



Breaking Down the New US Export Controls Framework and Tackling the Most Challenging Issues

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- **Understanding the new export controls framework, including order of review, specially designed, jurisdiction and classification**
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Laws, Regulations and Government Agencies

	Defense Articles & Services	Other Items	Dealings – Sanctioned Countries / Persons
Government Agency	US Department of State, Directorate of Defense Trade Controls (DDTC)	US Department of Commerce, Bureau of Industry and Security (BIS)	US Department of the Treasury, Office of Foreign Assets Control (OFAC)
Legal Authority	Arms Export Control Act (AECA)	International Emergency Economic Powers Act (IEEPA), Export Administration Act (EAA) - lapsed	International Emergency Economic Powers Act (IEEPA), Trading with the Enemy Act (TWEA)
Implementing Regulations	International Traffic in Arms Regulations (ITAR)	Export Administration Regulations (EAR)	Sanctions Regulations 31 C.F.R. 501-599 North Korea, Cuba, Syria, Sudan, Iran, Crimea SDN-driven programs (e.g., Russian Entities)
Control List	US Munitions List (USML)	Commerce Control List (CCL)	--
Website	pmddtc.state.gov	bis.doc.gov	treas.gov/offices/enforcement/ofac

Current State of ECR List Reform: Military Items Moved to the EAR

Not Transitioned, Totally ITAR

- **Category I – Firearms, Close Assault Weapons and Combat Shotguns**
- **Category II Guns and Armament**
- **Category III – Ammunition/Ordnance**
- **Category XII – Fire Control, Range Finder, Optical and Guidance and Control Equipment**
- **Category XIV – Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment**
- **Category XVIII – Directed Energy Weapons**

Transitioned, Moved to EAR

- Certain items and “specially designed” parts and components of the following:
 - Categories IV, V, VI, VII, VIII, IX, X, XI, XIII, XV, XIX and XX
- Administratively transitioned:
 - Categories XVII and XXI

Certain items from Cat. XVI, Nuclear Weapons Related Articles, transitioned to Department of Energy or the Nuclear Regulatory Commission

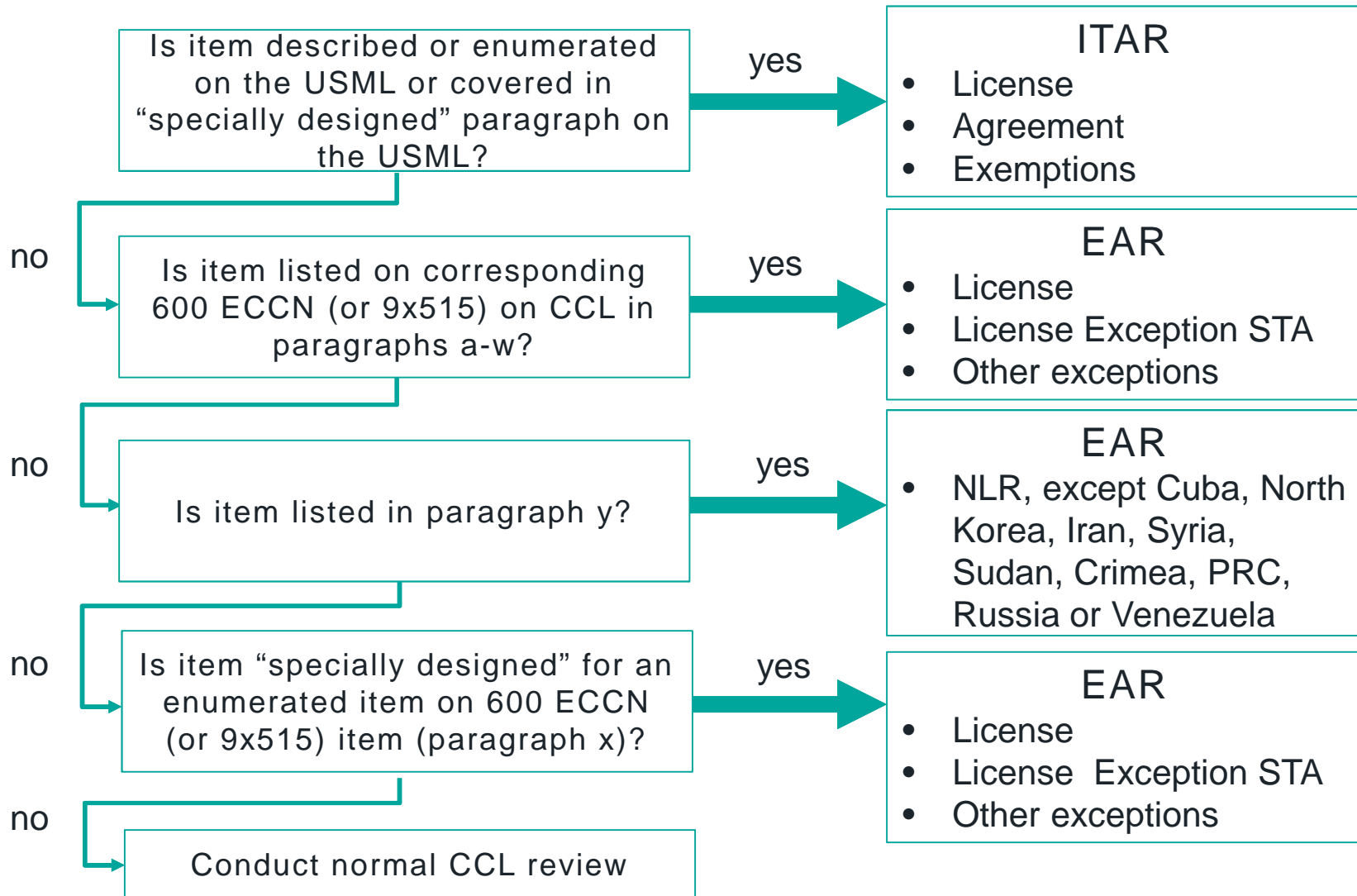
Current State of ECR List Reform: Military Items Moved to the EAR

