



Strengthening Trade Compliance in Line with Recent Legislative Developments and Impacts to Controls via an Examination of Extraterritorial Applications, Order of Review, and Classification

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marcus evans[®] Export Controls & Technology Transfers

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Agenda

- Recent Developments
- Case Study
 - ✓ Navigating Complex Licensing Regime
 - ITAR vs EAR Jurisdiction and Classification, including Order of Review and Specially Designed Test
 - ✓ Understanding the Challenges of Non-US Partners
 - US Content Contamination Problem, De Minimis Rule and Direct Product Rule



Defense Articles / Services

Government Agency:

US Department of State,
Directorate of Defense Trade
Controls (DDTC)

Legal Authority:

Arms Export Control Act (AECA)

Implementing Regulations:

International Traffic in Arms
Regulations (ITAR)

Control List:

US Munitions List (USML)

Website (guidance):

pmdrtc.state.gov

Other Items

Government Agency:

US Department of Commerce,
Bureau of Industry and Security
(BIS)

Legal Authority:

International Emergency
Economic Powers Act (IEEPA);
Export Control Reform Act (ECRA)

Implementing Regulations:

Export Administration Regulations
(EAR)

Control List:

Commerce Control List (CCL)

Website (guidance):

bis.doc.gov

Dealings - Sanctioned Countries

Government agency:

US Department of the Treasury,
Office of Foreign Assets
Control (OFAC)

Legal authority:

International Emergency
Economic Powers Act (IEEPA);
Trading with the Enemy Act
(TWEA)

Selected Programs:

Cuba, Syria, Iran, N. Korea,
Crimea Region
SDN/SSI-driven programs

Website (guidance):

treas.gov/offices/enforcement/ofac

- Sanctions/Recent OFAC Rules
 - April 2018. OFAC designated seven Russian oligarchs, 12 companies they own or control, 17 senior Russian government officials, a state-owned Russian weapons trading company and its subsidiary, a Russian bank
 - May 2018. Withdrawal from the JCPOA
 - January 2019. OFAC Designates PdVSA. Blocks all property and interests in property of PdVSA subject to US jurisdiction. It also prohibits US persons from engaging in transactions with PdVSA

- Export Control Reform
 - Movement of Items from USML to CCL
 - “Specially Designed” Test for Jurisdiction and Classification
- Recent EAR Rules
 - Additions/changes to Entity List and Unverified List
 - CCL Changes
- Recent ITAR Rules
 - § 126.4. Expands exemption for transfers of defense articles and services by or for a Department or Agency of the US Government
 - Proposed forms (license, disclosure, CJ, registration, retransfers, brokering)
 - USML Changes
- Export Control Reform Act of 2018
- Foreign Investment Risk Review Modernization Act of 2018

Current State of Export Control Reform (“ECR”)

