



Matthew S. Borman
Deputy Assistant Secretary
For Export Administration
Update 2014

The Commodity Jurisdiction Process

- State Department has delegated authority to determine whether an item is on the USML.
- State Department receives the request and makes the final decision on jurisdiction.

The Commodity Jurisdiction Process

- Defense and Commerce provide recommendations based on technical and policy reviews
- State determinations are subject to challenge
 - Interagency (escalation)
 - Applicant (appeal—120.4(g))

Export Control Reform and CJs

- Post ECR, the more positive USML should reduce CJ requests
 - If your item is enumerated on the USML, there is no need to submit a CJ
- However, if you believe that the item has or will have commercial application, then a CJ for review of the current controls would be appropriate

Order of Review

(The first step in a good submission)

- Review the USML
 - Specifically enumerated items
 - “Catch-all” controls and ITAR definition of “specially designed”
- If not on the USML, review the CCL
 - Review characteristics of item to determine applicable CCL category and product group
 - Review applicable 600 series ECCNs
 - Specifically enumerated items
 - “Catch-all” controls and EAR definition of “specially designed”
 - Review applicable non-600 series ECCNs

25

Good Submissions

- Go through order of review beginning with USML Section 120.6, “defense article”
- Include an analysis of “specially designed” if warranted
- Provide detailed information that is consistent with all pieces of the application
- Use facts that are not selective
- Anticipate and address questions

As a general rule, a request for review of a product in the development stage is much more difficult to draft and review

Good Submissions...

Include

- An analysis of the order of review
- Specs/Description
- Development History, including funding sources
- Modifications, if any
- Sales Data
- Export History
- Jurisdiction History
- Equivalent Items
- Foreign Availability
- Economic Considerations

All requests for additional information should be addressed as quickly as possible

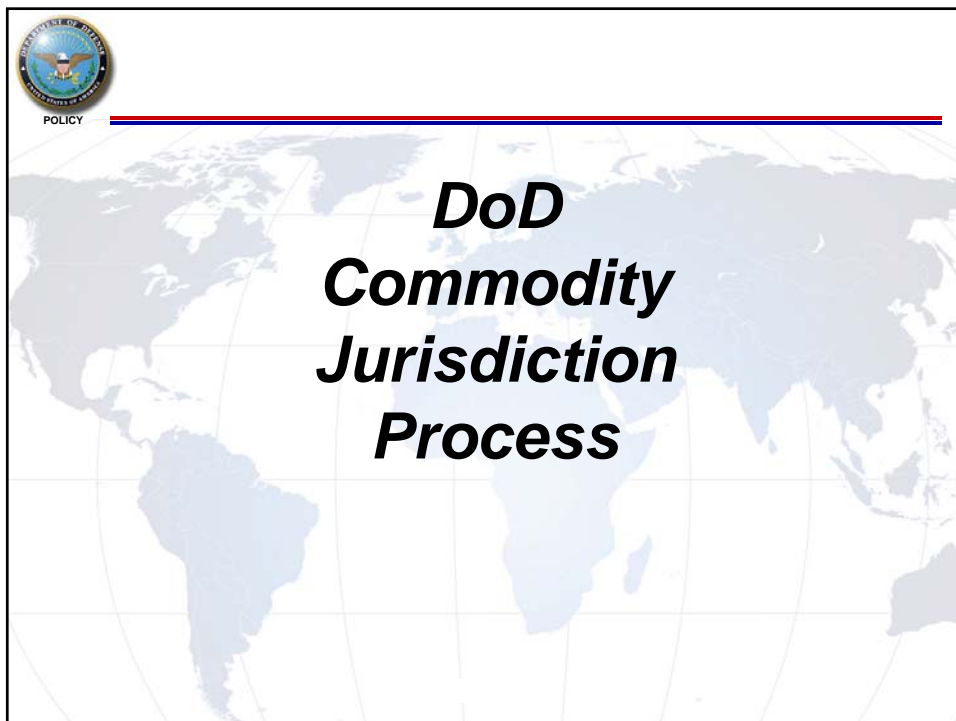
When to Consider a Formal CJ Submission

- When there is doubt on jurisdiction
- Before the item is shared/marketed
- When you begin to see/anticipate civil applications for items previously determined to be ITAR
- When there are equivalent civil items, either domestic or foreign, to an item believed to be ITAR

