

4. Jurisdiction and Classification

CUNY's tangible items such as laboratory instruments and materials, as well as software and technical data need to be classified prior to exportation to determine whether any control requirements apply to the item; in certain cases, laboratory access by certain foreign nationals for whom particular items are restricted, may also apply.

Jurisdiction Determination

CUNY must ensure that all "defense articles" (equipment, materials, technical data and software that appear on the [United States Munitions List \(USML\)](#)) are properly identified and treated as such. The process of determining whether an item is controlled as a defense article under the USML is called "jurisdictional determination," because it is a process of determining whether they are controlled under the jurisdiction of the [Department of State's](#) Directorate of Defense Trade Controls (DDTC's) ITAR. This process is fundamental to CUNY's export compliance program, as an ITAR determination governs licensing and authorization requirements for access by foreign nationals¹ in our laboratories², as well as transfers and exports out of the country. Hence, CUNY requires that no item (equipment, material, technical data, or software) be exported by any means, including access by foreign nationals within the U.S., until jurisdictional determination is confirmed by the OVCR.

The requirement to determine whether an item, in fact, meets the definition of a defense article may be triggered at numerous phases of the research process, starting with the earliest concept design stages. Many activities and functions such as Procurement, Human Resources, and IT, among others, are directly affected by this requirement. Therefore, all personnel thus affected must be aware of the jurisdiction determination process as assisted by OVCR and remain aware of all locations where such items are being used or stored. Once jurisdiction determination has been made, this information shall be provided to all affected parties by the OVCR.

Note: in the event a clear jurisdictional determination cannot be made from the facts at hand (i.e., there is an ambiguity as to whether the item may be alternatively controlled by the [Department of Commerce](#) as "dual use" or not controlled at all), the OVCR will apply for a [Commodity Jurisdiction](#) ("CJ") from DDTC. A CJ is a letter to DDTC requesting that the agency opine on the proper jurisdiction of an item, i.e. whether it is covered under the USML (and if so, under which Category) or falls under Commerce Department control. CJs are potentially complex documents that require significant preparation, the results of which can have significant implications for CUNY's current and future endeavors.

¹ For export control purposes, foreign nationals are defined as individuals who are not U.S. persons, i.e., they are not U.S. citizens, Permanent Residents, or Political Asylum recipients. Hence, foreign nationals are generally temporary immigrants present in the U.S. on B, J, H, F, L or O visas.

² One important exception to ITAR laboratory access restrictions involves ITAR items that CUNY self-invents (whether or not patented), as the product of fundamental research. When the process and results are intended for publication, a restriction may not apply. However, outbound ITAR exports will always trigger a license requirement analysis; and use of an ITAR item that CUNY procures or licenses from a vendor or third party to develop or inform its fundamental research may likewise trigger access restrictions, because the procured/licensed item is not per se self-invented.

USML Categorization

Once an item has been determined to fall under ITAR jurisdiction, its USML category must be identified. A defense article's categorization has important implications for CUNY in terms of potential licensing requirements or export restrictions, so categorizations must be performed precisely. For example, an asterisk next to a category's subparagraph denotes Significant Military Equipment (SME), which carries special licensing provisions and/or reporting. USML categorization will be performed by the OVCR.

ECCN Classification

Items that do not fall under ITAR jurisdiction may be controlled by the Department of Commerce (DOC), [Bureau of Industry and Security \(BIS\)](#), under the EAR. These items require EAR classification prior to export.

EAR classification is the exercise of understanding where an item or technology falls in the [Commerce Control List \(CCL\)](#). The CCL describes "dual-use" items (those items that may be considered for commercial or military use.) A classification will determine whether an export license is required based on the destination of the item or technology. It is important to note that items for purchase off-the-shelf, directly from a manufacturer, or by any other commercial means may be controlled under the EAR. Likewise, imported items (not withstanding foreign origin) could likewise be subject to EAR restrictions upon export out of the country.

Hence, CUNY requires proper export classification of EAR items to determine licensing requirements before any shipment or release is made. This also includes "deemed exports," defined as access by foreign nationals under certain circumstances to controlled EAR data for development, production or use of an item, where such applications fall outside the normal fundamental research³ exclusion (FRE).

There are three ways to classify an item. CUNY may self-classify; use a classification provided by a manufacturer, if available/applicable; or seek a formal classification from BIS.

Self-classifications of items that are under the jurisdiction of BIS will be performed by the OVCR, in conjunction with the PI. Together the OVCR and the PI will identify the accurate Export Classification Number (ECCN) on the CCL. This will be done as follows: a) review categories 0 through 9 on the CCL which cover areas such as electronics, lasers, computers,

³ By definition, fundamental research means that no publication or citizenship restrictions are accepted from any sponsor (industry or government agency) by any means (prime contract or flow-down), explicitly or unofficially. A publication restriction is one in which a sponsor requires withholding of research results for any reason other than a) to make sure that no proprietary data provided to the PI is disclosed in the published research results or; b) the time necessary to file a patent application. A sponsor's general requirement that publication be withheld "pending review" or review for a period of time beyond what is reasonably required to filter out proprietary data would constitute a publication restriction and disqualify CUNY from FRE protection. A citizenship restriction limits research participation to U.S. persons or reserves the right to determine which nationality among researchers can participate. Hence, in order to maintain as open a research environment as possible, CUNY strictly adheres to its policy of only conducting fundamental research, and not accepting any restrictions from a sponsor that would compromise the FRE.

sensors, aviation and marine applications, encryption, telecommunications, etc and identify the appropriate category; b) identify the appropriate product group, such as components, test equipment, materials, software, and technology, within the category; c) determine which ECCN heading and subheading will apply to the item by reviewing the characteristics of the item being classified. The ECCN will explain possible related export controls, possible license exceptions, and the reason for control. The reason for control in combination with the destination of the item will determine licensing requirements. When required, the OVCR will apply for the license.