| USML Category | | Key Milestone Dates | | Transition |
|---------------|--------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------|-----------------------------------------------|
| No. | Description | Effective Date | Transition End Date | ECCN |
| I. | Firearms | 24 May 2018 DDTC published proposed rules with opportunity to comment. DDTC drafting final rule, OMB has approved, and Congress is notified under 38(f). However, final rule still pending with DDTC. No further information available. | | |
| II. | Artillery | | | |
| III. | Ammunition | | | |
| IV. | Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines | 07/01/2014 | 06/30/2016 | 0A604 / 3A611 / 9A604 |
| V. | Explosives and Energetic Materials, Propellants, Incendiary Agents, and Their Constituents | 07/01/2014 | 06/30/2016 | 1C111 / 1C608 |
| VI. | Surface Vessels of War and Special Naval Equipment | 01/06/2014 | 01/05/2016 | 8A609 |
| VII. | Ground Vehicles | 01/06/2014 | 01/05/2016 | 0A606 / 3A611 |
| VIII. | Aircraft and Related Articles | 10/15/2013 | 10/14/2015 | 9A610 / 9A619 / 3A611 |
| IX. | Military Training Equipment | 07/01/2014 | 06/30/2016 | 0A614 |
| X. | Personal Protective Equipment | 07/01/2014 | 06/30/2016 | 1A613 / 9A515 |
| XI. | Military Electronics | 12/30/2014 | 12/29/2016 | 3A611 / 9A620 |
| XII. | Fire Control/Sensors/Night Vision | 12/31/2016 | 12/30/2018 | 7A611 |
| XIII. | Materials and Miscellaneous Articles | 01/06/2014 | 01/05/2016 | 0A617 / 8A620.f / 0A606 / 1A613 |
| XIV. | Toxicological Agents | 12/31/2016 | 12/30/2018 | 1A607 |
| XV. | Spacecraft and Related Articles | 11/10/2014 | 11/09/2016 | 9A515 / 9A004 / 3Axxx / 6Axxx / 7A004 / 7A104 |
| XVI. | Nuclear Weapons Related Articles | 07/01/2014 | 06/30/2016 | N/A |
| XVII. | Classified Articles, Technical Data, and Defense Services | 10/15/2013 | 10/14/2015 | N/A |
| XVIII. | Directed Energy Weapons | 12/31/2016 | 12/30/2018 | 6B619 |
| XIX. | Gas Turbine Engines and Associated Equipment | 10/15/2013 | 10/14/2015 | 9A619 |
| XX. | Submersible Vessels and Related Articles | 01/06/14 | 01/05/2016 | 8A620 |
| XXI. | Articles, Technical Data, and Defense Services Otherwise Not Enumerated | 10/15/2013 | 10/14/2015 | N/A |

- November 19, 2018. BIS advance notice of proposed rulemaking seeks public comments
 - To define and identify emerging technologies critical to national security of the US
 - Technologies that **should be** subject to US export controls
- Indicates BIS intention to impose export licensing requirements on currently EAR99 technology to China and other countries
 - EAR99 and ECCNs xY9xx (controlled only for AT reasons)
- In identifying emerging technologies, consider:
 - The development of emerging technologies in foreign countries
 - The effect export controls may have on the development of such technologies in US
 - The effectiveness of export controls on limiting the proliferation of emerging technologies in foreign countries

Export Control Reform Act of 2018

- Biotechnology, such as:
 - Nanobiology
 - Synthetic biology
 - Genomic and genetic engineering
 - Neurotech
- Artificial intelligence (AI) and machine learning technology, such as:
 - Neural networks and deep learning (e.g., brain modelling, time series prediction, classification)
 - Evolution and genetic computation (e.g., genetic algorithms, genetic programming)
 - Reinforcement learning
 - Computer vision (e.g., object recognition, image understanding)
 - Expert systems (e.g., decision support systems, teaching systems)
 - Speech and audio processing (e.g., speech recognition and production)
 - Natural language processing (e.g., machine translation)
 - Planning (e.g., scheduling, game playing)
 - Audio and video manipulation technologies (e.g., voice cloning, deepfakes)
 - AI cloud technologies
 - AI chipsets
- Position, navigation and timing (PNT) technology
- Microprocessor technology, such as:
 - System on chip (SoC)
 - Stacked memory on chip
- Advanced computing technology, such as:
 - Memory-centric logic
- Data analytics technology, such as:
 - Visualization
 - Automated analysis algorithms
 - Context-aware computing
- Quantum information and sensing technology, such as:
 - Quantum computing
 - Quantum encryption
 - Quantum sensing
- Logistics technology, such as:
 - Mobile electric power
 - Modeling and simulation
 - Total asset visibility
 - Distribution-based Logistics Systems (DBLS)
- Additive manufacturing (e.g., 3D printing)
- Robotics, such as:
 - Micro-drone and micro-robotic systems
 - Swarming technology
 - Self-assembling robots
 - Molecular robotics
 - Robot compliers
 - Smart dust
- Brain-computer interfaces, such as:
 - Neural-controlled interfaces Mind-machine interfaces
 - Direct neural interfaces
 - Brain-machine interfaces
- Hypersonics, such as:
 - Flight control algorithms
 - Propulsion technologies
 - Thermal protection systems
 - Specialized materials (for structures, sensors, etc.)
- Advanced materials, such as:
 - Adaptive camouflage
 - Functional textiles (e.g., advanced fiber and fabric technology) – Biomaterials
- Advanced surveillance technologies, such as:
 - Faceprint and voiceprint technologies

Foreign Investment Risk Review Modernization Act of 2018

What is CFIUS? The Committee on Foreign Investment in the United States is an interagency committee composed of various national security-related executive department agencies (including the Departments of Treasury, Commerce, State, Homeland Security, Defense, Justice and Energy, and with various White House offices).