Most requests are to verify CCL or to have a USML item reconsidered as CCL

Summary

- Jurisdiction is based on facts
- A comprehensive internal compliance program will generally yield correct results
- Jurisdiction issues are resolved by the State Department as informed by Defense and Commerce
- Objective and complete presentation of the facts leads to timely decisions




Defense Technology Security Administration

Michael R. Laychak
Licensing Director




**Update Conference
July 30, 2014**

DTSA  Ensuring the Edge



DTSA CJ Review Process

- Receive all CJs staffed from DoS/DDTC
- Coordinates National Security and Technical Analysis review in accordance with ITAR/USML & DoD Policy
- Staff to DTSA/Technical & within DoD, as appropriate: Services, Joint Staff, DARPA, MDA, NGA, NSA, and DoD intelligence community.
- Provides DoD recommendations for commodities jurisdictional control to DoS/DDTC for CJs



CJ Submission Documents

- **The CJ Package:**
 - Completed Form DS-4076
 - Supporting information such as:
 - Explanatory letter
 - Product specifications, blueprints, drawings, course handouts, training materials
 - Sales data
 - Foreign availability information
 - Authorization Letter, if CJ submitted by a third party or representative



Control List Review Criteria

Items that should remain controlled on the USML:

- Is the item certainly or likely to be considered a “critical” item?
- Does the item have, by virtue of its function (as opposed to merely its form or fit), immediate tactical utility without modification?

Items for potential transfer to the CCL:

- Items that have been historically USML-controlled defense articles merely by virtue of modifications to their form or fit (as opposed to their function) and are types of items that do not provide substantial or significant military or intelligence advantage in and of themselves
- An end item fielded by militaries but has only insignificant military utility, is obsolete, or has features that would limit utility





POLICY



Questions?

