

ICPA 2024 Annual Conference

COMMODITY JURISDICTION

Dave Glynn

Holland & Hart LLP

303-295-8071

djglynn@hollandhart.com

March 19, 2024

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Agenda Topics

- ◆ What is a Commodity Jurisdiction, How Determined, Where to Start
- ◆ Policy for Determining Defense Articles/Services
- ◆ Specially Designed & Order of Review
- ◆ Preparing & Submitting a CJ
- ◆ Tips for a Successful CJ
- ◆ CJ Metrics
- ◆ CJ Determinations



Commodity Jurisdiction

What is Commodity Jurisdiction?

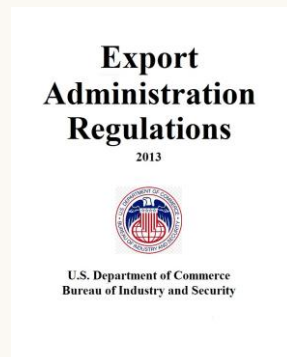
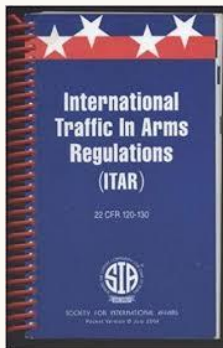
- ◆ Process to determine which agency has jurisdiction of your technology (item, tech data or service).
- ◆ The “CJ” process is the only official US Government mechanism to determine jurisdiction.



Commodity Jurisdiction

Where do you start?

- ◆ Look to your product, data or service
 - ITAR (State Department) – controls all items listed on the U.S. Munitions List (USML)
 - EAR (Commerce Department) – controls everything else (*i.e.*, commercial or “dual-use” items listed on the Commerce Control List (CCL))



Commodity Jurisdiction

How is Commodity Jurisdiction determined?

- ◆ Start with the USML (22 CFR Part 121)
 - determine if your item, technical data or service is listed
 - review all 21 categories, including “Miscellaneous Articles”*
- ◆ Don’t think your item is listed?
Don’t be so sure...



State Department Regulations (ITAR)

§ 120.3 Policy on designating and determining defense articles and services on the U.S. Munitions List.

An article or service may be designated a defense article or defense service if it:

- (a)(1) Meets the criteria of a defense article or defense service on the U.S. Munitions List; or
- (a)(2) Provides the equivalent performance capabilities of a defense article on the U.S. Munitions List.

State Department Regulations (ITAR)

And a specific article or service shall be determined in the future as a defense article or defense service if it:

- (b) Provides a critical military or intelligence advantage such that it warrants control under [the ITAR].



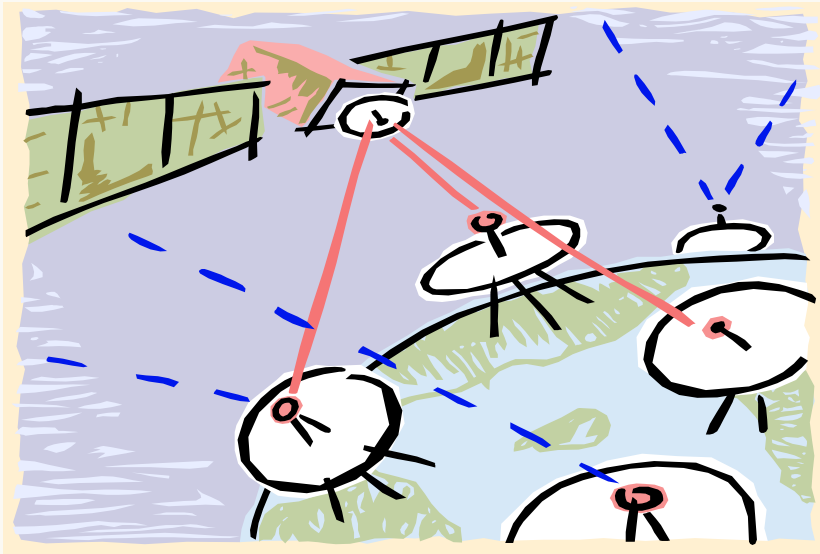
State Department Regulations (ITAR)

A specific article or service is not a defense article or defense service if it:

- (c)(1) is determined to be under the jurisdiction of another department or agency of the U.S. Government pursuant to a commodity jurisdiction unless superseded by changes to the USML or by a subsequent commodity jurisdiction determination, or
- (c)(2) meets one of the criteria of “specially designed” when the article is used in or with a defense article and specially designed is used as a control criteria.