What has changed? On August 13, 2018, legislation reforming CFIUS authority and process (Foreign Investment Risk Review Modernization Act (FIRRMA)) and dual-use export controls (Export Controls Reform Act (ECRA)) were signed into law as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA) (H.R. 5515, 115th Cong. (2018)). This legislation expands CFIUS's authority to review investment in US businesses and expand the scope of controlled technologies to include emerging technologies not currently controlled.

Implementation status? FIRRMA is partially implemented by the Department of Treasury through the Pilot Program. The Department of Commerce is in the process of defining and establishing controls for emerging technologies (i.e., not currently controlled).

| | Pre-FIRRMA | Post FIRRMA | Pilot Program (Effective as of November 10, 2018) | |
|---------------------|-----------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Covered Transaction | Transaction that results in, or could result in, control of a US business by a foreign person | Pending implementation, will add: <ul style="list-style-type: none"> • Acquisitions of property interest in proximity to national security facilities • Minority/passive investments in critical technology/infrastructure US business • Minority/passive investments with access to personal data of US citizens Exception for foreign passive investments via funds with a US general partner (GP) and where limited partners (LPs) do not have investment control or access to non-public technical information (e.g., an investment target's technology) | <ul style="list-style-type: none"> • Acquisition of equity interest or contingent equity interest by foreign person in "Pilot Program US Business;" and • One or More Access Rights <ul style="list-style-type: none"> – The right to access any material non-public technical information in the possession of the US business – The right to appoint a membership or observer to the board of directors (or similar body) – The right to be involved in substantive decision-making (other than voting shares) regarding critical technology OR | <ul style="list-style-type: none"> • Transaction that could result in foreign control of a Pilot Program US Business (e.g., a joint venture) |
| Filing | Voluntary notice | Pending implementation, will add: <ul style="list-style-type: none"> • Voluntary declaration (an abbreviated filing) • Mandatory declaration – Minority/passive investments above, if a foreign government will hold directly or indirectly a "substantial interest"; must be submitted 45 days prior to closing | <ul style="list-style-type: none"> • Mandatory declaration (abbreviated filing) • Possible results: (1) clear transaction; (2) request parties file full notice; (3) inform parties that cannot complete review without full notice; (4) initiate unilateral review • Alternative, parties can submit a file full notice | |
| Processing Timeline | Review – 30 days Investigation – 45 days Presidential Action – 15 days | Review – 45 days Investigation – 45 days (CFIUS may extend by 15 days) Presidential Action – 15 days | If a full notice, process timing same as under FIRRMA | If a declaration filing, CFIUS must take an action described above within 30 days |
| Filing Fee | None | Pending implementation, filing fee of 1% of the transaction value or US\$300,000, whichever is less | None | |

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Is item described or enumerated on the USML or covered in “specially designed” paragraph on the USML?

yes

ITAR

- License
- Agreement
- Exemptions

EAR

- License
- License Exception STA
- Other exceptions

EAR

- NLR, except Cuba, North Korea, Iran, Syria, Sudan, Crimea, PRC, Russia or Venezuela

EAR

- License
- License Exception STA
- Other exceptions

- USML Category VIII – Military Aircraft

(h) Parts, components, accessories, attachments, associated equipment and systems, as follows:

