

CLASSIFICATION UNDER THE EXPORT LAWS: WHERE DO WE GO FROM HERE?



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EXPORT DETERMINATIONS: LONG-RUNNING ISSUE

- Long-running issue:
 - ❖ See, e.g., “Review of the U.S. Munitions List and the Commodity Jurisdiction Process,” Memorandum Report 01-FP-M-027 (OIG/Department of State, March 2001)
 - ❖ “Interagency Review of the Commerce Control List and the U.S. Munitions List,” Report No. D-2001-092 (OIG/Commerce/State/Defense/Energy, March 2001)



EXPORT DETERMINATIONS: LONG-RUNNING ISSUE

- ❖ “DOD Involvement in the Review and Revision of the Commerce Control List and the U.S. Munitions List,” Report No. D-2001-088 (OIG/Department of Defense, March 23, 2001);
- ❖ “Export Controls: Clarification of Jurisdiction for Missile Items Needed,” GAO-02-120 (GAO, October 9, 2001)
- ❖ “Export Controls: Processes for Determining Proper Controls of Defense-Related Items Need Improvement,” GAO-02-996 (GAO, September 2002)



EXPORT DETERMINATIONS: LONG-RUNNING ISSUE

- ❖ “Interagency Review of Foreign National Access to Export-Controlled Technology in the United States,” Report No. D-2004-062 (OIG/Commerce, Defense, State, and Energy, April 2004)
- ❖ “Export Controls: Improvements to Commerce’s Dual-Use System Needed to Ensure Protection of U.S. Interests in the Post-9/11 Environment,” GAO-06-638 (GAO, June 2006)



TROUBLED HISTORY

- Exemplar GAO Report, September 2002
- Between 1998 and 2001, Commerce referred only 40 of over 12,000 classification requests to other agencies, even though it appeared that at least 250 should have been referred
- Commerce improperly classified over 250 State-controlled items as Commerce controlled
- No indication, between 2002 and the present, that Commerce has changed its processes or increased referrals



TROUBLED HISTORY

- No indication that Commerce has amended its processes to require classification requests to contain specific information related to the background of the item or technology, its funding, or its applications
- Enhanced liability for companies that rely on these classifications
- No enforcement risk for Commerce if misclassifications occur
- Enhanced national security risks to U.S. Government and civilian personnel



DISTINCTIONS

- “Jurisdiction” versus “Classification”
- Practical and Legal Implications:
 - ❖ Which one is binding?
 - ❖ Why?
 - ❖ Why is this a baseline question?
 - ❖ How far does liability extend?
- Should industry processes change?



EXPORT CLASSIFICATION REGIMES

- Department of State
 - ❖ Arms Export Control Act (“AECA”), 22 USCA § 2778(a) and (f)
 - ❖ International Traffic in Arms Regulations (“ITAR”), 22 CFR §§ 120.3 and 120.4
 - ❖ Covers defense articles, technical data and defense services
 - ❖ Commodity Jurisdiction (“CJ”) Process (ITAR § 120.4)
 - ❖ U.S. Munitions List, ITAR § 121.1



EXPORT CLASSIFICATION REGIMES

- Department of Commerce
 - ❖ EO 13222, as amended and extended under the International Emergency Economic Powers Act, 22 USCA § 1701 *et seq.*
 - ❖ Export Administration Regulations (“EAR”), 15 CFR § 748
 - ❖ Covers “dual-use” items (defined in § 772)
 - ❖ Commodity Classification (“CC”) Process, 15 CFR § 748.3
 - ❖ Commerce Control List, EAR § 774



CJ STATUTORY AUTHORIZATION

- No specific language, *per se*, in the AECA defines the CJ process
- § 2778(a)(1) provides: “...The President is authorized to designate those items which shall be considered as defense articles and defense services....The items so designated shall constitute the United States Munitions List.”



CJ STATUTORY AUTHORIZATION

- § 2778(f)(1) provides: “The President shall periodically review the items on the United States Munitions List to determine what items, if any, no longer warrant export controls under this [AECA] section.”
- In combination, provide statutory foundation for CJ process both to determine jurisdiction and to transfer items from the USML to the CCL



CJ OVERVIEW

- ITAR § 120.4
- Two-fold objective:
 - ❖ Used when doubt exists as to whether an article, data or service is covered on the USML; or
 - ❖ Used to redesignate an article, data or service currently covered on the USML as a CCL controlled item
- Statute requires State to notify Congress at least 30 days prior to the removal of any item from the USML



CJ OVERVIEW

- Whether Congressional notification is required for “in doubt” items or “solely redesignated” items is an open question
- Not self-executing
- Effectiveness of any CJ determination may be predicated upon Congressional notification
- At a minimum, State consults with Defense and Commerce on most CJ requests



