted a license or other approval under this subchapter is responsible for the acts of employees, agents, and all authorized persons to whom possession of the licensed defense article or technical data has been entrusted regarding the operation, use, possession, transportation, and handling of such defense article or technical data abroad. All persons abroad subject to U.S. jurisdiction who obtain temporary custody of a defense article exported from the United States or produced under an agreement described in part 124 of this subchapter, and irrespective of the number of intermediate transfers, are bound by the regulations of this subchapter in the same manner and to the same extent as the original owner or transferer.

(c) A person with knowledge that another person is then ineligible pursuant to § 120.1(c) or § 126.7 of this subchapter or subject to an order of debarment or interim suspension, may not,

directly or indirectly, in any manner or capacity, without prior disclosure of the facts to, and written authorization from, the Directorate of Defense Trade Controls:

(1) Apply for, obtain, or use any export control document as defined in § 127.2(b) for such debarred, suspended, or ineligible person; or

(2) Order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any transaction which may involve any defense article or the furnishing of any defense service for which a license or approval is required by this subchapter for export, where such debarred, suspended, or ineligible person may obtain any benefit therefrom or have any direct or indirect interest therein.

(d) No person may knowingly or willfully cause, or aid, abet, counsel, demand, induce, procure or permit the commission of any act prohibited by, or the omission of any act prohibited by, or the omission of any act required by 22 U.S.C. 2778, 22 U.S.C. 2779, or any regulation, license, approval, or order issued thereunder.

§ 127.2 Misrepresentation and omission of facts.

(a) It is unlawful to use or attempt to use any export or temporary import control document containing a false statement or misrepresenting or omitting a material fact for the purpose of exporting, transferring, reexporting, retransferring, obtaining, or furnishing any defense article, technical data, or defense service. Any false statement, misrepresentation, or omission of material fact in an export or temporary import control document will be considered as made in a matter within the jurisdiction of a department or agency of the United States for the purposes of 18 U.S.C. 1001, 22 U.S.C. 2778, and 22 U.S.C. 2779.

(b) For the purpose of this subchapter, *export or temporary import control documents* include the following:

(1) An application for a permanent export, reexport, retransfer, or a temporary import license and supporting documents.

(2) Electronic Export Information filing.

(3) Invoice.

(4) Declaration of destination.

(5) Delivery verification.

(6) Application for temporary export.

(7) Application for registration.

(8) Purchase order.

(9) Foreign import certificate.

(10) Bill-of-lading.

(11) Airway bill.

(12) Nontransfer and use certificate.

(13) Any other document used in the regulation or control of a defense article, defense service or technical data for which a license or approval is required by this subchapter.

(14) Any other shipping document that has information related to the export of the defense article or defense service.