Cat	ECCN(s)	ECCN Heading
IV	0A604 / 3A611 / 9A604	Commodities Related to Military Explosive Devices and Charges / Military electronics / Commodities related to launch vehicles, missiles, and rockets
V	1C111 / 1C608	Propellants and constituent chemicals for propellants / Energetic materials and related commodities
VI	8A609	Surface vessels of war
VII	0A606	Ground vehicles
VIII	9A610 / 9A619 / 3A611	Military aircraft / Military gas turbine engines / Military electronics
IX	0A614	Military Training Equipment
X	1A613 / 9A515	Armored and protective equipment / Spacecraft and related commodities
XI	3A611 / 9A620	Military electronics / Cryogenic and superconductive equipment

Current State of ECR List Reform: Military Items Moved to the EAR

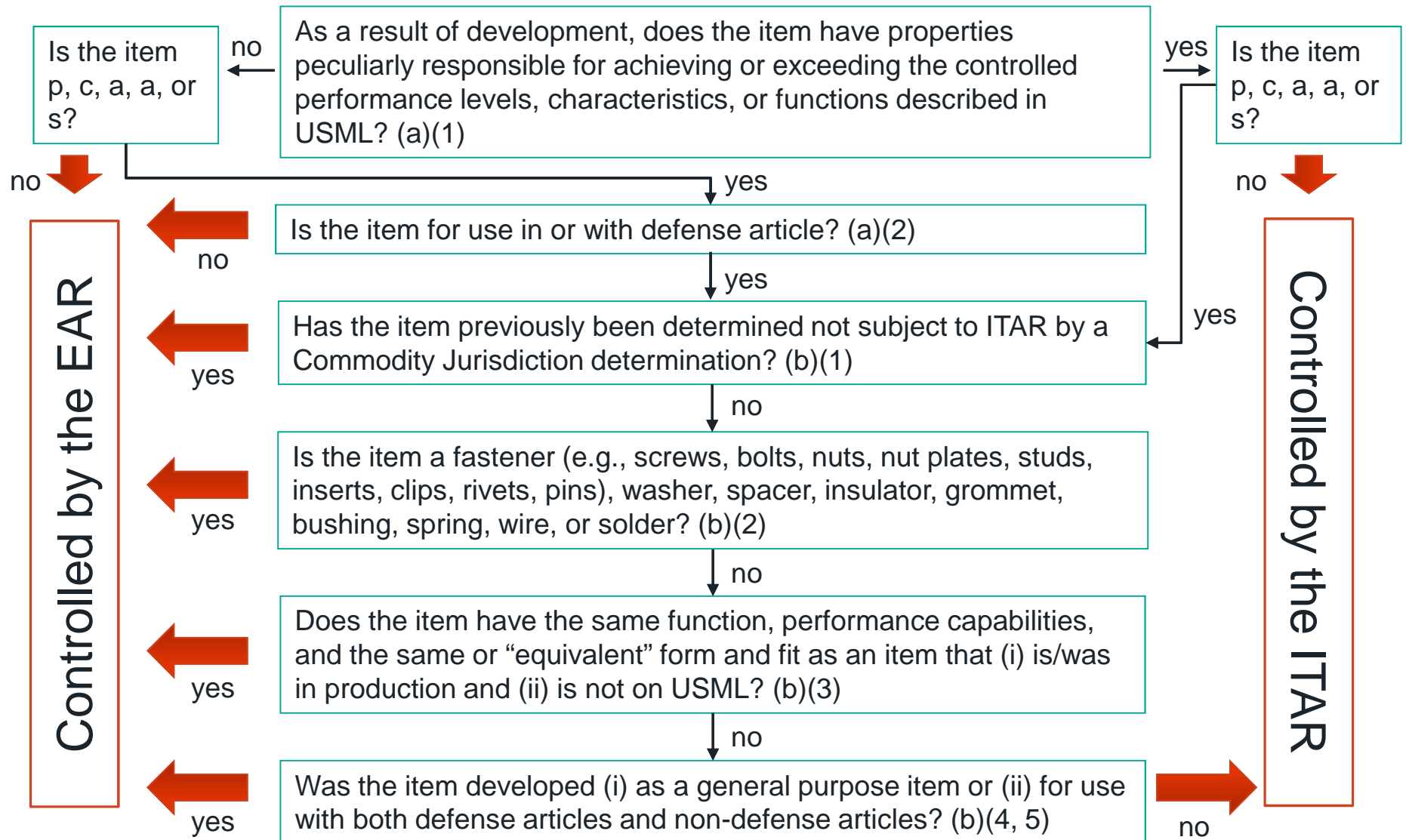
Cat	ECCN(s)	ECCN Heading
XIII	0A617 / 8A620.f / 0A606 / 1A613	Miscellaneous equipment and materials/ Submersible vessels, oceanographic and associated commodities / Ground vehicles / Armored and protective equipment
XV	9A515 / 9A004 / 3Axxx / 6Axxx / 7A004 / 7A104	Spacecraft and related commodities / International Space Station / Space-qualified items / Star trackers / Gyro-astro compasses and other devices
XVI	N/A	No articles from Category XVI--Nuclear Weapons Related Articles are identified in "600 series" ECCNs. Exports of such items or services are under the export control of the Department of Energy or the Nuclear Regulatory Commission
XIX	9A619	New USML Category Military gas turbine engines
XX	8A620	Submersible vessels, oceanographic and associated commodities

Post-Transition: Order of Review



Specially Designed Test: Decision Diagram for State (ITAR) vs. Commerce (EAR) Jurisdiction

§ 120.41



Definitions of Part, Component, Accessory, Attachment, or Software

- Part -- § 120.45(d)
 - Any single unassembled element of a major or a minor component, accessory, or attachment which is not normally subject to disassembly without the destruction or the impairment of designed use. (Examples: rivets, wire, bolts, etc.)
- Component -- § 120.45(b)
 - An item that is useful only when used in conjunction with an end-item. A major component includes any assembled element that forms a portion of an end-item without which the end-item is inoperable. (Examples: airframes, tail sections, transmissions, tank treads, hulls, etc.)
A minor component includes any assembled element of a major component.
- Accessories and attachments -- § 120.45(c)
 - Associated articles for any component, equipment, system or end-item, and which are not necessary for its operation, but which enhance its usefulness or effectiveness. (Examples: military riflescopes, special paints, etc.)
- Software -- § 120.45(f)
 - Includes but is not limited to the system functional design, logic flow, algorithms, application programs, operating systems and support software for design, implementation, test, operation, diagnosis and repair.