State Department Regulations (ITAR)

The intended use of the article or service after its export (*i.e.*, for a military or civilian purpose), by itself, is not a factor in determining whether the article or service is subject to the controls of [the ITAR].



U.S. Munitions List

Category VII – Tanks and Military Vehicles

Example: ceramic tiles for the U.S. Army's Stryker light armored vehicle

WHY?

Because the tiles are listed in USML Category VII(g)(3) as “composite armor parts and components specially designed for the vehicles in this category.”

U.S. Munitions List

Category VII – Tanks and Military Vehicles

However: ceramic tiles for a commercial application (e.g., armored car) are NOT controlled under the ITAR

WHY?

Because composite armor tiles for commercial vehicles (*i.e.*, non-armored) are NOT listed on the USML - they are not specially designed for a defense article

U.S. Munitions List

Category VII – Tanks and Military Vehicles (Cont.)

(h) Technical data and defense services directly related to defense articles described in this category



Commodity Jurisdiction Under Export Control Reform

“Specially Designed”

- ◆ Defined term – ITAR & EAR
 - addresses USML “catch-all” categories – “catch & release”
 - certain items moved to CCL (fasteners, washers, spacers, insulators, grommets, bushings, springs, wire, solder)
 - other items moved to CCL, subject to certain conditions
 - does not apply to items otherwise listed/enumerated on the USML – those items controlled regardless of being specially designed or not

Commodity Jurisdiction Under Export Control Reform

“Specially Designed”

◆ “Catch”

- Commodity/software is specially designed if it:
 - has properties peculiarly responsible for achieving or exceeding controlled performance levels, characteristics, or functions described in a USML category; or
 - is a part, component, accessory, attachment, or software for use in or with a defense article.

Commodity Jurisdiction Under Export Control Reform

“Specially Designed”

◆ “Release”

- Commodity/software is not specially designed if it:
 - is subject to the EAR pursuant to a CJ determination;
 - is a fastener (e.g., screws, bolts, nuts, nut plates, studs, inserts, clips, rivets, pins), washer, spacer, insulator, grommet, bushing, spring, wire, or solder;
 - has the same function, performance capabilities, and the same form and fit as a commodity or software used in or with a commodity that:
 - i. is or was in production (i.e., not in development); and
 - ii. is not enumerated on the USML;

Commodity Jurisdiction Under Export Control Reform

“Specially Designed”

◆ “Release” (Cont.)

➤ Commodity/software is not specially designed if:

- Was or is being developed with knowledge that it is or would be for use with both defense articles and also items not on the USML; or
- Was or is being developed as a general purpose commodity, i.e. with no knowledge for use in or with a particular commodity (e.g., a F/A-18 or HMMWV) or type of commodity (e.g., an aircraft or machine tool);

CAUTION: Documents contemporaneous with development are needed to justify release under the above criteria (e.g., concept design information, marketing plans, patent application declarations, or contracts).

Commodity Jurisdiction Under Export Control Reform

“Specially Designed”

➤ Requires a step-by-step analysis – Order of Review

Use the DDTC Specially Designed Decision tool:

https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_dt_specially_designed

Note: This tool is currently being updated to renovate the Order of Review.

Commodity Jurisdiction Under Export Control Reform

Order of Review

- ◆ Always begin with the ITAR (121.1(b)):
 - USML
 - Application of specially designed (120.41)
- ◆ Then move to the EAR (Supplement 4 to Part 774)
 - 600 Series
 - 515 Satellite/Space items
 - 501-505, 602 Firearms, Guns, Ammunition
 - Application of Specially Designed (772.1)
 - CCL

Use the USML Order of Review Decision tool:

https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_dt_order_of_review

Commodity Jurisdiction

Quiz – ITAR or EAR?

- ◆ an optical lens specially designed for a fully automatic machine gun sight
- ◆ a hand tool, used in the mining industry, designed to meet military specifications
- ◆ an off-the-shelf software operating system modified for use by army command personnel
- ◆ a power supply for a general purpose computer, 5% of sales are to the U.S. military

Commodity Jurisdiction

Who can submit a CJ?

