

EXPORT CONTROL COMMODITY JURISDICTION – The Importance of Getting it Right.

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One of the basic elements of any effective international trade compliance program is proper export control Commodity Jurisdiction (CJ) determination. This is a most fundamental and essential step in export compliance. Is your article, item, related assistance, service, technology or technical data on the Commerce Control List (CCL) or US Munitions List (USML)? You must answer this question correctly because the US Government (USG) applies very different licensing policies and procedures to these two lists.

If you don't get the jurisdiction right in the first place, the potential consequences can be highly negative, significant and numerous – perhaps even devastating. Recent examples of sophisticated and experienced exporters like the Boeing Company, Goodrich Corporation or L-3 Communications Corporation prove mistakes can be made. US Department of State Consent Agreements with those entities earlier in 2006 highlighted the importance of getting jurisdiction right and what happens when you get it wrong -- including large fines and a long list of mandated remedial compliance measures. Proper CJ determination is especially important for items on the USML due to their sensitivity and importance to the United States' national security. Such items in the wrong hands can do grave harm, putting the military, citizens and country at risk.

Unfortunately, many organizations continue to get jurisdiction wrong. There appear to be a couple of typical scenarios with a wide-range of variations.

One example is when Company A acquires Company B and Company B thought none of their products were export controlled. Company B might not have engaged in much exporting or are unaware of the specific regulatory requirements. Suddenly as a result of due diligence and the integration of Company B into Company A's already established trade compliance effort, it's realized that an improper CJ determination was made. In many cases like this there was little or no analysis done in support of the initial determination.

Another example is a company that has been exporting for years assuming an item was Commerce Department controlled with no license required. Suddenly they are advised by the State Department that the item is now considered under USML jurisdiction due to *slight* modifications that were made for military applications. The company "defaulted" to a vague notion their product was on the CCL or not controlled at all. Sometimes, the individuals who the company thinks might have made the original CJ determination have long since left.

When an item was originally designed and developed many years ago for commercial use but has since evolved over time and changed in some way for a specific sale to a military end-use and end-users it immediately complicates things. Some people who don't work with export controls routinely don't grasp the idea that a jurisdictional change takes place when a commercial commodity is modified--in any way, regardless of how minor, how small, how slight--for military application. Jurisdiction can shift in a heartbeat. And every export of the item made under the wrong license scheme could very well be a serious violation. Also,

remember that jurisdiction is dynamic. An item originally designed for purely commercial purposes may have military technology migrated into it over time. When such technology migration happens jurisdiction has likely moved as well.

Recommendations:

One Cognizant Authority: Remember, the US Department of State, Directorate of Defense Trade Controls is the only entity in the USG with the authority and responsibility for making CJ determinations. Policy and guidance on designation of defense articles, defense services and jurisdiction are covered in the International Traffic in Arms Regulations (ITAR), Parts 120.2 through 120.4.

Establish the Proper Controls: It is important to have a well-documented process-oriented approach to make these jurisdictional determinations – this cannot be overemphasized. This consistent effort along with the related written policies and procedures will help you arrive at the correct decision based on a step-by-step process. Inconsistent controls applied differently under different circumstances without specific written guidance will get you into big trouble.

Ask All the Right Questions: Without a consistent, rigorous, methodical checklist and/or flow diagram to step through this important process, you can get it wrong. To do this on your own, the effort must include consideration of “Some Questions to be Considered in Making Commodity Jurisdiction Determinations” included below. If you don’t ask all the right questions you can likely end up with the wrong answer.

Don’t Go it Alone: It’s also vital to have seasoned professionals involved in the process who know what they’re doing and are knowledgeable in the technology and USG regulations [i.e. to include the ITAR and Export Administration Regulations (EAR)]. This is not territory for those who are inexperienced or not attentive to detail. Again, there’s too much at stake if you get it wrong.

Pitfalls of Self-Determinations: There’s nothing that prohibits someone from making their own CJ determinations using the ITAR guidance. However, there’s clearly risk in doing so--particularly when it comes to the ITAR, Part 120.3(b). Unfortunately, no entity in industry has all the resources that the USG does to make a comprehensive assessment of significant military or intelligence applicability. That goes for consultants and lawyers as well.

Classification Comes Second: An important consideration here is to always determine jurisdiction first, then classification. Once you have the jurisdiction right the next step is to determine the appropriate classification under the EAR or ITAR. What is the EAR Export Control Classification Number? What is the ITAR Category and Sub-category?

Hold On to Your Records Forever: Another significant consideration in this area is documentation. While the EAR and ITAR mandate a five-year recordkeeping requirement, it is strongly recommend on all CJ determinations that records be maintained indefinitely. There are many cases where the USG has questioned a CJ determination made many years ago--well

beyond the five-year retention requirement. Providing an empty or incomplete file in response to such a USG inquiry does nothing to substantiate your jurisdictional determination. Unfortunately, if you don't have the records and process to back up your decision, many in the enforcement community will infer you either got it wrong or didn't really do it at all.

The bottom line: Correct CJ determinations are a critical, absolutely essential, first step in executing and managing an effective integrated global trade compliance program. Without accurate CJ determinations, your organization is putting itself at risk--and may be putting your Nation at risk as well.

Questions to Consider in Making Commodity Jurisdiction Determinations

- Is it specifically designed, developed, configured, adapted or modified for a military application?
- What was the initial design intent?
- Was it originally designed for a military or civil application?
- Was the underlying technology developed for a military or commercial use?
- Does the item have predominant military, space or intelligence application?
- Was it designed, manufactured or tested to meet military or commercial specifications?
- Did any funding for development or manufacture come from government entities?
- Has it been changed in anyway for military use?
- Is the part number unique to a military or commercial application?
- Are there separate part or model numbers for military and commercial use?
- Is the item (or any of its parts, pieces or components) on the USML?
- Does the item contain any parts, pieces or components that were specifically designed, developed, configured, adapted or modified for a military application?
- What is the current predominant application?
- What's the record of sales and percentage of sales (civil versus military)?
- If it's Commercial Off-The-Shelf (COTS), has it been modified, adapted, changed "in any way" for a military end-use or user?
- What exact changes have been made to the commercial item for military use?
- Does it have performance equivalent (in form fit and function) to an item used for civil application?
- Is there sufficient justification for Commerce or State Department jurisdiction?
- Is the commercial version of the item "exactly" the same as the military one?
- Can the commercial version be modified for a military end-use/user?
- Is domestic or foreign availability an issue? (i.e. can a customer get the same, equivalent or a more capable item elsewhere)?
- Is the item tamper-resistant or tamper-proofed in any way to make it more difficult to take apart or hinder access to?

- Is the article or service in question part of a larger system or sub-system? What is that system? Is the item integral to that system? Is the item inseparable from the system? Will attempting to replace or replacement of the item compromise the system or render it useless or ineffective?
- Has any technology developed for military application migrated to any commercial applications? Has any change in jurisdiction resulted?
- Is there any doubt if the item is on the USML or CCL?
- Are there any indications State has made previous jurisdictional determinations on the item?
- Is there any other reason to believe the item is on the USML or CCL?

About the author:

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