DEFENSE TRADE ADVISORY GROUP

Plenary Session – 26 September 2019

Working Group 1 White Paper

Consent Agreements: Compliance Measures

The Defense Trade Advisory Group (DTAG) was tasked in June, 2019,[1] to assist the State Department's Directorate of Defense Trade Controls, Bureau of Political-Military Affairs (DDTC), by analyzing fifteen Consent Agreements approved by DDTC from 2011 to mid-2019,[2] and to recommend how DDTC's Consent Agreement process could be improved. This White Paper reports DTAG's findings and recommendations in response to that tasking.

DTAG encourages DDTC to focus on structuring and deploying requirements and remedial actions that drive industry to establish a long-term, sustainable compliance posture and culture. Ultimately, DTAG believes the intent of Consent Agreements is to address perceived systemic weaknesses that brought about the Agreement and remediate those policies, procedures, tools, etc. that contributed directly or indirectly to those weaknesses. The measure of success in Consent Agreement implementation is a combination of a committed culture of compliance and improved policies and procedures (mistake-proofed where possible) whereby systemic weaknesses are less likely to occur and management and employee responses to such weaknesses are direct. This White Paper examines fifteen Consent Agreements from the requested time period to draw some conclusions of effectiveness of doing just that and it provides recommendations for DDTC to consider in order to bring about successful outcomes by refining publicly available guidance, structuring Consent Agreement requirements in a way to drive specific outcomes, and managing those requirements in an aligned, holistic fashion.

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[1] Letter of June 7, 2019, from Michael F. Miller, Acting Deputy Assistant Secretary of State for Defense Trade Controls.

[2] The Consent Agreements between DDTC and L3/Harris and AeroEnvironment, Inc., respectively, occurred after this project was undertaken by DTAG, so they were not analyzed by DTAG.

I. Introduction

A. Legal Basis for Consent Agreements

The Arms Export Control Act (AECA),[3] gives the President the authority to control the import and export of defense articles and services listed by the President on the United States Munitions List (USML)[4] in the International Traffic Arms Regulations (ITAR),[5] as administered by the Secretary of State[6] through the Directorate of Defense Trade Controls (DDTC).[7] The AECA

[3] 22 U.S.C. § 2751–99.

[4] *Id*. § 2778(a)(1); ITAR § 121.1.

[5] ITAR §§ 120–130. The ITAR was promulgated by the Secretary of State pursuant to Executive Order No. 11,958, 42 Fed. Reg. 4311 (Jan. 18, 1977). Citations to sections of the ITAR in this paper are cited as "ITAR § ____."

[6] The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services, and the temporary import of defense articles, is delegated to the Secretary of State by Executive Order No. 13,637, 3 C.F.R. § 223 (2013). The ITAR implements that authority.

[7] By virtue of delegations of authority by the Secretary of State, the ITAR is administered by the Deputy Assistant Secretary of State for Defense Trade Controls, Bureau of Political-Military Affairs. ITAR § 120.12.

authorizes punishment of ITAR violations with fines, imprisonment, and debarment,[8] and DDTC has authority to impose civil penalties up to $500,000 without a criminal conviction.[9] Criminal penalties for a violation of the ITAR may result in up to 20 years' imprisonment and $1,000,000 in fines.[10] Because the exercising of the foreign affairs function, including the decisions required to implement the Arms Export Control Act, is highly discretionary, it is excluded from review under the Administrative Procedure Act.[11] Exporters suspected of egregious violations often voluntarily consent to paying civil penalties and performing remedial actions as a condition of obtaining a "Consent Agreement" (CA) with DDTC.[12] The CA process is managed by the Director, Office of Defense Trade Controls Compliance (DTCC),[13] a subordinate office of the DDTC.

The CA process is initiated by DTCC preparing a Proposed Charging Letter[14] listing the charged violations and proposed penalties and corrective actions, and upon receiving the consent of the accused party, DDTC forwards the Proposed Charging Letter, draft CA, and Order to the Assistant Secretary, Bureau of Political-Military Affairs, Department of State, for approval.[15] Cases that are settled in that manner may not be reopened or appealed,[16] but failure of the charged party to

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[8] 22 U.S.C. § 2778(c) (violations may result in fines not more than $1,000,000, imprisonment for not more than 20 years, or both); ITAR § 127.3; *id*. § 127.7 (permitting Assistant Sec'y of State for Political-Military Affairs to administratively debar and thereby prohibit any person from activities subject to the ITAR).