<http://www.dtsa.mil/>
<http://elisa.dtsa.mil/>
<http://www.export.gov/ecr/>

Michael Laychak
571-372-2348
Michael.Laychak@dtsa.mil



DEFENSE TRADE CONTROLS COMMODITY JURISDICTION OVERVIEW

ERIC MCPHERSON
OFFICE OF DEFENSE TRADE CONTROLS POLICY



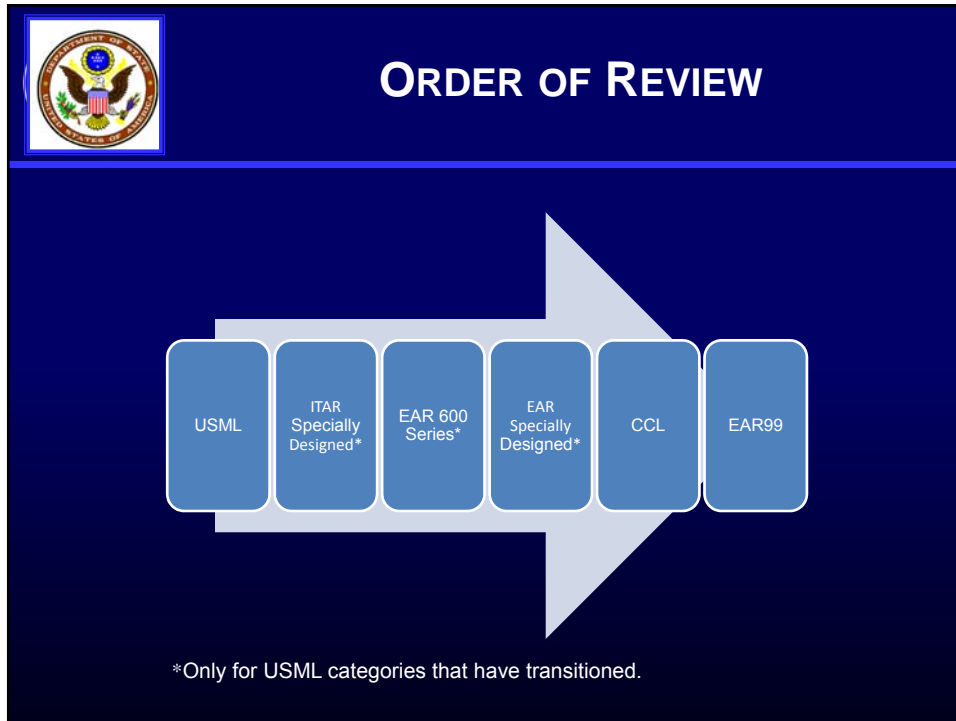
ORGANIZATION

- Commodity Jurisdictions (CJ) are a function of the Office of Defense Trade Control Policy (DTCP) within the Directorate of Defense Trade Controls (DDTC).
- DTCP Director is Ed Peartree
- CJ Team has 10 personnel



DESIGNATING DEFENSE ARTICLES AND DEFENSE SERVICES

- §2778 (a) (1) of the Arms Export Control Act
“In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purpose of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.”
- §120.3 of the International Traffic in Arms Regulations (ITAR) is the “Policy on designating or determining defense articles and services on the U.S. Munitions List.”
- ITAR §120.4 is the regulation for the Commodity Jurisdiction process.



POLICY FOR DESIGNATING DEFENSE ARTICLES AND DEFENSE SERVICES

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

(a) For purposes of this subchapter, a specific article or service may be designated a defense article (see §120.6 of this subchapter) or defense service (see §120.9 of this subchapter) if it:

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

(b) For purposes of this subchapter, a specific article or service shall be determined in the future as a defense article or defense service if it provides a critical military or intelligence advantage such that it warrants control under this subchapter.

Note to paragraphs (a) and (b): An article or service determined in the future pursuant to this subchapter as a defense article or defense service, but not currently on the U.S. Munitions List, will be placed in U.S. Munitions List Category XXI until the appropriate U.S. Munitions List category has been amended to provide the necessary entry.



POLICY FOR DESIGNATING DEFENSE ARTICLES AND DEFENSE SERVICES (CONTINUED)

(c) A specific article or service is not a defense article or defense service for purposes of this subchapter if it:

(1) Is determined to be under the jurisdiction of another department or agency of the U.S. Government (see §120.5 of this subchapter) pursuant to a commodity jurisdiction determination (see §120.4 of this subchapter) unless superseded by changes to the U.S. Munitions List or by a subsequent commodity jurisdiction determination; or

(2) Meets one of the criteria of §120.41(b) of this subchapter when the article is used in or with a defense article and specially designed is used as a control criteria (see §120.41 of this subchapter).

Note to §120.3: 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 this subchapter.

Remember: specially designed only applies to categories that have transitioned.



Now Focus on the USML

- ITAR §120.3 is a general policy statement for use by the U.S. government to inform you of how we determine items that are defense articles or services.
- Focus your self determination on the text of the USML
 - Transitioned categories are more specific and positive, while categories that have not transitioned are broadly controlling.
 - USML VI, VII, VIII, XIII, XVII, XIX, XX, and XXI today
 - USML IV, V, IX, X, and XVI in July
 - All other categories have not yet transitioned and have the “old” ITAR language.
- Start your review with the USML.
- For a transitioned category your part is there or it is not. For the other categories it may still be a little vague.
- If your part is not enumerated it may fall into a paragraph with “specially designed” as a control parameter. In this instance, please see ITAR § 120.41.