(b)(3) - Same Function, Performance Capabilities, and the Same or “Equivalent” Form and Fit

- The comparison item must be in “production” not in “development”
- “Equivalent” form means that the item being classified has been modified solely for fit purposes.
 - Form = its configuration (including the geometrically measured configuration), material, and material properties that uniquely characterize it
 - Fit = its ability to physically interface or connect with or become an integral part of another commodity
 - Function = the action or actions it is designed to perform.
 - Performance = the measure of a commodity's effectiveness to perform a designated function in a given environment (e.g., measured in terms of speed, durability, reliability, pressure, accuracy, efficiency)

(b)(4, 5) - Developed as Dual-purpose or as General Purpose Item

- Must establish that:
 - (4) Was or is being developed with knowledge that it is or would be for use in or with both defense articles on the USML and also commodities not on the USML;
 - (5) Was or is being developed as a general purpose commodity or software, i.e., with no knowledge for use in or with a particular commodity (e.g., a F/A-18 or HMMWV) or type of commodity (e.g., an aircraft or machine tool)
- This must be established by documents contemporaneous with the development.
 - For example, concept design information, marketing plans, declarations in patent applications, or contracts
 - Absent such documents, the commodity may not be excluded from being specially designed by either paragraph (b)(4) or (5)
- “Knowledge” includes not only the positive knowledge a circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence
 - Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts

Specially Designed Test: Product Migration / Export Jurisdiction

Product / Modification

- Specially designed component determined not subject to ITAR by prior CJ determination
- Fastener specially designed to meet MILSPEC and ruggedness
- Major component being developed to meet MILSPEC but also intended for civil market
- Part used in civ & mil production; military part differs only in mounting/physical dimensions
- Poor civil market sales, downgrade civ version capabilities and cost. Impact on military version?

Export Jurisdiction

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Order of Review: Phased Array Antenna

- Apply the order of review to a phased array antenna



Phased array antenna for use on commercial aircraft, trains, ships, etc.
Designed as antenna up and down link with communications satellite on the move