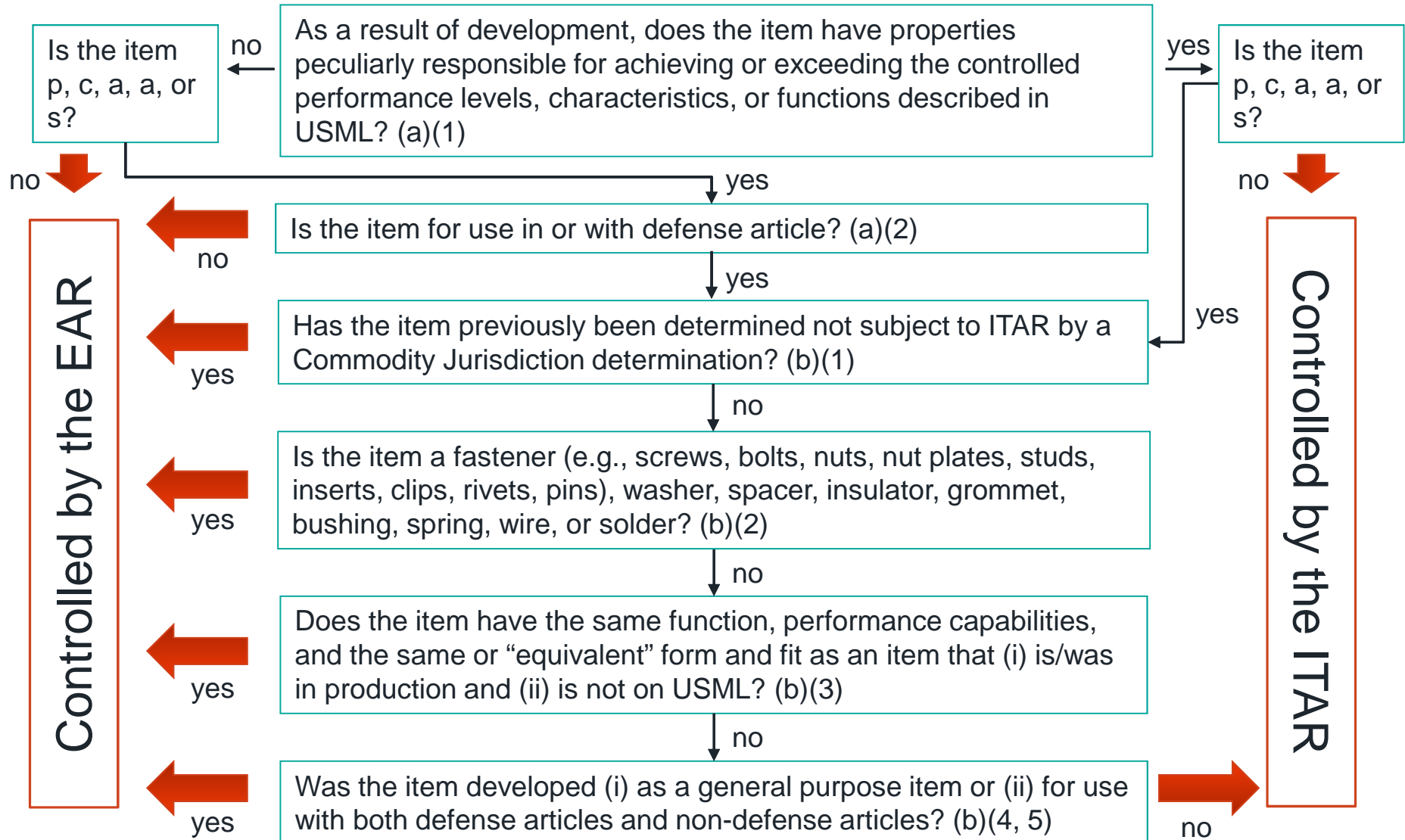
(1) Parts, components, accessories, and attachments **specially designed** for the following US-origin aircraft: The B-1B, B-2, B-21, F-15SE, F/A-18 E/F, EA-18G, F-22, F-35, and future variants thereof; or the F-117 or US Government technology demonstrators. Parts, components, accessories, and attachments of the F-15SE and F/A-18 E/F that are common to earlier models of these aircraft, unless listed in paragraph (h) of this category, are subject to the EAR

- Life Support System

- Specially designed for listed aircraft?
- For example, what if it can be used on listed aircraft but also on non-listed aircraft?



