



United States Department of State

*Bureau of Political-Military Affairs
Directorate of Defense Trade Controls*

Washington, D.C. 20522-0112

In Reply Refer to
DTC Case **GC 2909-14**

Mr. Brinley Salzmann
Export Group for Aerospace & Defence
c/o ADS
“Show Centre”
ETPS Road
Farnborough
Hampshire GU146FD
United Kingdom

YOUR LETTER DATED: August 22, 2014
SUBJECT: Authority of Foreign Persons to Make Jurisdictional and Classification
Self-Determinations

Dear Mr. Salzmann:

This is in response to your request for confirmation that the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR) permit foreign persons to determine the export control jurisdictional and classification status of commodities, technology, and software (“articles and items”) subject to the ITAR or the EAR when no U.S. government jurisdictional or classification determinations exist with respect to such articles or items.

The Departments of Commerce and State confirm that this is the case for both the ITAR and the EAR. Not only is a foreign person permitted to make such self-determinations, a foreign person indeed must know whether an article or item is subject to the jurisdiction of the ITAR or the EAR and how it is classified under the applicable set of regulations to know what, if any, licensing or other obligations the ITAR or the EAR impose on that party’s reexport or retransfer of the article or the item. This is because a core element of the ITAR and the EAR is that the person, whether U.S. or foreign, conducting a controlled transaction is the person primarily responsible for determining how to comply with such controls. Because the regulations do not control all articles and items equally, a person about to export, reexport, or retransfer an article or item subject to the ITAR or the EAR

In Reply Refer to
DTC Case **GC 2909-14**

must first determine which set of regulations governs and how the applicable regulation classifies the article or item. Only then can the person conduct the additional steps necessary to determine whether the ITAR or the EAR impose a licensing or other obligation on the proposed transaction. Because the ITAR and the EAR are extraterritorial, a foreign person's failure to take the steps necessary to ensuring compliance with the ITAR or the EAR can result in its being subject to fines or other punishment if its reexport or retransfer violated the ITAR or the EAR.

As noted in your request, the Departments of State and Commerce generally prefer that U.S. original equipment manufacturers (OEMs) provide jurisdictional and classification determinations to foreign persons engaging in controlled transactions with the articles and items manufactured by the OEM. OEMs tend to have the most accurate information necessary to make jurisdictional and classification determinations. In addition, an OEM's provision of correct jurisdictional and classification determinations to the U.S. and foreign parties engaged in controlled transactions with its articles or items generally helps to ensure more consistent compliance with the export control obligations pertaining to the articles and items. As also noted in your request, the Departments of State and Commerce, however, realize that OEMs or the other U.S. persons who originally exported an item may not be, for whatever reason, willing or able to provide jurisdictional and classification determinations regarding articles or items or may even provide determinations that are incorrect. In such cases, as described above, the foreign person about to engage in the reexport or retransfer of the article or item must review the ITAR, and potentially also the EAR, to determine the jurisdictional and classification status of the article or item to know whether the regulations impose any licensing or other obligations on its proposed transaction.

If, for example, the U.S. exporter does not provide the foreign person recipient with information about the jurisdictional and classification status of the articles or items exported, then the foreign person acts at its peril if it does not review the ITAR and the EAR to determine the jurisdictional and classification status of the item and any other regulatory obligations before reexporting or retransferring the article or item. Similarly, if the U.S. exporter provides the foreign person with a jurisdictional and classification determination that is incorrect, then the foreign person similarly acts on such incorrect information to its peril. This means, for example, that a foreign person is still liable for violating the ITAR if the U.S. exporter told the foreign person that the article was not subject to the ITAR (i.e., not enumerated or otherwise described on the USML) when, in fact, the item was

In Reply Refer to
DTC Case **GC 2909-14**

subject to the ITAR because it was enumerated or otherwise described on the USML. The ITAR's USML and the EAR's Commerce Control List (CCL) are just as available for a foreign person to review as they are for a U.S. person. See 22 C.F.R. §121.1 at www.pmddtc.state.gov and 15 C.F.R. 774, Supplement No. 1 at www.bis.doc.gov.

A core objective of the Administration's Export Control Reform Effort is to revise the ITAR and the EAR so that both U.S. and foreign persons will be able to more easily determine which regulation applies to an article or item and how the article or item is classified under the applicable regulation. If the regulations are clear and the foreign person has sufficient facts to make a correct jurisdictional and classification determination, then it does not need to ask the U.S. government to confirm the self-determination. If, however, a U.S. or foreign person is uncertain about whether an article or item is enumerated or otherwise described on the ITAR's USML, then it may seek from the State Department a formal determination regarding whether the article or item is subject to the ITAR – a commodity jurisdiction (CJ) determination. See 22 C.F.R. §120.4. Similarly, if a U.S. or foreign person is uncertain about whether an item is enumerated or otherwise described on the EAR's CCL, then it may seek from the Commerce Department a formal classification determination, generally referred to as a "CCATS." See 22 C.F.R. §748.3.

With respect to your request that the Departments of State and Commerce publish an FAQ on their respective websites confirming the guidance described in this letter, we agree that such an FAQ would be helpful to others and will publish the following, slightly modified version of your proposed FAQ:


Question: May a foreign person, such as an intermediate consignee or end user, "self-determine" (i.e., assess for itself) the jurisdictional and classification status of a commodity, item of software, or unit of technology under the International Traffic in Arms Regulations (ITAR) or the Export Administration Regulations (EAR), respectively, absent a U.S. government or other reliable determination pertaining to such items?

Answer: Yes. Absent such a determination, a foreign person may make a self-determination of an item's jurisdictional and classification status. Indeed, a foreign person is obligated to know whether an item is subject to the ITAR or, if subject to the EAR, how it is classified before reexporting or transferring the item in order to ensure compliance with the ITAR's and the

EAR's licensing and other obligations. The U.S. exporter is responsible for determining the jurisdictional and classification status of the items it is exporting. However, if reliable jurisdictional and classification information has not already been provided by another party, such as the original equipment manufacturer, then the foreign person may and, indeed, must make these determinations itself in order to avoid violating the ITAR or the EAR if it later reexports or retransfers the article or item. As a matter of due diligence, however, the foreign person should seek jurisdictional and classification information from the manufacturer of the items or the owner of the technology in question and resolve any potential differences in interpretation. If after reviewing the ITAR's U.S. Munitions List (USML) and all relevant facts, doubt exists regarding whether the item is enumerated or otherwise described on the USML, the foreign person should request from DDTTC a commodity jurisdiction determination pursuant to 22 C.F.R. §120.4. If the item is clearly not enumerated or otherwise described on the USML and, after reviewing the EAR and all relevant facts, there is doubt regarding whether or where the item is enumerated or otherwise described on the EAR's Commerce Control List, then the foreign person should request from the Department of Commerce Bureau of Industry and Security a commodity classification determination pursuant to 15 C.F.R. §748.3.

This letter is a joint response from the Departments of State and Commerce because you addressed the same question to both departments. Should you require further assistance on this matter, please contact Sam Harmon at (202) 663-2811 or via e-mail at HarmonSC@State.gov or Tim Mooney at (202) 482-2440 or via e-mail at Timothy.Mooney@bis.doc.gov.

Sincerely,



Kevin Wolf
Assistant Secretary
Bureau of Industry and Security



Kenneth B. Handelman
Deputy Assistant Secretary
Directorate of Defense Trade Controls