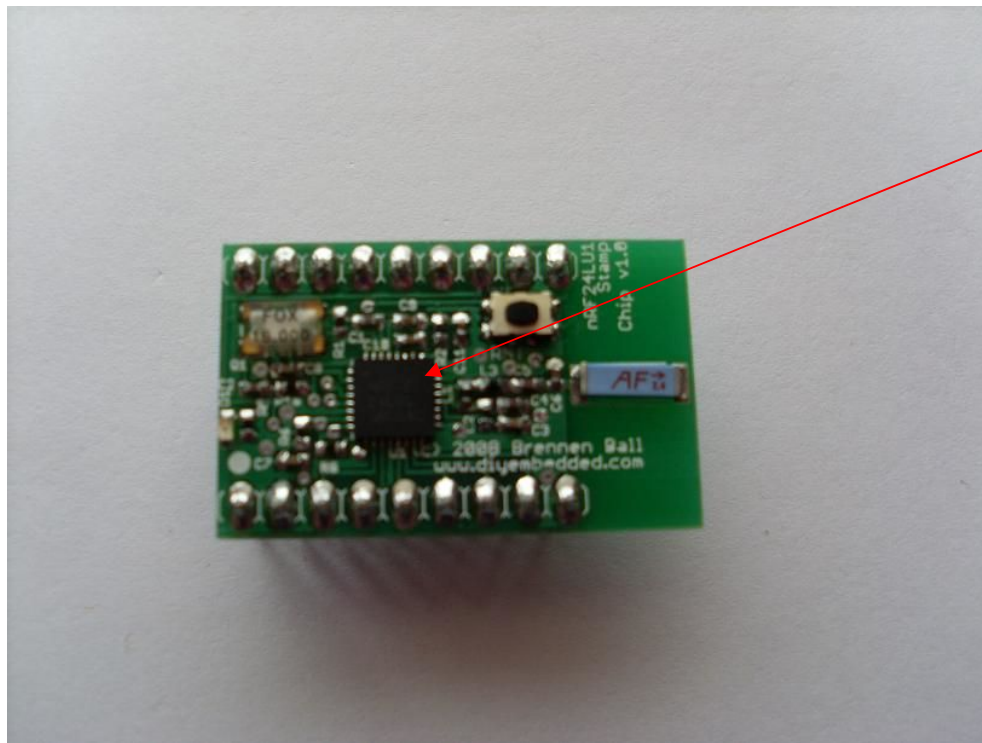
Order of Review: Phased Array Antenna

- Is item described or enumerated on the USML or covered in “specially designed” paragraph on the USML?
 - Category XI – Military Electronics
 - (c) Parts, components, accessories, attachments, and associated equipment, as follows:
 - (10) Antenna, and ***specially designed*** parts and components therefor, that:
 - (i) Employ four or more elements, electronically steer angular beams, independently steer angular nulls, create angular nulls with a null depth greater than 20 dB, and achieve a beam switching speed faster than 50 milliseconds;
 - (ii) Form adaptive null attenuation greater than 35 dB with convergence time less than one second;
 - (iii) Detect signals across multiple RF bands with matched left hand and right hand spiral antenna elements for determination of signal polarization; or
 - (iv) Determine signal angle of arrival less than two degrees (e.g., interferometer antenna);

See page 45 of the ITAR HANDBOOK

Order of Review: Rx / Tx ASIC used in Antenna

- Apply the order of review to the Rx / Tx ASIC



Application Specific