[9] 22 U.S.C. §§ 2778(e); ITAR § 127.10(a).

[10] 22 U.S.C § 2778(c).

[11] *See U.S. Ordinance, Inc., v. United States,* 432 F. Supp.2d 94 (D.D.C. 2006) (holding district court lacked jurisdiction to issue declaratory judgment that exporter of defense articles was in full compliance with provisions of ITAR, as under the AECA, determination of whether a party was in compliance with ITAR was committed to the discretion of the Executive Branch.)

[12] 22 C.F.R. § 128.11(b).

[13] The acronym DDTC is often used in this paper to refer to responsibilities that may have been delegated to and performed by DTCC.

[14] ITAR § 128.3(b).

[15] ITAR § 128.11(b).

[16] ITAR § 128.3(a), stating in part:

> The Deputy Assistant Secretary of State for Defense Trade Controls or the Director, Office of Defense Trade Controls Compliance, with the concurrence of the Office of the Legal Adviser, Department of State, may initiate proceedings to impose debarment or civil penalties in accordance with § 127.7 or § 127.10 of this subchapter, respectively. Administrative proceedings shall be initiated by means of a charging letter. The charging letter will state the essential facts constituting the alleged violation and refer to the regulatory or other provision involved. …

comply with the terms of the consent agreement and order may result in a requirement to pay the civil penalty and comply with other punitive terms of the order.[17]

B. Standard Contents of DTCC Consent Agreements

CAs generally contain the following or similar elements (not inclusive):

1. Notice of intent to institute an administrative proceeding pursuant to AECA and ITAR;
2. Recitation that Respondent has viewed the Proposed Charging Letter, agrees to enter a CA, and without admitting guilt, wishes to settle the charges by performing the listed remedial measures;
3. The term of years that the CA will be effective (usually two to four years);
4. Respondent's promise that it will continue the remedial measures specified in CA after completing the term of the CA;
5. Acknowledgement that the terms of the CA may be revoked, and additional charges may be brought against the Respondent if the agreement is based upon any false information provided by the Respondent;
6. Agreement by DDTC and Respondent to be bound by the terms of the CA;
7. Agreement that any assignees and successors of Respondent shall follow and apply to all affected entities or units;
8. Statement of AECA and ITAR jurisdiction;
9. General Remedial Measures (RMs), e.g.:
    a. Respondent will notify all parties who acquire or merge with Respondent that they will be bound by the RMs in this CA;
    b. Respondent will notify DTCC at least 60 days before a merger or divestiture;
    c. Respondent will ensure adequate resources are dedicated to ITAR compliance, including policies and procedures that ensure personnel responsibilities;

[17] Hughes Network Systems (Beijing) Co. Ltd. (HNS China), a wholly owned subsidiary of Hughes Network Systems Corporation (HNS), was under a Consent Agreement dated March 2003 with DDTC for their activities related to failed satellite launches in the People's Republic of China (PRC). Alleged violations of the Consent Agreement led to DDTC's May 2004 imposition of a policy of denial against HNS for a period of one year and in January 2005, DDTC entered into a new Consent Agreement with HNS and its successor DirectTV Group, Inc. *See* Notice of Debarment Involving Hughes Network Systems (Beijing) Co. Ltd, 70 Fed. Reg. 35,333 (2005).

d. Respondent shall appoint a Special Compliance Officer (SCO) or Internal Special Compliance Officer (ISCO) as Designated Officials (DO) for the entire term that the Consent Agreement is in force. A term of service is stated for each Designated Official, and requirements for replacement of a DO are stated.

    i. The duties of the DO are described in extensive detail.

e. Respondent shall institute strengthened policies and procedures, and shall enhance its AECA and ITAR compliance program with specific attention to the areas described in the CA paragraphs detailing the cause of the violations;

f. Respondent shall review and verify the export control jurisdiction of all hardware that Respondent's ITAR-regulated operating divisions, subsidiaries and business units, and any defense services, technical data, including software, directly related to such hardware;

g. Audits shall be performed by independent outside auditors during the time periods and frequency specified;

10. Fines;

    a. Respondent shall pay a fine in the agreed amount;

    b. Many CAs also permit a portion of the fine to be suspended and applied to defraying a portion of the costs associated with the remedial compliance measures specified in the CA;

11. Debarment;

12. Respondent agrees to arrange onsite reviews by DTCC while the CA is in effect;

13. DTCC agrees that upon signing of the Order, the CA resolves the civil penalties or administrative sanctions with respect to civil violations of the AECA or the ITAR arising from facts Respondent has disclosed in writing to the Department in its listed Voluntary and Directed Disclosures;

14. Respondent waives, upon the signing of the Order, all rights to seek any further steps in this matter, including an administrative hearing pursuant to Part 128 of the ITAR; and,

15. Within a specified period, Respondent shall submit to DTCC a written certification as to whether all aspects of this Consent Agreement have been implemented.

