

## § 120.3

## 22 CFR Ch. I (4-1-03 Edition)

### § 120.3 Policy on designating and determining defense articles and services.

An article or service may be designated or determined in the future to be a defense article (see § 120.6) or defense service (see § 120.9) if it:

(a) Is specifically designed, developed, configured, adapted, or modified for a military application, and

(i) Does not have predominant civil applications, and

(ii) Does not have performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications; or

(b) Is specifically designed, developed, configured, adapted, or modified for a military application, and has significant military or intelligence applicability such that control under this subchapter is necessary.

The intended use of the article or service after its export (i.e., for a military or civilian purpose) is not relevant in determining whether the article or service is subject to the controls of this subchapter. Any item covered by the U.S. Munitions List must be within the categories of the U.S. Munitions List. The scope of the U.S. Munitions List shall be changed only by amendments made pursuant to section 38 of the Arms Export Control Act (22 U.S.C. 2778).

### § 120.4 Commodity jurisdiction.

(a) The commodity jurisdiction procedure is used with the U.S. Government if doubt exists as to whether an article or service is covered by the U.S. Munitions List. It may also be used for consideration of a redesignation of an article or service currently covered by the U.S. Munitions List. The Department must submit a report to Congress at least 30 days before any item is removed from the U.S. Munitions List. Upon written request, the Office of Defense Trade Controls shall provide a determination of whether a particular article or service is covered by the U.S. Munitions List. The determination, consistent with §§ 120.2, 120.3, and 120.4, entails consultation among the Departments of State, Defense, Commerce and other U.S. Government agencies and industry in appropriate cases.

(b) Registration with the Office of Defense Trade Controls as defined in part 122 of this subchapter is not required prior to submission of a commodity jurisdiction request. If it is determined that the commodity is a defense article or service covered by the U.S. Munitions List, registration is required for exporters, manufacturers, and furnishers of defense articles and defense services (see part 122 of this subchapter).

(c) Requests shall identify the article or service, and include a history of the product's design, development and use. Brochures, specifications and any other documentation related to the article or service shall be submitted in seven collated sets.

(d)(1) A determination that an article or service does not have predominant civil applications shall be made by the Department of State, in accordance with this subchapter, on a case-by-case basis, taking into account:

(i) The number, variety and predominance of civil applications;

(ii) The nature, function and capability of the civil applications; and

(iii) The nature, function and capability of the military applications.

(2) A determination that an article does not have the performance equivalent, defined by form, fit and function, to those used for civil applications shall be made by the Department of State, in accordance with this subchapter, on a case-by-case basis, taking into account:

(i) The nature, function, and capability of the article;

(ii) Whether the components used in the defense article are identical to those components originally developed for civil use.

NOTE: The form of the item is its defined configuration, including the geometrically measured configuration, density, and weight or other visual parameters which uniquely characterize the item, component or assembly. For software, form denotes language, language level and media. The fit of the item is its ability to physically interface or interconnect with or become an integral part of another item. The function of the item is the action or actions it is designed to perform.

(3) A determination that an article has significant military or intelligence applications such that it is necessary

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to control its export as a defense article shall be made, in accordance with this subchapter, on a case-by-case basis, taking into account:

(i) The nature, function, and capability of the article;

(ii) The nature of controls imposed by other nations on such items (including COCOM and other multilateral controls), and

(iii) That items described on the COCOM Industrial List shall not be designated defense articles or defense services unless the failure to control such items on the U.S. Munitions List would jeopardize significant national security or foreign policy interests.

(e) The Office of Defense Trade Controls will provide a preliminary response within 10 working days of receipt of a complete request for commodity jurisdiction. If after 45 days the Office of Defense Trade Controls has not provided a final commodity jurisdiction determination, the applicant may request in writing to the Director, Center for Defense Trade that this determination be given expedited processing.

(f) State, Defense and Commerce will resolve commodity jurisdiction disputes in accordance with established procedures. State shall notify Defense and Commerce of the initiation and conclusion of each case.

(g) A person may appeal a commodity jurisdiction determination by submitting a written request for reconsideration to the Director of the Center for Defense Trade. The Center for Defense Trade will provide a written response of the Director's determination within 30 days of receipt of the appeal. If desired, an appeal of the Director's decision can then be made directly to the Assistant Secretary for Politico-Military Affairs.

### § 120.5 Relation to regulations of other agencies.

If an article or service is covered by the U.S. Munitions List, its export is regulated by the Department of State, except as indicated otherwise in this subchapter. For the relationship of this subchapter to regulations of the Department of Commerce, the Department of Energy and the Nuclear Regulatory Commission, see § 123.20 of this

subchapter. The Treasury Department controls permanent imports of articles and services covered by the U.S. Munitions Import List from foreign countries by persons subject to U.S. jurisdiction (31 CFR part 505). The Department of Commerce regulates the export of items on the Commerce Control List (CCL) under the Export Administration Regulations (15 CFR parts 768–799).

### § 120.6 Defense article.

*Defense article* means any item or technical data designated in § 121.1 of this subchapter. The policy described in § 120.3 is applicable to designations of additional items. This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in § 121.1 of this subchapter. It does not include basic marketing information on function or purpose or general system descriptions.

### § 120.7 Significant military equipment.

(a) *Significant military equipment* means articles for which special export controls are warranted because of their capacity for substantial military utility or capability.

(b) Significant military equipment includes:

(1) Items in § 121.1 of this subchapter which are preceded by an asterisk; and

(2) All classified articles enumerated in § 121.1 of this subchapter.

[58 FR 39283, July 22, 1993, as amended at 62 FR 67275, Dec. 24, 1997]

### § 120.8 Major defense equipment.

Pursuant to section 47(6) of the Arms Export Control Act (22 U.S.C. 2794(6) note), *major defense equipment* means any item of significant military equipment (as defined in § 120.7) on the U.S. Munitions List having a nonrecurring research and development cost of more than \$50,000,000 or a total production cost of more than \$200,000,000.

### § 120.9 Defense service.

(a) *Defense service* means:

(1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad