

Items Subject to the Jurisdiction of the International Traffic in Arms Regulations Are Controlled as “Defense Articles” at the Point of Manufacture

Section 38(a)(1) of the Arms Export Control Act (AECA), authorizes the President to “control the import and the export of defense articles and defense services.” The President is authorized to “designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the [U.S. Munitions List].” The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services was delegated to the Secretary of State and further delegated to the Deputy Assistant Secretary of State for Defense Trade Controls and the Managing Director, Directorate of Defense Trade Controls. The International Traffic in Arms Regulations (ITAR) implements the AECA, and Part 121 of the ITAR sets forth those items on the U.S. Munitions List (USML). Designations of defense articles are made by the Department of State with the concurrence of the Department of Defense. Items that are not subject to the jurisdiction of the ITAR are subject to the export control jurisdiction of other agencies, as described in ITAR section 120.5, such as the Export Administration Regulations (EAR).

Determining the jurisdiction and classification of items plays a fundamental role in the U.S. export control system. Indeed, determining whether an item is subject to the jurisdiction of the ITAR or of another set of export control regulations is the first step one must take when determining the applicable controls on the export, retransfer or reexport of that item. After the jurisdictional status of an item is determined (*e.g.*, whether it is subject to the ITAR or the EAR), then one must determine its classification status (*e.g.*, where on the ITAR’s USML or the EAR’s Commerce Control List the item is described). Only after these steps are completed can one determine whether a license or other authorization is required to export, retransfer or reexport the item to the destination, end-user or end-use at issue.

Thus, making incorrect self-jurisdiction and classification determinations can lead to delays in exporting as well as export violations. Numerous articles have been written by practitioners in the export field advising their fellow exporters to make sure of the proper jurisdiction and classification status of an item prior to its export, retransfer or reexport. One who exports an item without being certain of its

jurisdiction and classification status does so at his or her own peril. A mistake or mistaken assumption can lead to civil and criminal penalties. The ITAR provides a process by which one may seek and receive an official determination of the jurisdictional status of an item. These are referred to as “commodity jurisdiction” (CJ) determinations. (See ITAR § 120.4). Seeking and receiving such an authoritative determination provides legal certainty of the jurisdictional status of an item and a product line, and thereby reduces the risks of civil or criminal penalties for noncompliance and business disruptions.

ITAR §120.6 states that a “defense article,” is any item or technical data designated in §121.1 of the ITAR (i.e., the USML). This means that an item that is within the scope of the USML is subject to the jurisdiction of the ITAR and that an item that is not within the scope of the USML is not subject to the jurisdiction of the ITAR. The USML is, however, not an exclusive list of specific defense articles or parts and components. Rather, it includes general descriptions of types of items and also “catch-all” controls over non-specific parts, components, accessories, attachments, and other items that are specifically designed modified for other defense articles. The USML also includes all technical data, including software, and defense services directly related to any defense article.

The jurisdiction status of an item is determined as a matter of law at the time of its manufacture. Thus, a defense article remains a defense article from the time of its manufacture to and through any subsequent use, whether civil or military, unless it has been determined to not be ITAR-controlled through a CJ determination. The Department does not automatically provide jurisdiction determinations about specific articles or services when they reach the market. Rather, the person exporting, retransferring or reexporting an item is responsible for determining the jurisdiction and classification status of an item in order to take the first step in determining whether a U.S. government license or other authorization is required for the export, retransfer or reexport. In addition, ITAR registration requirements in ITAR Part 122 require manufacturers to make self-determinations regarding the jurisdiction status of their products at the time of manufacture.

Determinations made by exporters, reexporters, and manufacturers cannot change the actual jurisdiction status of an article. *Thus, an item that is within the scope of the USML remains ITAR-controlled even if an error is made in a jurisdiction or classification decision by a manufacturer or exporter.*

The Department of State is providing this official policy guidance as a consequence of unofficial guidance Department personnel provided in 2010

regarding parts and components controlled in U.S. Munitions List Categories VIII(h) (aircraft components) and XV(e) (spacecraft components). Recipients of that guidance in 2010 concluded that a product or item they incorrectly determined as not subject to the jurisdiction of the Department of State at the time of export from the U.S. may continue to be incorrectly controlled for purposes of re-export or retransfer. This official guidance supersedes that 2010 unofficial guidance.

In conclusion, determining the correct jurisdiction and classification status of an item or service is critical to avoiding potential violations of export control regulations. While companies may and indeed should make self-determinations regarding the jurisdiction and classification status of an item they manufacture, export or reexport, it is to their advantage to seek a CJ determination when in doubt about whether the article or service is covered by the USML.

If manufacturers or exporters have a question about this current policy guidance, they should contact Mr. Eric McPherson in the Office of Defense Trade Controls Policy. If manufacturers or exporters have a compliance concern about prior exports or future reexport or retransfer requirements, they should contact Mr. Glenn E. Smith, Chief of the Enforcement Division in the Office of Defense Trade Controls Compliance.