- ◆ Exporter or Manufacturer can submit a CJ to the State Department... but be careful
 - CJ determinations are binding, but can be “reconsidered”
 - Insufficient information will result in “Return Without Action”
 - Can be used for a USML reconsideration
 - Should treat the item as under ITAR control until a determination is received
 - Statements made in CJs can be criminal!

Commodity Jurisdiction

Tips for a Successful CJ Submission:

- ◆ Tell the story – “biography” of your product
- ◆ Address two distinct audiences
 - Engineers
 - Regulators
- ◆ Support documentation is vital
 - Drawings (be sure to label)
 - Explain why certain documents are included
- ◆ Complete all DS-4076 blocks
 - Use “N/A” sparingly
- ◆ Include a cover letter
 - Suggest USML or ECCN

Commodity Jurisdiction

Questions to be addressed in a CJ:

- ◆ Was the item originally designed for a commercial or military purpose? Where derived? Single purpose or variety of functions or industries?
- ◆ Where did initial development \$ come from?
- ◆ Was the underlying technology originally developed for commercial or military purpose?
- ◆ Does the item contain parts, components, or assemblies that were originally specifically designed, developed, or modified for a military application?
- ◆ What is the form, fit, function and performance capability of the article?

Commodity Jurisdiction

Key Definitions for CJs:

- ◆ **Form** = configuration (including geometrically measured configuration), material, and material properties that uniquely characterize it.
- ◆ **Fit** = ability to physically interface or connect or become an integral part of another commodity.
- ◆ **Function** = the action or actions it is designed to perform.
- ◆ **Performance capability** = the measure of a commodity's effectiveness to perform a designed function in a given environment (e.g., measured in terms of speed, durability, reliability, pressure, accuracy, efficiency).

Commodity Jurisdiction

Example demonstrating use of “equivalent” for Specially Designed purposes:

Example 1 (meets the “equivalent” standard): A fuel pump used in AT-only controlled aircraft in "production" is modified for use in a military aircraft. **The fuel pump has the same function, performance capabilities, but needed to be modified solely for fit purposes (to fit in an area of a military aircraft).** No other changes to the fuel pump were made, such as for fuel flow.



Commodity Jurisdiction

Example 2 (does NOT meet the “equivalent” standard):
A fuel pump used in AT-only aircraft in "production" is modified for use in a military aircraft. However, in addition to modifying the fuel pump solely for fit purposes (to fit in an area of a military aircraft), the fuel pump has been made of higher strength materials to allow it to pump at a higher pressure.



Commodity Jurisdiction

How to apply?

- ◆ Electronic
 - Web-based application – Defense Export Control and Compliance System (DECCS)
 - Electronic CJ Request Form DS-4076 is required
 - Supplemental documents are uploaded with the completed DS-4076 form
- ◆ Hardcopy
 - No longer accepted for CJ Requests
- ◆ DDTC Registration NOT Required
- ◆ Timing
 - Typically, 45-55 business days depending on the USML category

Commodity Jurisdiction

Special Requirements:

- ◆ **Manufacturer Authorization Letter**
 - Required if CJ NOT submitted by manufacturer
 - If manufacturer no longer in business, provide description
 - Template available on DDTC CJ webpage
- ◆ **Classified Material**
 - Cannot be submitted in DECCS
 - Describe in cover letter, DDTC will reach out
- ◆ **Voluntary Disclosure Related**
 - Enter Case Number in DS-4076 Block 2
- ◆ **FMS**
 - Provide Letter of Offer and Acceptance Number in DS-4076 Block 11

Commodity Jurisdiction

Where can I find more information regarding CJs?