ITAR Specially Designed Test



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.

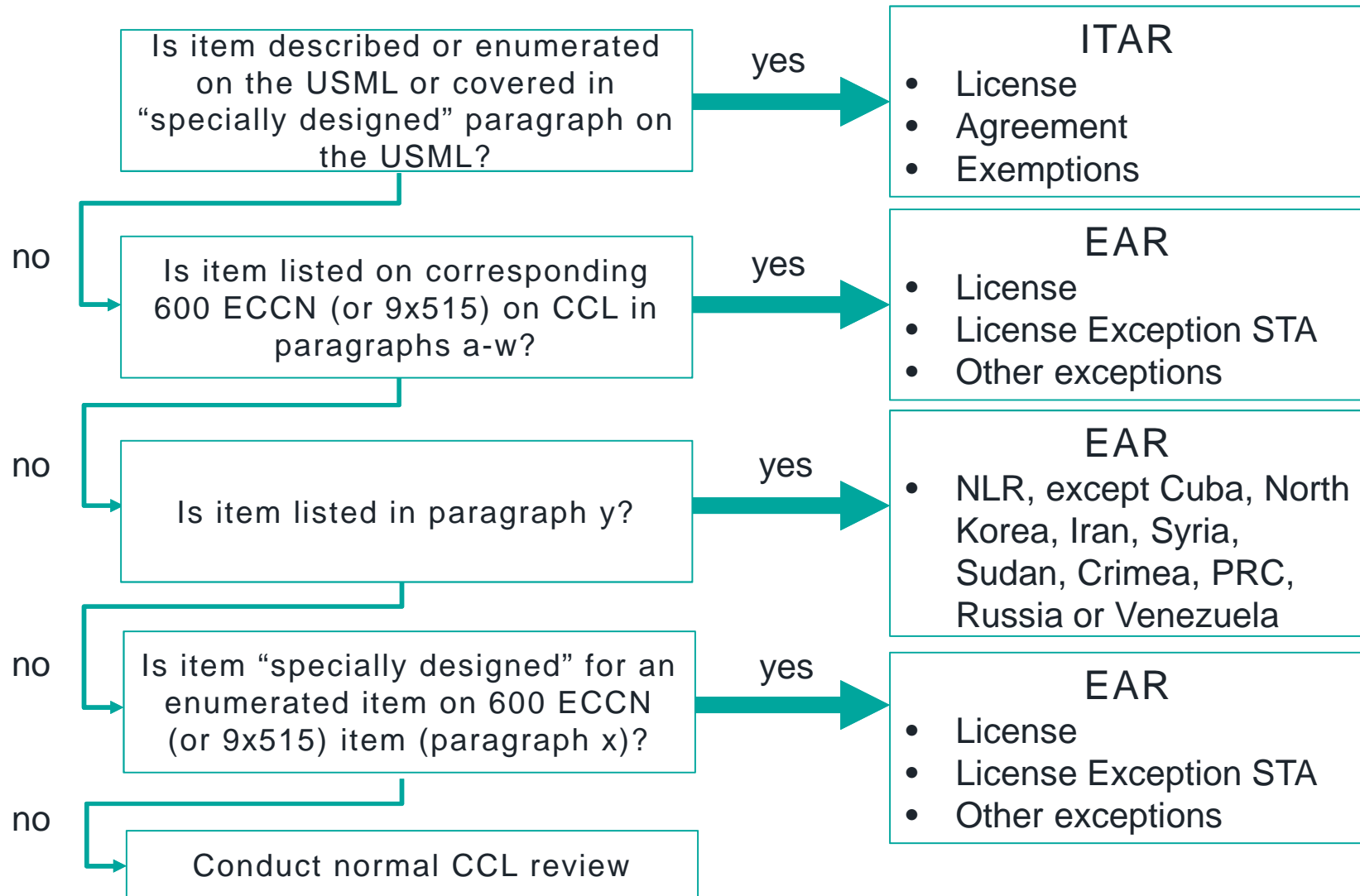
(b)(3) - Same Function, Performance Capabilities, and the Same or “Equivalent” Form and Fit