II. DTAG's Approach to the DDTC Tasking

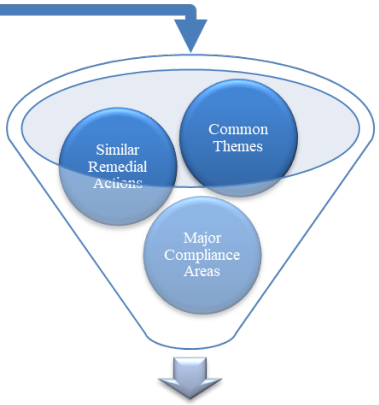
A. DTAG Working Group Members

Josh Fitzhugh (co-chair) Clifford Chance LLP	Matt Fogarty General Motors Company
Daniel Perrone (co-chair) Raytheon Company	Greg Hill Leonardo DRS, Inc.
Fred Alvarado AeroVironment, Inc.	Laura Kraus Airbus OneWeb Satellites
Sarah Banco SpaceX	Spence Leslie nVent
Jim Bartlett Full Circle Trade Law, PLLC	Johanna Reeves Reeves & Dola LLP
Andrew Booth Sierra Nevada Corporation	Heather Sears Global Compliance Counsel, LLC
Dava Casoni University of Southern California	Olga Torres Torres Law PLLC
Ashley Farhat HRL Laboratories, LLC	

B. List of Consent Agreements Analyzed[18]

Year	Company
2019	Darling Industries, Inc.
2018	FLIR Systems, Inc.
2017	Bright Lights USA, Inc.*
2016	Microwave Engineering Corporation*
2016	Rocky Mountain Instrument Company
2016	Marc Turi and Turi Defense Group, Inc.*
2014	Intersil Corporation
2014	Esterline Technologies Corporation
2013	Raytheon Company
2013	Meggitt-USA, Inc.
2013	Aeroflex Incorporated
2012	Alpine Aerospace Corporation
2012	TS Trade Tech Incorporated
2012	United Technologies Corporation
2011	BAE Systems plc

*Fine only. No remedial actions identified.



Six Consistent Areas of Remedial Actions

Six subteams created and tasked to:

1. Review the remedial action;
2. Investigate and make some level of determination on effectiveness; and
3. Identify if there are any opportunities for improvement and make such recommendations.

C. Six Areas of DTAG Analysis

DTAG reviewed each of the following areas[19] in recommending how DTCC's Consent Agreement process could be improved.

1. Use of Monitors
2. Required Audits
3. Reviews of Respondent's Past ITAR Compliance
4. Program Enhancement

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[18] The Consent Agreements between DDTC and L3/Harris and AeroEnvironment, Inc., respectively, occurred after this project was undertaken by DTAG, so they were not analyzed by DTAG.

[19] DTAG determined that it could not usefully determine the effectiveness of fines, whether paid or suspended, debarment, the duration of the CA effective period, or the status reporting requirements, so DTAG did not analyze those areas.

5. Automation
6. Onsite Reviews

DTAG conducted this analysis by reviewing the remedial action, examining common themes, investigating effectiveness through interviewing DTAG members who have played roles in and around Consent Agreements, and identifying areas for improvement. The following are the results of this analysis.

III. Discussion and Analysis of Remedial Actions

Remedial measures tend to be broadly written to apply to multiple fact patterns and multiple Respondents, which results in varying interpretation. Although the format of all CAs is similar, the deployment, management, and effectiveness of remedial measures vary widely. The effectiveness is further impacted by DTCC's need to rely on third parties, outside counsel, and consultants to oversee, manage, and audit the compliance programs and responses to CA requirements.