Integrated Circuit

Order of Review: Rx / Tx ASIC used in Antenna

- Is item described or enumerated on the USML or covered in “specially designed” paragraph on the USML?
 - Assume:
 1. The antenna is described by XI(c)(10)
 2. But the ASIC is not specially designed or programmed for this antenna
- What is the next step?
 - Check the remainder of the USML before you go to the CCL
 - Cat. XI(c)(1) controls ASICs “programmed for defense articles in this subchapter”
-- Assume not applicable for this ASIC
- Is the ASIC listed on corresponding 600 ECCN on CCL in paragraphs a-w?
 - Review 3A611.a-w (and the related controls note). See page 218 of ITAR HANDBOOK.
 - f. ASICs that are not controlled by paragraph .y of this entry and that are programmed for "600 series" items
- Is the ASIC listed in paragraph y? 3A611.y -- No
- Is the ASIC “specially designed” for an enumerated item on 600 ECCN item (paragraph x)? 3A611.x – No
- Is the ASIC listed elsewhere on the CCL. Start with 3A001

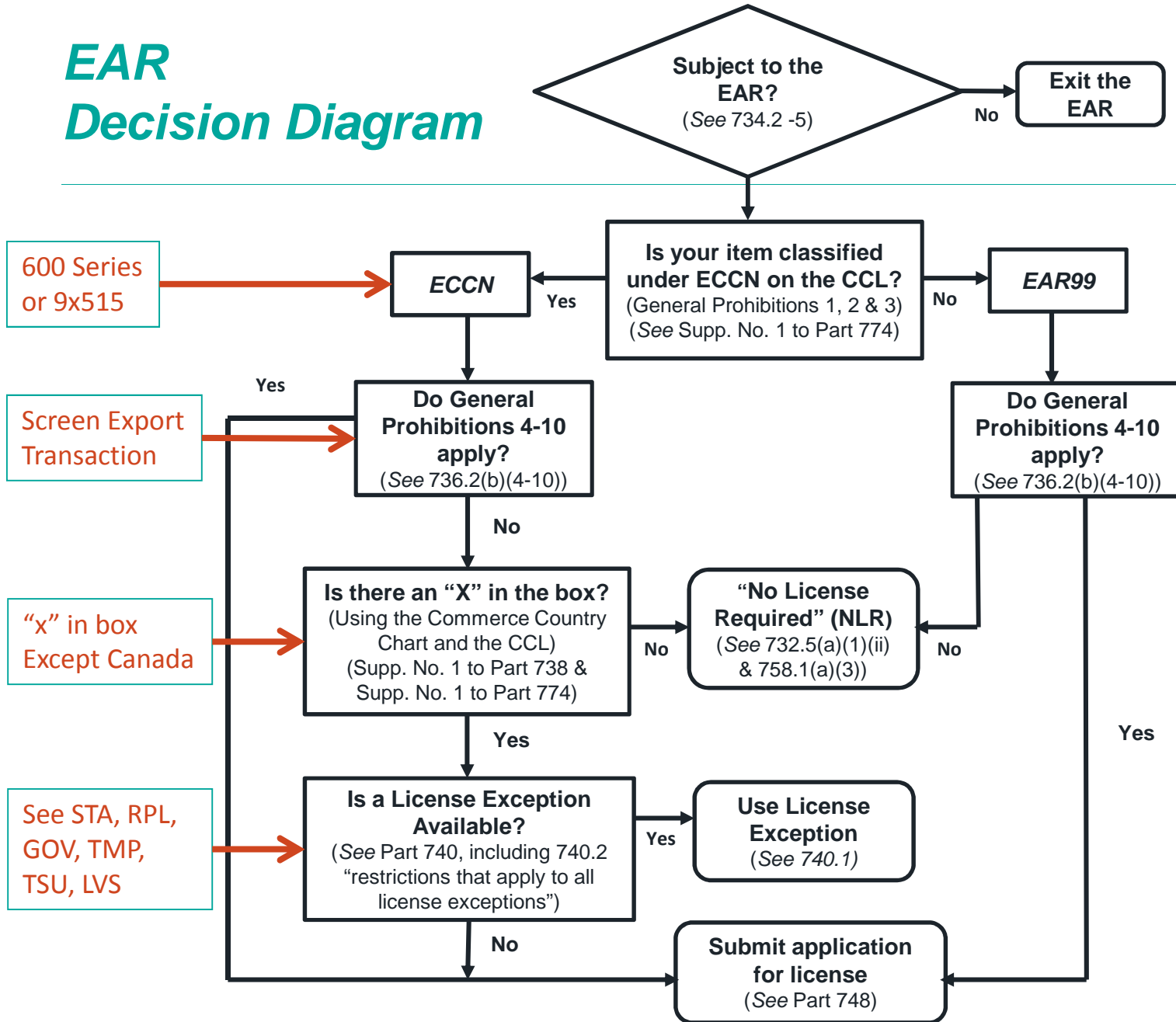
Problem with Bifurcated Jurisdiction: Technical Data Exchange with Foreign Person

