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BLOG

Whether to Voluntarily Disclose Potential ITAR Violations and the Lesson from L3Harris

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On September 23, 2019, L3Harris Technologies, Inc. (L3Harris) agreed to settle charges of alleged unauthorized exports of defense articles, providing false statements, violating licensing provisos, terms, and conditions, and failing to properly manage temporary export licenses. Under the three-year Consent Agreement, L3Harris will pay a $13,000,000 fine (partially suspended on condition that the funds be used to remediate), subject itself to an external Special Compliance Officer, and undergo two external audits of its compliance program.

This is the second Consent Agreement made public by the Directorate of Defense Trade Controls (DDTC) this year.

The Charging Letter details 131 alleged violations. The violations are primarily related to L3Harris's failure to maintain a sufficiently capable compliance program to manage the concerns the U.S. Government previously expressed about the increased capabilities of L3Harris's third-generation Adaptive Networking Wideband Waveform (ANW2C). Although not necessarily specific to the ANW2C, many public Consent Agreements tell similar stories about companies that are unable to manage the use of temporary export licenses, agreements, and/or license exemptions.

This Consent Agreement is interesting because of how DDTC accounted for L3Harris's cooperation as a mitigating factor in the final penalty. In this case, it appears that DDTC learned of certain alleged violations by L3Harris from a referral from the Defense Technology Security Administration (DTSA). DDTC directed a disclosure that led to L3Harris then supplementing that disclosure with several voluntary disclosures to DDTC that were all considered in arriving at the Charging Letter.

A directed disclosure, subsequent voluntary disclosure(s), and what seems to be an overwhelmed compliance program are also not especially interesting characteristics in the context of DDTC Consent Agreements. The interesting characteristic, in this case, is how DDTC addressed three of those subsequent voluntary disclosures.

DDTC stated in its Proposed Charging Letter that, although "the Department considers these disclosures voluntary, the violations in these disclosures are directly related to the directed disclosure matter." Consequently, although the Department of State explicitly considered three of the disclosures voluntary, in the next sentence it stated, "the voluntary nature of these three disclosures will not be considered a mitigating factor."

One is forced to ask, what does the Department of State gain by not considering the disclosures mitigating if it considered them to have been made voluntarily? How related were the three subsequent disclosures to the directed disclosure to completely eliminate any potential mitigation credit? If the Department of State had simply determined that the three disclosures were not actually voluntary because they arose from the directed disclosure, then this would likely go unnoticed. However, by explicitly finding them to have been voluntary and then denying any mitigation credit, the Department of State is effectively removing the incentive to make voluntary disclosures.

Every company has to undergo a calculus when evaluating whether to make a voluntary disclosure to the government. This Charging Letter further complicates this calculus in that it suggests a voluntary disclosure may be insufficient alone to receive mitigation credit. If the Department of State begins a practice of not providing credit for voluntary disclosure, then such a practice will likely have a chilling effect on companies the next time they must make a decision of whether to disclose.
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