The Strategic Commodity Jurisdiction (CJ) Request

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Introduction

With Export Control Reform, an anticipated result of moving to a positive control list is fewer commodity jurisdiction (CJ) requests. Previously, approximately two-thirds of the more than 1,000 CJ requests per year were to confirm a self-determination. While that need for a CJ under a positive control list may diminish, manufacturers and exporters should consider using the CJ process more for proactive and strategic purposes.

There are four primary types of proactive and strategic CJ requests:

(1) Where the applicant is seeking to "define out" an item off the U.S. Munitions List (USML) so that it doesn't meet the relevant control criteria where the criteria is ambiguous.

(2) Where the applicant is asking for the removal of the item from the USML where the control criteria clearly captures the item.

(3) Where, for categories not yet revised by Export Control Reform, the applicant would like to "grandfather" an item as subject to the Export Administration Regulations (EAR) even if the revised USML category would otherwise have included it.

(4) Where the applicant is developing emerging technologies and there is significant risk that amendments to the USML in the future will control such items, and applicant would like to exclude its item from these changes to the USML.

The following is a brief description of these types of strategic CJ requests.

Defining Out Items Off the U.S. Munitions List

One complaint often raised about the new USML control criteria is that there are still a number of entries that are unclear. While clarity has its advantages, there is one potential benefit in its absence: the ability to "define out" your item off the USML by the CJ process.

As a co-drafter of the new USML, the general reason for why some entries still lack clarity is because the government was unable to more precisely define the criteria for how to control certain items. As such, the government used broader language to cast a wider net and then determine those items on a case-by-case basis via the CJ process.

In this way, these strategic CJs are similar to how the system worked before Export Control Reform but now the government has a more focused view of the types of specific items that are intended to be controlled as opposed to the broader "specifically designed for military applications" concept.

To demonstrate the "define out" strategy, let's say you have an unmanned aerial vehicle (UAV) and it has certain properties that may fit Category VIII(a)(5) of the USML, which controls "unarmed military unmanned aerial vehicles." The criteria "unarmed" and "unmanned" are fairly straightforward, but what does "military" mean? Since "military" is undefined and could mean anything, this lack of clarity enables an applicant to make the case for why the item is not a "military" UAV and hence not a defense article.

For purposes of items potentially caught as specially designed, an effective strategic CJ can release items that do not otherwise meet the other four available specially designed releases. In this case, it will "define out" the item since it will not meet the definition of specially designed.

Where a CJ is identified as a prerequisite to release an item from the USML, such as in the case of Department of Defense funding for developmental items, any submission needs to be approached strategically to avoid control.

In all these cases, an applicant is trying to "define out" the item from the USML. If the Department of State

agrees, then it is not removing the item from the USML – which would require Congressional Notification - but is instead stating it doesn't meet the definition of a defense article.

Removing Items from the U.S. Munitions List

The CJ process is very rarely used for the direct purpose of requesting removal of an item from the USML. Instead, an applicant typically notes in the CJ request that it has treated the item or items as controlled on the USML out of an abundance of caution, and then the applicant tries to persuade the Department of State that the item should not be a defense article.

Under positive control criteria, especially where there is no ambiguous word or term in the relevant entry, it is more difficult to make the case that an item is not currently controlled as a defense article. For example, if you are a manufacturer of aircraft lithium-ion batteries that provide greater than 38 VDC nominal, then it is hard to argue for how the item doesn't meet Category VIII(h)(13) on the USML. Instead, the argument is why it should not be a defense article, and this requires a strategic approach to the CJ request.

Importantly, unlike the "define out" approach, the removal of a defense article from the USML requires a Congressional Notification under Section 38(f) of the Arms Export Control Act. These notifications, despite the 30-day timeframe identified in the ITAR, actually can take several years to process. Until then, the item is still a defense article even if the regulators agree that it is not a defense article.

Grandfathering Items for Unrevised USML Categories

One very strategic, and surprisingly not very often used, type of request is the use of a CJ to take advantage of the "grandfathering" provision from the initial implementation rule for Export Control Reform. This provision allows for a CJ determination issued prior to the effective date of a revised USML category to grandfather an item as subject to the EAR even where the revised criteria would otherwise expressly control the item.

For example, Boeing received a CJ determination on October 11, 2013 that grandfathered its wing-folding system for the Boeing 777 as subject to the EAR, even though on October 15, 2013 this wing-folding system was going to be enumerated by Category VIII(h)(4) of the USML. Thus, Boeing could control this wing-folding system as subject to the EAR and with an ECCN of 9A991.d rather than as USML.

As reflected by the Boeing example, this type of request has been effectively used. Although most categories have been revised, this strategy can still be used following the upcoming publication of the proposed rules revising Categories I, II, III, XII, XIV, and XVIII.

Grandfathering Items from Future USML Revisions

Another aspect that companies need to consider is future controls on the USML of certain emerging technologies that are not currently identified. Section 120.3 of the ITAR provides a broad policy statement for what types of items may be added to the USML in the future, and Category XXI serves as a current holding place for such items until the USML is appropriately amended.

For a company that invests millions or billions of dollars into a new product line that involves an emerging technology, determining whether to submit a strategic CJ determination request to the Department of State should be part of the development process. This CJ determination may also serve to grandfather the item from any future changes to the USML that would have enumerated the item. In this scenario, it may make business sense to submit such a CJ and to argue the case for why the item is not currently controlled and should not be controlled in the future.

Although these CJ requests are rare, they do happen. In my time on the CJ team at the Department of State from 2010 to 2013, about two dozen CJ requests fell into this area.

Conclusion

Moving to a positive control list is an essential step to more clearly identifying whether an item is a defense article. However, even with a positive control list, the CJ process is still going to be widely used. It is critical for companies to understand the strategic importance behind the types of CJ request identified in this article. As importantly, these strategic CJ requests require approaching and positioning the CJ request in ways that

are different from how most have been traditionally tailored before Export Control Reform. This difference can materially affect the outcome of the CJ determination.

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