How CJs ARE A LITTLE DIFFERENT

- You do not have to be registered with DDTC to submit a Commodity Jurisdiction request.
 - Should your product/service be determined ITAR controlled you will be required to register with the Department of State.
- There are no fees for CJ requests, and the number of submissions will not affect your registration fee.
- You may submit a export license application while you have a CJ request under review. We will not factor in your license application into the final determination. We will consider it something done out of an abundance of caution on your part.
 - Should your item be determined to be CCL, you will no longer need your license for that specific commodity or service.
- CJs are the only legally binding jurisdiction determination. Meaning, if you submitted a Commodity Classification and Tracking System (CCATS) request to Commerce and got your Export Commodity Classification Number (ECCN) for your product, that does not mean that your product is not ITAR controlled.
 - Come to DDTC first if you have questions about the jurisdiction of your product.



Specially Designed, ITAR §120.41

Paragraph (a) describes how an article is specially designed. Paragraph (b) provides criteria for determining whether a part, component, accessory, or attachment is not specially designed.



Specially Designed, ITAR §120.41 (continued)

- (a)(1) As a result of development, has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions described in the relevant USML paragraph.
 - “Catch” based on performance



Specially Designed, ITAR §120.41 (continued)

- (a)(2) Is a part, component, accessory, attachment or software for use in or with a defense article.
 - Very broad catch

Note: Be sure to review the definitions in ITAR §121.8.



Specially Designed, ITAR §120.41

(continued)

- For all releases from specially designed, the phrase “specially designed” must be included in the control text. Something cannot be release from specially designed if the control text does not describe it as specially designed. (See the notes to 120.41 for additional details)
- (b)(1) Is subject to the EAR pursuant to a CJ determination.
 - EAR CJ determination
- (b)(2) Is, regardless of form or fit, a fastener, washer, spacer, insulator, grommet, bushing, spring, wire, or solder.



Specially Designed, ITAR §120.41

(continued)

- (b)(3) Has the same function, performance capabilities, and the same or “equivalent” form and fit as a commodity or software used in or with a commodity that:
 - Is or was in production (i.e., not in development); and
 - Is not enumerated on the USML.

Note: “equivalent” is defined to mean form has been modified solely for fit purposes. If you do anything else to it, other than modify how it fits, this release may not apply.



Specially Designed, ITAR §120.41 (continued)

- (b)(4) Was or is being developed with knowledge that it is or would be for use in or with both defense articles and commodities not on the USML.
 - Must have contemporaneous documents that establish this fact such as concept design information, marketing plans, declarations in patent applications or contracts.



Specially Designed, ITAR §120.41 (continued)

- (b)(5) Was or is being developed as a general purpose commodity or software, with no knowledge for use in or with a particular commodity or type of commodity (e.g., an aircraft or machine tool).
 - Must have contemporaneous documents that establish this fact



WHEN A CJ MAKES SENSE

- Where uncertainty exists, submit a CJ request to DDTC using form DS-4076
 - The ITAR does not require the submission of CJ requests
 - CJ requests are legally binding
 - After October 15, 2013, CJ requests related to revised USML categories must include an explanation as to why you cannot determine whether your item is identified on the USML



COMMODITY JURISDICTION PROCESS

- After initial review for completeness, a CJ request will be assigned a case number with this structure: CJ XXXX-14.
- Any case assigned a CJ case number will undergo interagency review.
- Interagency review is governed by National Security Council (NSC), and includes:
 - Department of Commerce
 - Department of Defense
 - As necessary:
 - NASA
 - Department of Energy
 - Department of Homeland Security
 - Other U.S. government agencies
- Department of State is responsible for resolving disputes in the interagency and has final authority on the determination.
- A final determination is mailed to the applicant in a hard copy letter; if you check the box in Block 19 of the DS-4076, you can also receive the letter via email.