Each Respondent is a different company with differing circumstances, including the types of violations, the owners and employees involved, and the objectives of both DTCC and the Respondent. These circumstances may require significantly different courses and outcomes from otherwise similar CAs. DTCC needs to determine whether these differences can be better addressed in the CA process to improve compliance while minimizing the inevitable interference with Respondent's business operations.

A. Use of Monitors

How should a Special Compliance Officer (SCO or Internal SCO; ISCO) be selected to serve as "Designated Officials" (DOs), what qualifications should they have, and what roles and responsibilities should they perform? It was unclear what experiences a DO was expected to bring to the table, what companies should expect of the DO, and if the DO is specifically required to assist the Respondent to drive sustainable and right-sized compliance or whether DTCC's expectation is that they are simply their monitor within the Respondent's company.

Findings and Assessment

The Working Group reviewed the CAs that included an SCO or ISCO, and interviewed internal and outside legal counsel who were involved with a number of the CAs. The analyzed CAs did not state any qualifications other than that a person nominated to be SCO could not have been employed in any prior capacity by or previously represented Respondent or any of Respondent's operating divisions, subsidiaries, or business units, and agrees not to engage in such activities for a period of five years after from the termination of the CA. The ISCO is required to be currently employed by the Respondent and have been a full-time employee of the Respondent for a minimum of two years before nomination, unless DTCC grants an exception.

Lack of transparency in the nomination and selection process leads industry to question what qualifications are expected of the SCO. For example, does the SCO need to be experienced in business operations similar to Respondent's? Clearly, this would assist the SCO in understanding the difficulties and better methods of implementing remedial measures in Respondent's business. The only apparent clue is the defining language in the CA that the designated official's role is to monitor the company's compliance program, oversee its compliance with the CA and its compliance improvement program, and report to senior management and DDTC on the company's compliance with the CA and its ITAR obligations as a whole. This seems to be reflected in the fact that several SCOs in recent years have been appointed soon after they retired from DDTC or a law enforcement agency, but had no commercial business experience. Being sensitive to the need for specific monitoring of CA requirements, DTAG contends that requiring, or at least strongly preferring, that SCOs come from industry or can demonstrate firm understanding of and experience managing business complexities will enhance the probability of compliance program success and sustainability.

In discussing experiences with individuals on the DTAG involved in the process, it became clear that monitorships tend to play out differently in each CA. Some monitors have been highly directive, urging the company towards specific compliance solutions or enhancements. Others were more reactive, allowing the company to shape its improvement program with less direction. It was also reported that the experience of monitors with the relevant industry and ITAR requirements can vary significantly, as alluded to above. We were unable to find any publicly available guidelines describing how a monitor should be selected or discussing acceptable standards for responsibilities and functions.

Recommendations

The monitor role is critical to the success of most CAs and it is DTAGs view that the main way to enhance the monitorship role is to drive DOs to become company partners and not simply watchdogs. The SCO/ISCO can act as guide, drill sergeant, overseer, investigator, promoter and honest broker; some or all of which may be appropriate to advance the objectives of a CA. A SCO/ISCO can guide the company as it maps out a new compliance program; help scope and define the CA audits to maximize effectiveness; assist in spotting underlying issues or systemic weaknesses; promote visibility and focus on compliance with senior management and line personnel; push the company to take ownership of compliance risks; maintain a drumbeat for compliance improvement and progress against CA objectives; and help the company understand the CA exit criteria and process. The monitor can raise the visibility of the compliance function and securing adequate resources and support across the organization.

Achieving these objectives is not easy. The monitor must understand the company's operations, structure, industry, governance, and compliance risks. The SCO/ISCO must, of course, understand the relevant ITAR requirements and how they apply to company operations. Without this understanding, the DO may push the company into creating a compliance program that does not fit its needs, cannot effectively manage its compliance risk and may not be

sustainable. A compliance program not tailored to the company's specific compliance risks, business needs and available resources will not succeed.

It is recommended that DTCC develop and implement internal guidelines that standardize the objectives and expectations for ITAR monitorships, which include demonstrating specific business experience and acumen. This would include selection criteria for monitors, instructions for DTCC interface with monitors, and guidelines for monitors to use in developing their own approaches and workplans.

DTAG further recommends that DOs be required to include in their second report a summary of their overall workplans for structuring the monitorship including how the SCO anticipates driving sustainable compliance in the Respondent's particular business structure. Requiring such a summary could help DO, the company and DTCC establish more effective, more tailored monitorships that integrate more fully with the company's other activities.