- You need to exchange technical data with non-US ASIC producer to determine which option is best for the antenna system, including information related to other elements of the antenna that also are not specially designed for the antenna.
- Do you need a TAA?
 - Technical data related to the ASIC and other EAR components is controlled under the EAR
 - Technical data directly related to the antenna or its ITAR components is controlled under Cat. XI(d)

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EAR Decision Diagram



License Exception STA

See EAR Part 740 for License Exceptions and Supp. 1 for Country Groups

1. Authorizes exports and reexports to the following 36 countries:

1. Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey, or the United Kingdom.

2. Comments

1. The *ultimate* end user must be armed forces, police, paramilitary, law enforcement, customs, correctional, fire, or a search and rescue agency of a government of one of the countries listed in Country Group A:5, or the United States Government
2. The purchaser, intermediate consignee, ultimate consignee, and end user must have been previously approved on a license or other approval issued by BIS or DDTC (not necessarily for same product or program)
3. Consignee undertaking required for export ***and for reexport and retransfer***

License Exception RPL

See EAR Part 740 for License Exceptions and Supp. 1 for Country Groups

1. Authorizes

1. Exports and reexports associated with one-for-one replacement of parts previously lawfully exported from the US
2. Export and reexport of items that were returned to the United States for servicing and the replacement of defective or unacceptable US-origin commodities and software

2. Comments

1. Items to be replaced are to be destroyed abroad or returned for replacement
2. Cannot be used for holding in stock

License Exception TMP

See EAR Part 740 for License Exceptions and Supp. 1 for Country Groups

1. Authorizes temporary exports and reexports

1. Tools of the trade, except to Country Group E:2 + Sudan and Syria
2. Kits consisting of replacement parts, except to Country Group E:2
3. Items for exhibition or demonstration, except to Country Group E:2
4. Inspection, calibration, testing, repair, except to Country Group E:2
5. Exports to US sub, affiliate or facility in Country Group B (subject to further BIS authorization for retransfer or reexport)
6. Certain other exports and reexports

2. Comments

1. Allows demonstration at trade show
2. 600 series not allowed to D:5 countries

License Exceptions TSU

See EAR Part 740 for License Exceptions and Supp. 1 for Country Groups

1. Authorizes the export operation technology and sales technology
 1. "Operation technology" is the minimum technology necessary for the installation, operation, maintenance (checking), and repair of those commodities or software that are lawfully exported or reexported under a license, a License Exception, or NLR.
 2. "Sales technology" is data supporting a prospective or actual quotation, bid, or offer to sell, lease, or otherwise supply any item.
2. Comments
 1. Technology to support a sale can be exported and reexported anywhere (except sanctioned countries) without notice or license