- 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

Order of Review



9A610 Military Aircraft and Related Commodities

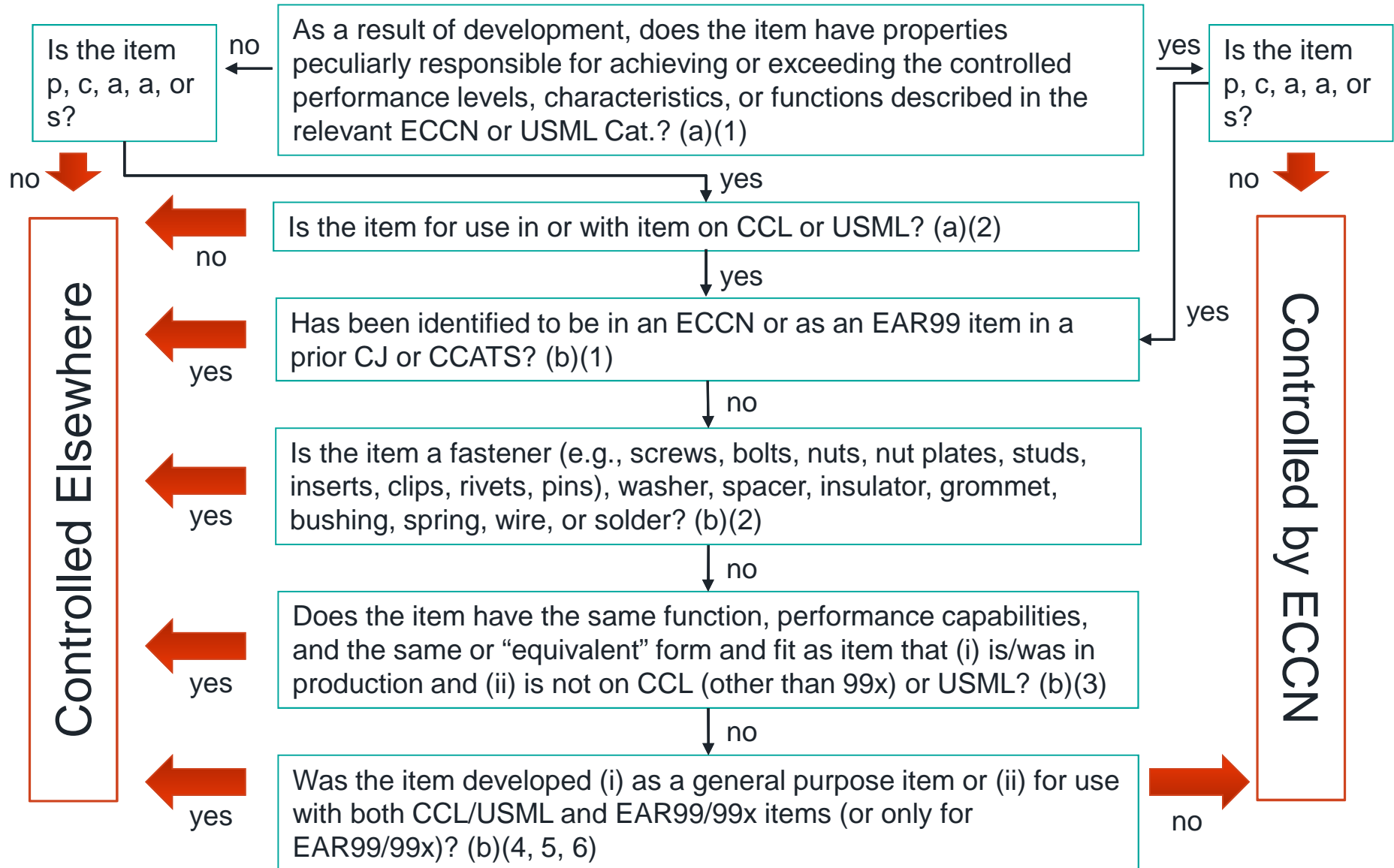
- a. 'Military Aircraft' "specially designed" for a military use that are not enumerated in USML paragraph VIII(a)
- g. Aircrew life support equipment, aircrew safety equipment and other devices for emergency escape from aircraft controlled by either USML paragraph VIII(a) or ECCN 9A610.a
- x. "Parts," "components," "accessories," and "attachments" that are "specially designed" for a commodity enumerated or otherwise described in ECCN 9A610 (except for 9A610.y) or a defense article enumerated or otherwise described in USML Category VIII and not elsewhere specified on the USML or in 9A610.y, 9A619.y, or 3A611.y

CCL Classification

- ✓ Life Support System?
- ✓ Component?



