The first question to ask when doing an export control jurisdictional analysis is “What is the ‘it’ at issue?”

Of what do you seek a jurisdictional determination?

(a) An item (e.g., hardware or parts)?
(b) Information (e.g., technology or technical data)?
   (c) Software?
(d) A service (e.g., assistance or training)?
Has item already been determined to be not ITAR-controlled by (1) DDTC through a CJ, RWA, or other writing, or (2) the company using this decision tree?

Yes

Is item subject to EAR per 734.3?

Yes

Control per EAR (and consider possible dual controls of another agency)

No

Is the item (or any of its parts or components) identified on the USML (i.e., listed in a subcategory) or MTCR as controlled?

No

Yes

Is there reason to believe that DDTC or another party has taken the position that the item is ITAR controlled, such as in a CJ, voluntary disclosure, license application, proviso, DSP-83, TAA/MLA, contract clause, or a statement?

No

Has jurisdictional issue been resolved with DDTC such that company is confident that DDTC would not treat item as ITAR-controlled (e.g., through CJ involving similar item, correspondence, proviso, RWAs, or other writing?)

Do the criteria in 120.3 support possible argument that item should not be ITAR-controlled?

Yes

Shorthand Q: "Considering the criteria in 120.4, does the item have (a) predominant civil applications or civil performance equivalents and (b) no significant military or intelligence applicability?"

No

Identify specific USML subcategory and control per ITAR

Shorthand Q: "Was the item (or any part or component), regardless of how it is used now, originally specifically designed, developed, configured, adapted or modified in any way for a military application, military end-item, or a commercial satellite, spacecraft or launch end-item or application?"

"See-Through Rule" and ask whether any of the item’s parts or components are on USML.

Remember

Please send any suggestions, corrections, or other thoughts to Kevin Wolf at kwolf@bryancave.com or 202-508-6113 or to Susan Kovarovics at susan.kovarovics@bryancave.com or 202-508-6132.
Decision Tree B -- Export Control Jurisdiction Determination Process for Information to be Released to Foreign Persons in the United States or Abroad or Exported from the United States

Start Here

1. Information required for and directly related to a defense article per 120.10(a)(1)?
   - Yes
     - Does not include general scientific, mathematical, or engineering principles, basic marketing information, or general system descriptions per 120.10(a)(5). Also does not generally include financial, contractual, business, or admin data.
   - No
     - Related to defense article or service?
       - Yes
         - Control per NISPOM and applicable regs of other agencies (e.g., DoD or PTO)
       - No
         - Classified or covered by Invention Secrecy Order?
           - Yes
             - Is it “technology” per 772.1 (e.g., tech data or specific info necessary for development, production or use of item)?
               - Yes
                 - Subject to EAR per 734.3(a)?
                   - Yes
                     - “Publicly available” per 734.3(b)(3)?
                       - Yes
                         - Not subject to U.S. export control regulations
                       - No
                         - Control per regs of other agencies (e.g., NRC, OFAC, DOE, PTO)
                       - No
                         - Be mindful of BIS interpretation of General Technology Note
               - No
                 - Subject to regs other than EAR or ITAR per 734.3(b)?
                   - Yes
                     - Control per regs of other agencies (e.g., NRC, OFAC, DOE, PTO)
                   - No
                     - Remember
               - No
                 - “Public domain” per 120.11?
                   - Yes
                     - Control per NISPOM and applicable regs of other agencies (e.g., DoD or PTO)
                   - No
                     - Possible need for OSB review of DoD-owned data (32 CFR pt 250)
         - No
           - Has jurisdictional issue been resolved with DDTC such that company is confident that DDTC would not treat info as ITAR-controlled?
             - Yes
               - “Subject to EAR” per 734.3(a)?
                 - Yes
                   - “Publicly available” per 734.3(b)(3)?
                     - Yes
                       - Not subject to U.S. export control regulations
                     - No
                       - Control per regs of other agencies (e.g., NRC, OFAC, DOE, PTO)
                 - No
                   - Control per NISPOM and applicable regs of other agencies (e.g., DoD or PTO)
             - No
               - Is there reason to believe DDTC or others have taken position that information is ITAR-controlled?
                 - Yes
                   - “Publicly available” per 734.3(b)(3)?
                     - Yes
                       - Not subject to U.S. export control regulations
                     - No
                       - Control per regs of other agencies (e.g., NRC, OFAC, DOE, PTO)
                 - No
                   - Control per NISPOM and applicable regs of other agencies (e.g., DoD or PTO)

Note

Subject to regs other than EAR or ITAR per 734.3(b)?
Decision Tree D -- Export Control Jurisdiction Determination Process for (1) Activities Performed by U.S. Persons or (2) Services and Assistance to be Provided by U.S. Persons to Foreign Persons In the United States or Abroad

Start Here

Is it an activity controlled by 734.5? (E.g., Does it relate to proliferation concerns (nuclear, UAVs, missiles, CBW), denial orders, or encryption software?)

- Yes: Control per EAR (and consider possible dual controls of another agency, e.g., DOE or OFAC)
- No: Continue with decision tree

If the recipient of the service is not a "foreign person," then the service is not a "defense service."

Remember

Is it a defense service per 120.9?

- Yes: "Technical Assistance" containing "technology" per 772.1 and subject to EAR per 734.3?
  - Yes: Control per applicable regs of other agencies (e.g., DOE or OFAC)
  - No: Has jurisdictional issue been resolved with DDTC such that company is confident that DDTC would not treat service as ITAR-controlled?
    - Yes: Control per applicable regs of other agencies (e.g., DOE or OFAC)
    - No: Do the criteria in 120.3 support possible argument that the service should not be ITAR-controlled?
      - Yes: Control per applicable regs of other agencies (e.g., DOE or OFAC)
      - No: Identify specific USML subcategory of the defense article to which the defense service relates and control per ITAR

Remember

A service can still be a "defense service" even if underlying data is not ITAR-controlled

Is there reason to believe that DDTC or others have taken position that service is ITAR-controlled?

- Yes: Control per applicable regs of other agencies (e.g., DOE or OFAC)
- No: Do the criteria in 120.3 support possible argument that the service should not be ITAR-controlled?
  - Yes: Control per applicable regs of other agencies (e.g., DOE or OFAC)
  - No: Identify specific USML subcategory of the defense article to which the defense service relates and control per ITAR

Remember

"Technical Assistance" containing "technology" per 772.1 and subject to EAR per 734.3?