CC STATUTORY AUTHORIZATION

- Statutory authority is currently an open issue due to the lapse of the Export Administration Act
- Classification is considered part of the process to determine what is on the CCL, See 15 CFR § 748.3(a) (“BIS will advise you whether or not your item is subject to the EAR, and if applicable, the appropriate ECCN.”)
- EO 13222, as amended and extended pursuant to the IEEPA national security provisions



CC OVERVIEW

- 15 CFR § 748.3
- Used to determine whether an item is “subject to the EAR”
- Used to determine the correct Export Control Classification Number (“ECCN”), NOT whether an item is controlled by Commerce



CC OVERVIEW

- Legal and Practical Distinctions:
 - ❖ Commerce does not staff out all classification requests – see, e.g., GAO-02-996, at pp. 8-10: “Classification of items without input from State and Defense has resulted in Commerce *improperly* classifying some State-controlled items.” (emphasis added)



CC OVERVIEW

- Legal and Practical Distinctions:
 - ❖ Errors by Commerce flow down liability to the exporter, not to Commerce personnel or the agency
 - ❖ No concept of “3rd-party indemnification” with a U.S. Government agency



“CJ” VERSUS “CC” DISTINCTIONS

- Only State may change the “jurisdictional” export controls of an item



WHY SHOULD COMPANIES CARE?

- Enforcement actions carry far-reaching consequences: *e.g.*, 2006 Boeing Company Settlement Agreement; 2006 Goodrich Corporation/L-3 Corporation Settlement Agreement
- Liability runs wide and deep
- Liability extends to parties in an “advisory” capacity in the form of “aiding and abetting”



WHY SHOULD COMPANIES CARE?

- **Personal Issue:** Traditional parties affected by export classification or jurisdictional decisions include: officers, directors, company empowered officials, company export licensing and compliance personnel and in-house counsel
- **Expansion Issue:** Additional parties now affected by export classification or jurisdictional decisions include: law firms, consulting firms, companies which provide assistance in the export classification process



ISSUES THAT VARY BETWEEN CJs AND CCs

STATE	COMMERCE
<p>“Sophisticated exporter” applies to the AECA under the <i>United States v. Lee</i> standard</p>	<p>Commerce does not impose a “sophisticated” standard that varies from applicant to applicant</p>
<p>State identifies the information required in CJs in ITAR § 120.4</p>	<p>Commerce identifies the information required in its classification requests in EAR § 748.3(b)(1) and (2)</p>
<p>State standards require more detailed information related to the product or technology and directly penalize those who submit CJ requests that exclude information the Government deems “material”</p>	<p>Commerce standards require limited information related to the product or technology and do not appear to penalize those who submit CCs for exclusion of information in the request</p>



ISSUES THAT VARY BETWEEN CJs AND CCs

STATE	COMMERCE
State process currently allows for paper submission, although State has outlined its intent to move CJs to electronic submissions	Commerce process can be handled electronically (through SNAP) or by paper submission
State currently provides no form for CJs, although the Department has urged individuals to look to the proposed electronic submission form for CJ requests to determine the information needed for the process	Commerce CC form is the same for all types of submissions: licenses, technical reviews, commodity classification requests and advisory opinions



PRACTICAL IMPLICATIONS OF THE VARIANCE

- Amount of background research required to submit CJs
- Amount of historical information related to funding of products and technology needed for CJs
- Extent of knowledge of acquisition history and validity of transfers of CJs from entity to entity
- Research to be conducted regarding the actual transfer of CJ'd items or technology



HANDLING NEW PARTIES TO THE PROCESS

- State Department approach, and eventually Commerce approach, will alter the relationship between consultants, law firms and companies seeking to pursue the CJ or CC process
- Criticality of jurisdictional and classification determinations will extend beyond the export arena
- Proposed solutions



NEW ISSUES IN RISK MITIGATION

- Given the extended reach of recent enforcement actions and the critical nature of jurisdictional determinations, where can mitigation occur:
 - ❖ Understand who is preparing your classification or jurisdictional determinations
 - ❖ Review agreements with consultants and law firms to ensure that the following provisions are addressed:
 - Who is working on any export issues that may involve access to controlled information?
 - Who will obtain necessary export authorizations?



NEW ISSUES IN RISK MITIGATION

- ❖ Review agreements with consultants and law firms to ensure that the following provisions are addressed:
 - Who will be responsible for the final determination on whether information is controlled?
 - Who will indemnify whom?
 - Who provides certifications as to compliance with the export laws?
 - Who determines which individuals may work on particular export issues on behalf of a company?
 - Who determines whether violations have occurred?



NEW ISSUES IN RISK MITIGATION

- Introduces a new “era” of specifying legal obligations between consultants, attorneys and clients
- Introduces the need for key allocation of responsibility in the process, especially from an indemnification perspective
- Carries consequences under Sarbanes-Oxley
- Alters who may be a “respondent” in an enforcement action



QUESTIONS?