EAR: Specially Designed Test



9A610 Military aircraft and related commodities, other than those enumerated in 9A991.a (see List of Items Controlled).

License Requirements

Reason for Control: **NS, RS, MT, AT, UN**

| Control(s) | Country Chart (See Supp. No. 1 to Part 738). |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------|
| NS applies to entire entry except: 9A610.b; parts and components controlled in 9A610.x if being exported or reexported for use in an aircraft controlled in 9A610.b; and 9A610.y. | NS Column 1 |
| RS applies to entire entry except: 9A610.b; parts and components controlled in 9A610.x if being exported or reexported for use in an aircraft controlled in 9A610.b; and 9A610.y. | RS Column 1 |
| MT applies to 9A610.t, .u, .v, and .w | MT Column 1 |
| AT applies to entire entry | AT Column 1 |
| UN applies to entire entry except 9A610.y. | See § 746.1(b) for UN controls |

List Based License Exceptions (See Part 740 for a description of all license exceptions)

LVS: **\$1500**

GBS: **N/A**

CIV: **N/A**

Special Conditions for STA

STA: (1) Paragraph (c)(1) of License Exception STA (§740.20(c)(1) of the EAR) may not be used for any item in 9A610.a (i.e., "end item" military aircraft), unless determined by BIS to be eligible for License Exception STA in accordance with §740.20(g) (License Exception STA eligibility requests for 9x515 and "600 series" items). (2) Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2) of the EAR) may not be used for any item in 9A610.

List of Items Controlled

Related Controls: (1) Military aircraft and related articles that are enumerated in USML Category VIII, and technical data (including software) directly related thereto, are subject to the ITAR. (2) See ECCN 0A919 for controls on foreign-made "military commodities" that incorporate more than a de minimis amount of U.S.-origin "600 series" controlled content. (3) See USML Category XIX and ECCN 9A619 for controls on military aircraft gas turbine engines and related items.

Reasons for Control: What does “x” in the box mean on the Country Chart?

- A license is required if “x” in box
- If no “x” or EAR99 use NLR for exports or reexports (if pass screening)

| Countries | Chemical & Biological Weapons | | | Nuclear Nonproliferation | | National Security | | Missile Tech | Regional Stability | | Firearms Convention | Crime Control | | | Anti-Terrorism | |
|-----------------------------|-------------------------------|------|------|--------------------------|------|-------------------|------|--------------|--------------------|------|---------------------|---------------|------|------|----------------|------|
| | CB 1 | CB 2 | CB 3 | NP 1 | NP 2 | NS 1 | NS 2 | MT 1 | RS 1 | RS 2 | FC 1 | CC 1 | CC 2 | CC 3 | AT 1 | AT 2 |
| Togo | X | X | | X | | X | X | X | X | X | | X | | X | | |
| Tonga | X | X | | X | | X | X | X | X | X | | X | | X | | |
| Trinidad & Tobago | X | X | | X | | X | X | X | X | X | X | X | | X | | |
| Tunisia | X | X | | X | | X | X | X | X | X | | X | | X | | |
| Turkey ³ | X | | | | | X | | X | X | | | | | | | |
| Turkmenistan | X | X | X | X | | X | X | X | X | X | | X | X | | | |
| Tuvalu | X | X | | X | | X | X | X | X | X | | X | | X | | |
| Uganda | X | X | | X | | X | X | X | X | X | | X | | X | | |
| Ukraine ^B | X | | | | | X | X | X | X | X | | X | X | | | |
| United Arab Emirates | X | X | X | X | | X | X | X | X | X | | X | | X | | |
| United Kingdom ³ | X | | | | | X | | X | X | | | | | | | |

