

A step-by-step overview of commodity jurisdiction



There are many good reasons for a company to seek a formal commodity jurisdiction ('CJ') determination from the Department of State's Directorate of Defense Trade Controls – and it's not as difficult as it might at first appear, write Olga Torres and Matt Fogarty.

Under U.S. export controls laws and regulations, companies are generally entitled to self-classify items they seek to export. However, there are many reasons why a company may want to seek a formal commodity jurisdiction ('CJ') determination from the Department of State's Directorate of Defense Trade Controls ('DDTC'). Most often, a company has developed a new product, service, or technology and it is unclear whether the item is captured on the U.S. Munitions List ('USML') or the Commerce Control List ('CCL'). A

where, otherwise, a company believes the classification may have changed.

Whatever the reason for seeking a determination, the CJ process is not as complex as it may initially seem. And, moreover, there are a number of steps a company can – and should – take in preparing a CJ request to ensure that the company receives a timely, accurate, and favourable CJ ruling.

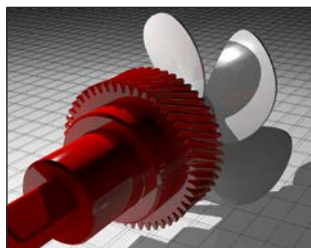
Step 1: Identify the desired classification

As an initial step, a company should make its own assessment of the

CJ submission package must provide substantial documentation, including:

- A completed form DS-4076;
- Technical specifications for the product (including information regarding its capabilities and possible uses);
- Marketing and technical brochures;
- Historical information regarding the product's design and development;
- Sales information (if available);
- Information regarding any identical or similar products available overseas; and
- Any other information that may be useful.

As discussed below, once all of this information is assembled, it can be uploaded electronically using DDTC's electronic form submission application.



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CJ offers the safety and assurance of an official determination.

Even where a product's classification appears clear from reviewing the USML and the CCL, a CJ may still be advisable. For example, a formal CJ determination provides official confirmation of a product's USML or CCL classification and could serve as strong evidence in the event of a future potential violation. A CJ could also be useful where a company is confident that its product is controlled under the Export Administration Regulations ('EAR'), but seeks to affirm that lower classification and/or to confirm that a more restrictive classification under the International Traffic in Arms Regulations ('ITAR') does not apply. CJs are also helpful in cases where a product's capabilities or end-users or end uses have changed or

potential classifications for a given product, service, or technology. The company's compliance, sales, and technical personnel should each review the USML and the CCL to attempt to identify possible controls applicable to the item. In this process, it is important to consider the full range of more restrictive and less restrictive classifications. Additionally, as you review each potential classification, it is helpful to document the reasons why the classification may or may not apply.

Step 2: Assemble the CJ submission package

In reviewing a CJ request, DDTC considers a number of factors, such as the product's capabilities, its actual and intended end-user and end uses, and whether or not it was designed to military specifications. Accordingly, a

Step 3: Strategise

A favourable CJ determination – a determination in which a product, service, or technology is determined not to be controlled on the USML – can be hugely beneficial to an organisation by avoiding licensing requirements and by expanding the universe of customers for a product. In this regard, every CJ request ought to have two aims. First, of course, it is critical to provide all relevant information regarding the product or technology so that the agencies can make an accurate determination. But, second, it's just as critical to make the case for your desired classification and/or to demonstrate why other, more restrictive classifications should not apply. This is the value of the transmittal letter: to tell the story of the product or technology – its development and intended uses, its

capabilities and limitations – and to make the argument for the classification State should assign.

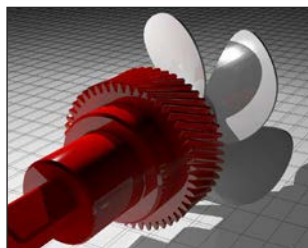
Additionally, think strategically for the future. Given the time and effort involved in obtaining a CJ, consider whether it might be useful to mention future anticipated versions or modifications and to cover such future products under the current CJ. Consider also whether the product or technology may be offered in different configurations or at different feature levels. It may be possible to separate out higher, military-specific configurations, which may yield a more restrictive classification, from lesser-featured, commercial configurations, which could yield a less restrictive classification and, consequently, be subject to fewer licensing requirements.

Step 4: Submit and wait

The full CJ request package – including the form DS-4076, the transmittal letter, and any accompanying attachments – must be submitted through DDTC's electronic form submission application, which is separate and distinct from DDTC's online licensing portal, D-Trade. Importantly, users need not go through the lengthy process of obtaining a D-Trade account just to submit a CJ

request; indeed, anyone, including companies not registered with DDTC,¹ can submit a CJ request.

DDTC tends to take anywhere from 30 to 60 days and sometimes longer to review requests and issue determinations. Once in the system,



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the request will likely enter into the inter-agency review process managed by DDTC's Office of Defense Trade Controls Policy. Each request is assigned to a CJ officer, who then determines whether and to what agencies to refer the request. A typical request may be referred to technical experts within DDTC, to the Commerce Department's Bureau of Industry and Security, and to the Defense Department's Defense Technology Security Administration ('DTSA'), as well as any other agencies that may be able to offer insight into the capabilities of, and national security concerns posed by, the product or technology. In turn, DTSA may refer the request to other offices within the Defense Department, such as the Department of the Army, for input on the classification. Once all of the agencies have responded, the CJ officer reconciles their recommendations and issues the determination. If conflicts arise, the case may be re-referred or escalated, thus extending the review time.

In general, this process is opaque and there is little a company can do to

help expedite or influence consideration of the request. However, companies can track the progress of the request using DDTC's online CJ tracking system, MARY,² and should follow up with DDTC if it appears the request has stagnated.

Once the determination is issued, it is critical for a company to communicate the export classification throughout the organisation. Additionally, note that an unfavourable CJ determination does not have to be the end of the process. If you believe the determination is in error or if there are aspects of the product or technology that it appears the agencies did not fully consider, you may request that DDTC reconsider. Though, unless and until a new determination is issued, the CJ stands as the product's formal classification and it is important to implement any necessary enhancements or modifications to the company's compliance programme to account for the classification.

Links and notes

¹ Although, note that, per 22 C.F.R. § 122.1, any U.S. person who manufactures or exports items controlled under the USML must register with DDTC. In this respect, if a U.S. company believes there is enough of a likelihood that a product or technology is controlled on the USML to warrant submitting a CJ request, it may be advisable for the company to first register with DDTC out of an abundance of caution in order to avoid a potential ITAR violation.

² See <http://dtas-online.pmdtcc.state.gov/MARY/index.cfm>.

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