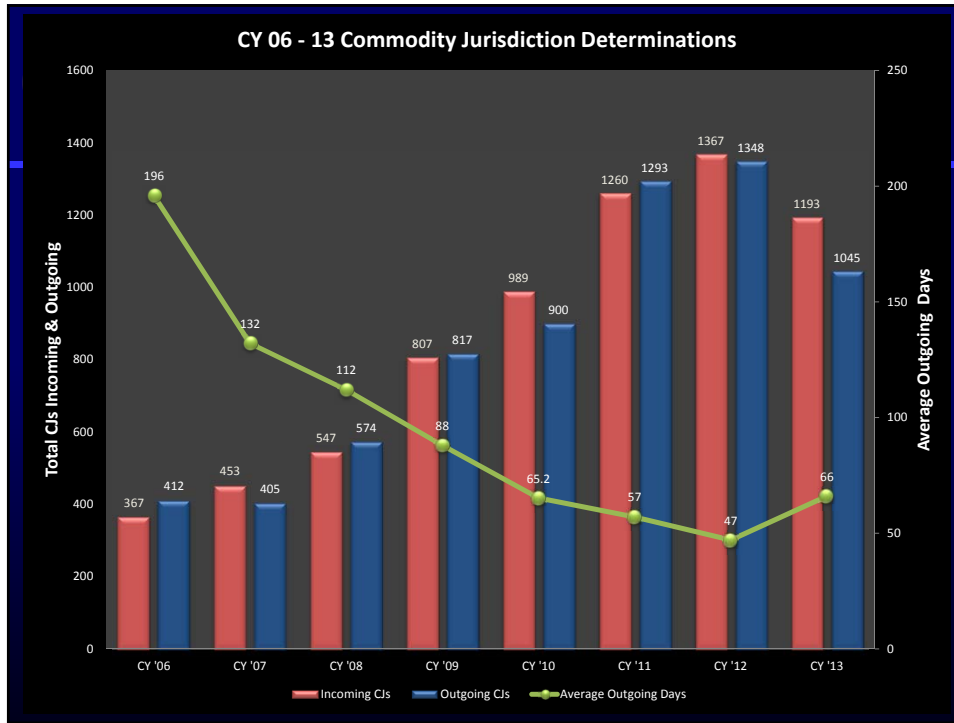
TIMELINES

- Should an applicant not have received electronic confirmation from DDTTC, please call the Response Team after one week.
- The interagency process can be complex and take some time to reach a decision. It is recommended that should an applicant need to export something while a CJ request is in process, an Export License be requested from Defense Trade Controls Licensing (DTCL). This request will not prejudice the final determination of your CJ request.
 - Any export license request would be subject to the regulations and policies of DTCL.
- Although every effort is made to complete a CJ Request in 60 days, it may take longer to complete the review.



Published Information

- DDTTC now publishes both processing status and final determinations on our CJ webpage.
- Processing status is visible in the MARY system.
 - MARY will identify when we received it, when we staffed it, and when the DOD and DOC positions were received.
 - If you have submitted a CJ request and do not see it in MARY within 2 business days, please contact us and we will track down the status. It is a manual data entry system.
 - We do not show other agencies as these are the 2 required.
 - If both agencies have responded that does not necessarily indicate that the case has closed.
 - A case may be still under review, escalated or in closing process, and will show as "Open" in MARY.
 - Please be patient if your case is less than 30 days and you see it in MARY - it is being reviewed.
- DDTTC also publishes a final determinations database.
 - This webpage can be filtered by column or keyword searched (CTRL "F")
 - Cases published are determined by what claims of proprietary information are contained in the DS-4076.
 - The more detailed information contained in Block 5, the more useful the database will be to industry for the purposes of comparing its products.



IMPORTANT NOTES

- A CJ issued by DDTC is the only legally-binding determination of jurisdiction.
- ITAR Part 121 contains the categories of the United States Munitions List (USML).
- An export license requested during CJ processing does not prejudice the final determination on the CJ request.
- Please fill out Block 5 of the DS-4076 as completely as possible, and be as specific and concise as possible in Block 15 should you feel information is proprietary.
- Applications and all attached documents will be reviewed by generalists and technical experts, so please explain your submission with both audiences in mind.