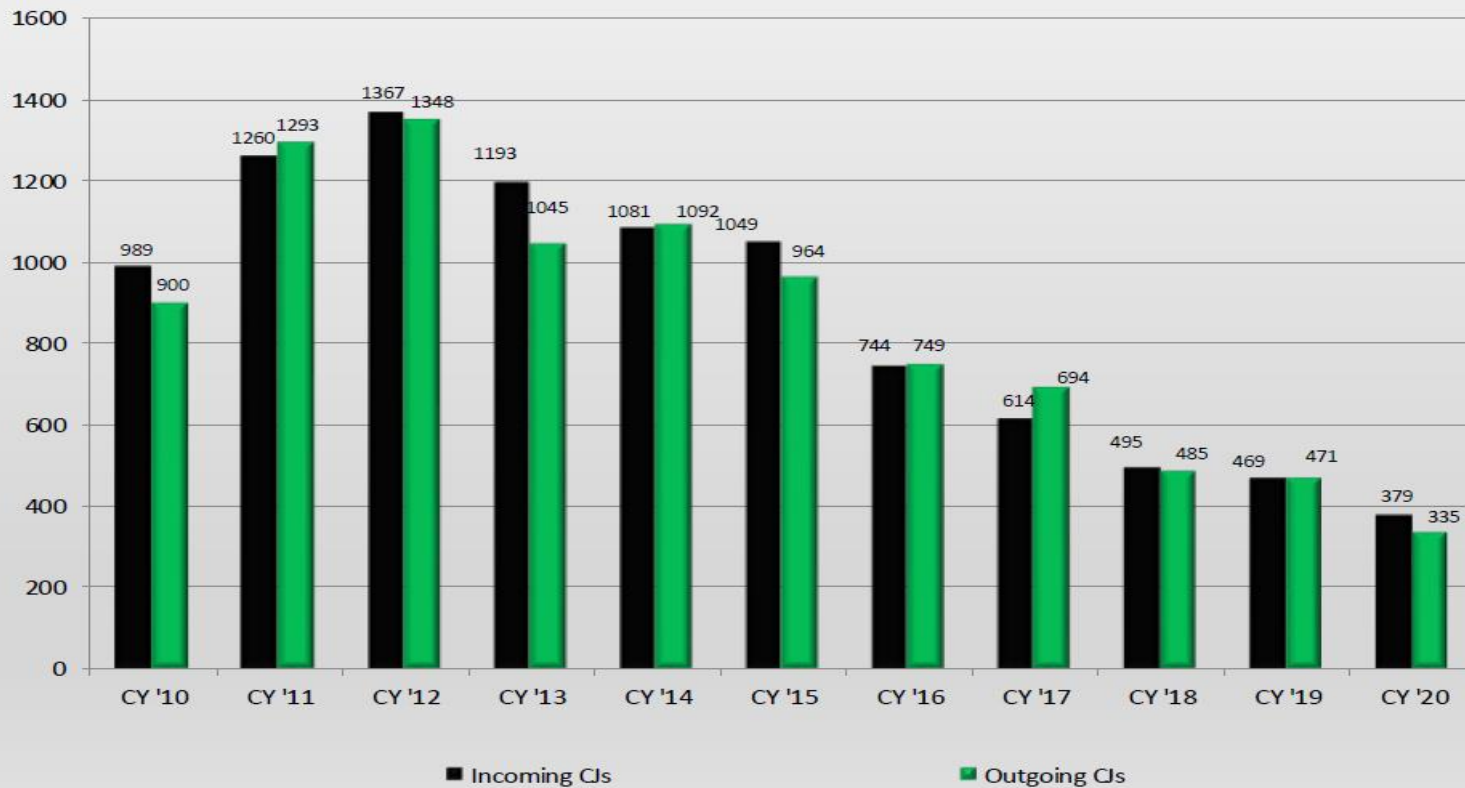
- ◆ State Department – Directorate of Defense Trade Controls (DDTC) website:

https://www.pmddtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=249f7c0adb6cf7007ede365e7c9619fd

Remember: only the State Department can make a commodity jurisdiction. The Commerce Department can only issue classification determinations.