B. Required Audits

What types and frequency of audits should DTCC require, and what qualifications should the auditors have?

Findings and Assessment

DTAG found that most CAs required at least one audit, with many agreements requiring two. The plan for the first audit generally must be submitted to DTCC for approval within six months of the order, and the audit report must be filed with DTCC by the anniversary of the order. The second audit typically must be completed within 32 or 36 months of the order.

During DTAG interviews, there was general praise for the potential and, to some extent, the delivery of the audits. They promise both motivation for and measurement of improvement. Interviewees confirmed the overall value in the CA audit process in identifying and resolving weaknesses in existing compliance plans.

However, several interviewees thought the audits failed to deliver their potential. They noted that the auditors' focus on correcting specific (often administrative) weaknesses can distract both the company and DTCC from addressing more significant structural problems. Findings from the first audit frequently drive much of the remediation program undertaken by the Respondent, as CA exit is often conditioned to some extent on how well the respondent fixes the issues identified in the first audit. The second audit is often specifically scoped to assess whether the Respondent had remediated any findings from the first audit. This rhythm—identifying failures, risks or weaknesses in the first audit, conducting a remediation program to address them and measuring its effectiveness in a second audit—appears to incentivize the respondent, the monitor, and even DTCC to treat the first audit's findings as a roadmap for success in CA compliance.

The requirement for external audits is one of the most valuable in a CA. While we believe these external audits are often effective in identifying specific compliance issues, the methodology used in many CA audits has two key limitations.

First, auditors typically test specific practice (compliance records) against a control condition, often the company's internal governance, and report failures against that condition. For example, if company governance requires that any transaction with a third party must be screened against relevant sanctions and denied parties lists, the auditors will examine transaction documents to assess whether that control is being applied. However, they often do not assess the effectiveness of the control condition in promoting the overall goals of compliance. For example, the audit may assess whether a respondent has a screening policy, and whether the screening mandated in company policies is carried out successfully, but frequently does not assess whether the screening policy effectively mitigates the underlying export control risk and whether appropriate procedures exist throughout the company, in this case that the company could engage in a controlled transaction with a proscribed party.

Second, the audit cycle typically uses the first audit to establish a benchmark of findings that the company then works to close, and the second audit to test whether the company has succeeded in closing those audit findings. While it can be useful to measure the improvement between first and second audit in this way, the focus on fixing audit findings can encourage the company to address the symptoms rather than the underlying cause, thereby interfering with the CA's broader intent to improve ITAR risk management as a whole.

Recommendations

Weaknesses in audits could be strengthened by grounding the audits in concepts of risk management thus avoiding the “gotcha” exercise of identifying administrative errors which draws the attention away from sustainable program building. DTAG is not suggesting that identifying administrative errors is unimportant. Rather, it is recommended that this activity is conducted in some other fashion, thus allowing audits to drive the culture of compliance and not simply additional hours in writing disclosures. Additional instructions could be provided in the CA or as part of the audit plan approval process that would:

- Encourage scoping of both the initial and second audit to provide a more holistic and risk-based review of corporate compliance by, for instance, increasing focus on the comprehensiveness and effectiveness of respondent's policies and procedures for managing compliance risk, as measured against the failings identified in the Charging Letter and relevant ITAR requirements, rather than just collecting a list of failings identified in the audit process by corporate activity, division and site; and
- Require the auditors to provide a risk management assessment as part of the audit report in both the first and second audit, so the respondent is motivated to concentrate on the overall concept of ITAR risk rather than on closing out specific audit findings.

The first audit would review company operations and help identify weaknesses or risks that could be addressed through compliance improvements, while the second audit would assess whether those improvements are being delivered.

C. Reviews of Respondent's Past ITAR Compliance

"Lookback reviews": How thoroughly did Respondent comply with ITAR requirements (*e.g.,* jurisdiction and classification of defense articles, export/import authorizations, recordkeeping, brokering, required reports) over the five years preceding the CA?

Findings and Assessment

Ten of the fifteen CAs reviewed had internal "lookback reviews", meaning requirements to conduct an internal assessment of certain elements of ITAR compliance over the preceding period. Six of these reviews included an examination of jurisdiction and classification decisions made by the company, and six included reviews of the internal resources applied by the company to export control compliance. The classification reviews varied in scope depending on the nature of the company's activities and the alleged compliance failures, but the scope of the internal resource reviews was relatively standard across CAs.