Other License Exceptions

See EAR Part 740 for License Exceptions and Supp. 1 for Country Groups

1. License Exception GOV

1. Authorizes exports and reexports of the following to personnel and agencies of the US Government or agencies of cooperating governments
 1. Items for use by personnel and agencies of the US Government
 2. Items for use within national territory by agencies of cooperating governments
 3. Items for use by diplomatic and consular missions of a cooperating government
 4. Other international bodies
 5. Comment:
 1. This is for direct export to the USG or other cooperating governments not for delivery through industry contractor

2. License Exception LVS

1. Authorizes the export and reexport of items of limited value as specified in the ECCN to Country Group B (Supp. 1 to Part 740)

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Squire Patton Boggs Worldwide Locations



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Cleveland	Northern Virginia	Buenos Aires+	Berlin	Dubai	Moscow	Hong Kong
Columbus	Palo Alto	Caracas+	Birmingham	Frankfurt	Paris	Jakarta+
Dallas	Phoenix	La Paz+	Bratislava	Kyiv	Prague	Perth
Denver	San Francisco	Lima+	Brussels	Leeds	Riyadh	Seoul
Houston	Tampa	Panamá+	Bucharest+	London	Warsaw	Shanghai
Los Angeles	Washington DC	Santiago+	Budapest	Madrid		Singapore
Miami	West Palm Beach	Santo Domingo				Sydney
						Tokyo

+Independent Network Firm

- 16 January 2016 Implementation Day of the Joint Comprehensive Plan of Action (JCPOA) between the E3/EU+3 and Iran
- US primary sanctions remain in place and US companies generally continue to be unable to do business with or involving Iran
- General License H authorizes foreign subsidiaries to engage in almost all Iran-related transactions that a purely non-US company could engage in without triggering the possible imposition of US sanctions
 - 8 categories of transactions that remain prohibited to foreign subsidiaries including transactions with persons on the SDN List
 - Authorizes US persons to establish or alter operating policies and procedures to enable foreign subsidiaries to engage in permitted Iran-related transactions
 - OFAC warns against providing transaction specific advice
 - US persons may not facilitate or approve transactions
 - US persons may not structure transactions or otherwise help their sub avoid the sanctions or fit within General License H

EAR De Minimis Rule (15 C.F.R. §734.4)

- General Rule:
 - If the foreign-made item is destined for Cuba, Iran, Syria, Sudan or North Korea, the US controlled content is de minimis if it is valued at 10% or less of the total value of the foreign-made item
 - If the foreign-made item is destined for any other country, the US controlled content is de minimis if it is valued at 25% or less of the total value of the foreign-made item
 - Compare hardware to hardware, software to software and technology to technology; do not sum US hardware, software and technology content
- 600 Series Rule:
 - There is no de minimis level for foreign-made items that incorporate US-origin “600 series” items when destined for a country listed in Country Group D:5 (ITAR 126.1 countries)
- Certain exclusions and limitations:
 - No de minimis for certain: high-performance computers, encryption technology, 9E003 technology and 6A003 items.
 - Special rules and requirements for encryption
 - Must submit a one-time report on de minimis calculation for technology
- OFAC also does not require a license for reexports when US content is 10% or less
 - 31 C.F.R. §560.205

About George Grammas

George Grammas is a partner in the Washington, DC office of Squire Patton Boggs (US) LLP. He chairs the firm's International Trade / Global Import and Export Compliance Practice, and is chair emeritus of the Aerospace and Defense Industry Group.

During his more than 25 years of practice in export controls, Mr. Grammas has served as advisor to the State Department through the Defense Trade Advisory Group; co-chair of the Joint Defense Trade Committee of Electronic Industries Alliance and the Aerospace Industries Association; chair of the export controls committee for CANEUS International; international trade counsel to the EIA; and legal adviser to the Society for International Affairs.

Squire Patton Boggs (US) LLP is part of the global firm Squire Patton Boggs comprised of over 1,500 lawyers in 44 offices among 21 countries.



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