Commodity Jurisdiction

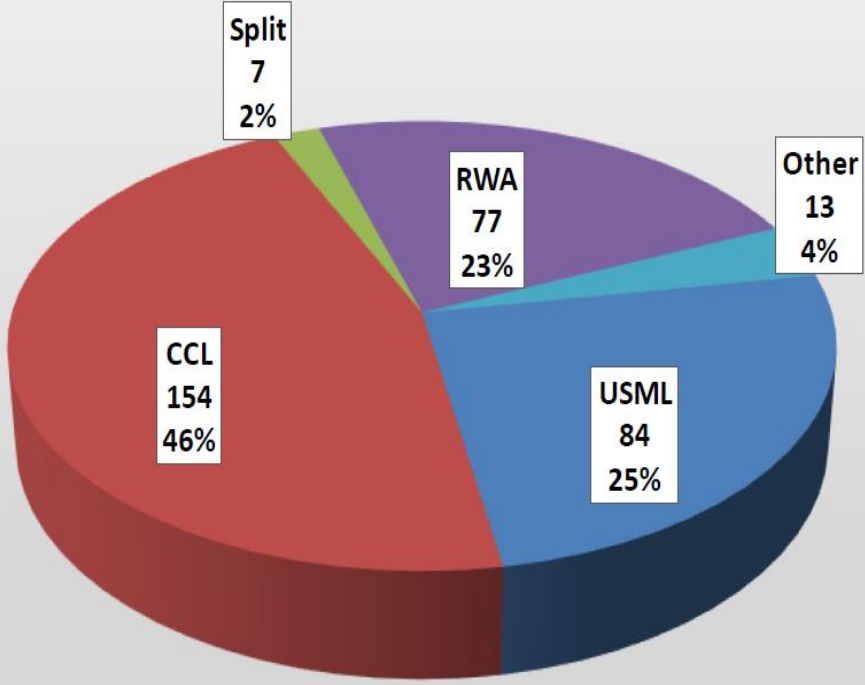
CJ Determinations CY 2010-2020, total received and issued



Commodity Jurisdiction

CJ Determinations

CY 2020, aggregate determinations



Commodity Jurisdiction

CJ Final Determinations On-line

- ◆ DDTC has posted CJ final determinations on its website:
https://www.pmdotc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=6ea6afdcdbc36300529d368d7c96194b
- ◆ Use DS-4076 Block 13 to lodge objections to publication on this website
- ◆ CJ determinations issued to other companies are not binding on your company unless you export that exact product!
- ◆ Published CJ final determinations may be of little use due to the lack of details

Commodity Jurisdiction

Commodity Jurisdiction Determinations

<u>Model Name</u>	<u>Manufacturer</u>	<u>Description</u>	<u>Final Determination</u>	<u>Final Determination Date</u>
Insert 1120-15105.08	Eurocopter Deutschland GmbH	Threaded insert for the BO 105 helicopter blade weight chamber cover's attachment screw	ECCN 9A991.d	10/14/2010
Insert (Tracking) 1120-15105.09	Eurocopter Deutschland GmbH	Threaded insert for the BO 105 helicopter blade weight chamber cover's attachment screw	ECCN 9A991.d	10/14/2010
Auxiliary Tab 1120-15105.15	Eurocopter Deutschland GmbH	Reduces the chord-wise force on the BO 105 helicopter blade during flight	ECCN 9A991.d	10/14/2010
Erosion Protection Shell (outer) 1120-15154	Eurocopter Deutschland GmbH	Provides leading-edge protection for the BO 105 helicopter blade	ECCN 9A991.d	10/14/2010
Erosion Protection Shell (center) 1120-15155	Eurocopter Deutschland GmbH	Provides leading-edge protection for the BO 105 helicopter blade	ECCN 9A991.d	10/14/2010
Portable Hydraulic Test Stand H106 D33354	Avtron Aerospace, Inc.	Hydraulic Power Unit for Pressure and Flow	EAR99	10/14/2010
Portable Hydraulic Test Stand H106 D33354	Avtron Aerospace, Inc.	Hydraulic Power Unit for Pressure and Flow.	EAR99	10/14/2010
Erosion Protection Shell (inner) 1120-15156	Eurocopter Deutschland GmbH	Provides leading-edge protection for the BO 105 helicopter blade	ECCN 9A991.d	10/14/2010
Radar Set Type TPS-43G 336D844G01 & 336D845G01	Westinghouse Electric Corporation	Wave guides used as spare parts by Pakistani Defense Department radar manufacturing installation	USML Category XI(c)	10/14/2010

Commodity Jurisdiction

Okay, suppose your CJ determination indicates your article, technical data, or service is subject to the ITAR?

- ◆ Think - License or Other Authorization!
 - Virtually all exports from the U.S. will require a license or other authorization
 - You may need a license or authorization even if you don't ship from the U.S.
 - Your company must register with the DDTC