These reviews sometimes, but not always, aligned with violations identified in the Charging Letters. DTAG members interviewed for this assessment generally believed these reviews were not intended to identify additional past compliance failures, but rather provided an opportunity for DTCC to assess the company and its compliance program more broadly, and to push for compliance enhancements not necessarily tied either to the compliance failures being alleged or to the strict bounds of the ITAR. They noted, as well, that lookback reviews can be resource intensive, requiring major efforts to, e.g., review large volumes of parts or data in order to confirm prior jurisdiction and classification determinations.

Recommendations

"Lookback reviews" are a helpful element of many CAs, and can provide a baseline for future classifications, for example. However, DTAG contends that they can also be too broad, requiring substantial resources to reclassify large numbers of items or data, much of which may not be useful in establishing a going-forward compliance program. While the effort may be warranted, it should be based on an assessment by DTCC that the review will address key elements of the compliance failure alleged in the Charging Letter and that the resources required to complete the review would not be better used for other compliance enhancements. It was one interviewee's experience that the Respondent dedicated significant hours to a classification review, which revealed additional errors that were disclosed, but on a product that was nearing end-of-life and would not be exported moving forward. Flexibility should be afforded to avoid these scenarios where appropriate.

When assigning these reviews DTCC could undertake with the company a cost/benefit analysis to confirm that the effort is the most valuable use of compliance resources and will address some ongoing risk identified by the Charging Letter or another underlying risk identified by either the Department or the Respondent. Having Respondents focus on perceived punitive or minor administrative (sometimes dated) requirements could have a detrimental effect on the Respondent's ability to respond timely to all Consent Agreement requirements and fulsomely implement a sustainable program.

D. Program Enhancement

Which compliance program elements (*e.g.,* senior management support, employee hiring and staffing, policies and procedures, denied party screening, training, recordkeeping, investigation and remediation of suspected violations, hot lines, ombudsman programs) were most valuable in, or missing from each CA?

Findings and Assessment

All of the CAs reviewed by the Working Group required the Respondent to implement strengthened compliance policies and procedures within twelve months. All DTAG interviewees accepted the value of compliance enhancements as part of the CA remediation program. The requirement is an opportunity by the company to improve its compliance and reduce its overall ITAR risk.

Some noted that the deadline for improvements was difficult to achieve in many instances, and that it provides no time to incorporate lessons learned from the first audit, due in the same timeframe.

Further, complex company structures create significant challenges in deploying and implementing improved policies and procedures. It was the experience of numerous interviewees that the twelve-month deadline was often met by publishing new or rewritten policies. While strengthened polices are the foundation for an effective compliance program, it is the site-by-site procedures, automated work flows, and other desktop level instructions that are critical in driving compliance throughout large, often multinational, companies. Without such implementation, a high level policy document is likely to be overlooked in a fast paced business environment. Compliance controls need to be embedded within business process to be truly successful.

In this case, finding the balance between requiring enhanced policies and embedding controls in business process is challenging – as there is no one-size-fits-all solution. However, identifying and recommending the need to do both is likely warranted.

Recommendations

The requirement could be improved with additional guidance on what good compliance programs look like, and a longer deadline better aligned with other elements of the CA to allow the Respondent, DO, and auditors to better understand how to embed compliance controls into their particular company structure and implement those procedural changes that will have the lasting and sustainable effect desired by DTCC.

Specifically, the Department should consider publishing more detailed guidance on what makes an effective compliance program, in line with the Office of Foreign Assets Controls (OFAC) Compliance Framework, the Justice Department's *Guidance on Evaluating Corporate Compliance Programs* or the Bureau of Industry and Security *Export Compliance Guidelines*.

Consider, also, extending the program enhancement deadline from twelve to twenty-four (or even thirty-six) months. This deadline could be managed closely by the DO who should align his/her workplan and the company priorities to ensure the most effective deployment of policies and procedures. Publishing a series of new policies is step one. Understanding how to effectively communicate, deploy, and embed compliance into the Respondent's business procedures and managing that implementation is how to truly create a sustainable compliance system for which all business, sites, and employees of the Respondent buy-in to and are responsible.

E. Automation

What types of automated export compliance systems were most valuable in each CA?

Findings and Assessment

The requirement for automated compliance enhancements was present in many, but not all of the reviewed CAs. The inclusion of an automation requirement was not necessarily related to the violations alleged in the Charging Letter. Automation requirements vary significantly across CAs in both breadth and specificity. Some CAs reviewed require a general automation effort without specifying any elements of that effort, while others provide specific mandates that generally appear to be linked to compliance failings alleged in the Charging Letter.

Interviewees noted that automation is frequently challenging, time consuming and expensive, but is clearly an effective tool when fully and properly implemented and audited. Indeed, implementing automation that error-proofs certain aspects of trade compliance can and should be deployed where affordable and available. It should be balanced, however, as companies may develop a false sense of compliance if depending too heavily on automation or delay compliance measures on account of future automation that may take years to implement.

Automation requirements in CAs seem to work best when they require specific end-state improvements directly related to the failures alleged in the proposed charges, while allowing the company and the DO to determine what additional automation would be appropriate, given the company's compliance posture, risks, and existing IT facilities. For example, if the charges allege that the respondent did not retrieve temporarily exported defense articles within the 4-year validity of a DSP-73 temporary export license, the CA could require the respondent to automate its system for DSP-73 tracking, but allow for automation into other spaces to be at the discretion of the Respondent in coordination with the DO.

Recommendations

DTAG recommends that DTCC focus on automation requirements that specifically address the alleged failures in the Charging Letter, while leaving any broader automation requirement to determination between the company and the DO.

To the extent DTCC requires automation, the Department should consider further counterbalancing the cost of that automation against CA fines through a separate offset from other compliance enhancements.

F. Onsite Reviews

What was the value of CA requirement for onsite review by DTCC during the effective periods of the CAs, and what types of onsite reviews would be most effective?

Findings and Assessments

Nearly all CAs contained the requirement that Respondent facilitate DTCC compliance visits on short notice. In most CAs, the onsite visits were mandated in addition to outside audits and other external requirements. Individuals interviewed indicated that on-site visits appear to be used by DTCC to develop a better understanding of the company's existing compliance processes and the status of its improvement program but it was unclear how this did or did not give a clearer picture of the Respondent's program on balance with the semi-annual reporting of both the company and DO, and the multitude of other internal and external parties involved in monitoring and reporting the CA progress.

The Working Group recognizes the value of company visits by DTCC and that such visits are going to be part of any future CA. Onsite reviews can valuable element of CA oversight, providing DTCC with an opportunity to assess the parties' compliance policies and procedures firsthand while providing the respondent with direct exposure to DTCC's thinking on important compliance topics.

DTAG contends, however, that visits interrupt overall progress in compliance improvement if not well coordinated with other non-company audits, visits, and reporting. We also note the value to companies in having visibility of DTCC expectations for such visits in advance, so they can prepare and manage the visits more effectively.

Recommendations

DTCC should prepare and publish a standard agenda for company visits. That agenda can be modified as necessary with each visit to achieve its specific purposes, but would nonetheless provide companies with some predictability while promoting consistency and objectivity in DTCC's reviews. DDTC could also consider suspending company visits or otherwise balancing them by taking a holistic view of all internal and external monitoring and reporting via the Respondent itself, the SCO/ISCO, external auditors, and other mechanisms.

IV. SUMMARY CONCLUSIONS AND RECOMMENDATIONS

There is no one-size-fits-all when it comes to Consent Agreements and addressing the remedial actions therein. DTAG is sensitive to the Department's need to balance (and indeed we advocate for herein) standardization along with customization as well as knowing that when a CA is first engaged there are known unknowns. That said, DTAG believes the goal of any CA is long-term, sustainable compliance. DTAG has provided numerous recommendations above toward achieving that goal. In that context, DTAG requests the Department generally consider the following as summary recommendations:

1. Publish or refine standardized guidance in appropriate areas such as qualification requirements and guidelines for 3rd parties (e.g. auditors and/or DOs) and general expectations of a compliance program.
2. Partner with the Respondent to customize (to the extent appropriate) the Consent Agreement and remedial actions to ensure greatest levels of program implementation, culture change, and compliance sustainability.
3. Add flexibility where possible to drive a holistic approach to all efforts under the CA, allowing for requirements to shift based on DO inputs or other monitoring and reporting.
4. Remain mindful of the multitude of requirements inherent to CAs and help Respondents focus on those that are significantly impactful in addressing failures that brought on the Agreement (and thereby preventing future non-compliance) and instituting a culture of compliance at the Respondent company.