List Driven

- LVS
- GBS
- CIV
- STA

Not List Driven

- TSU
- TSR
- RPL
- TMP
- GOV

- Authorizes Exports and Reexports to the Following 37 Countries:
 - Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, 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
- Comments
 - For 600 series, 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
 - 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)
 - Consignee undertaking required for export and for reexport and retransfer

Exporting and Reexporting EAR Items

US

UK



- **BIS License (obtained by SuppEAR)**
- **STA**

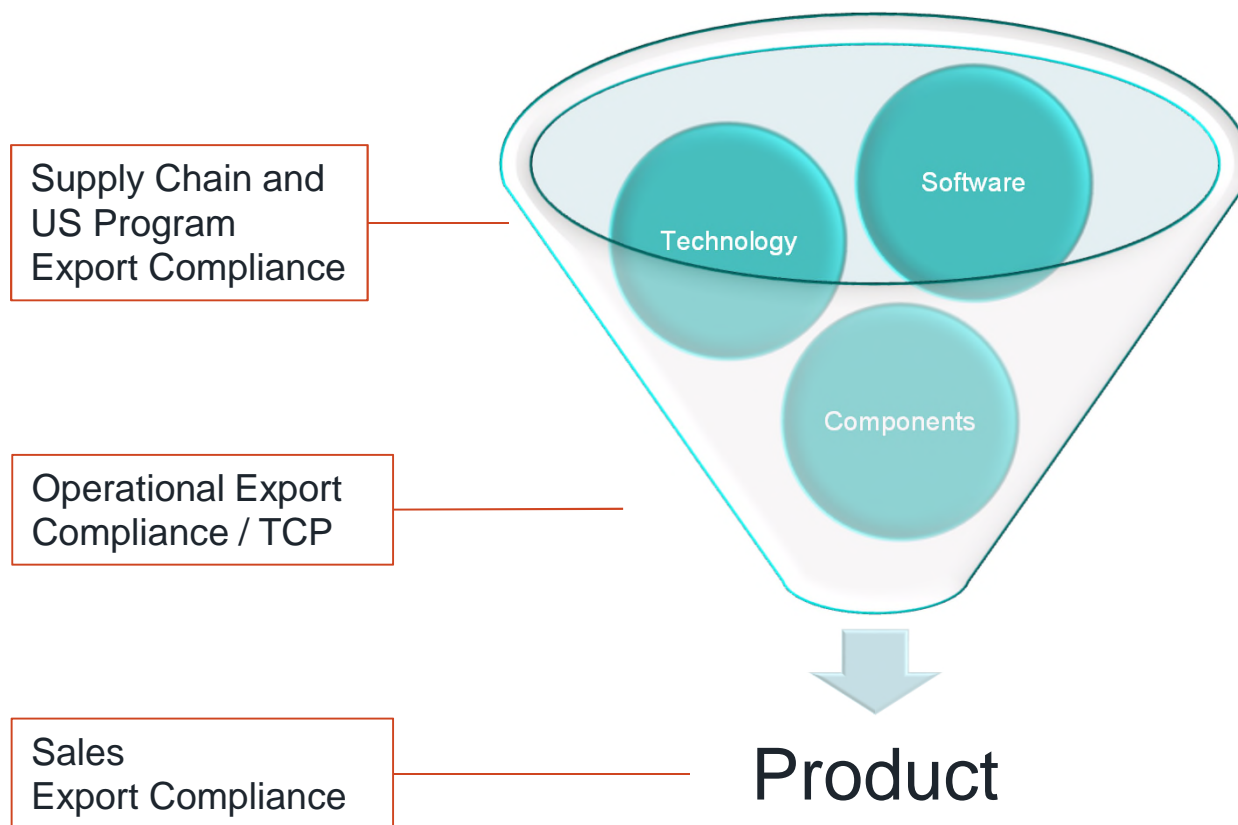
- **BIS License (obtained by SuppEAR)**
- **BIS License (obtained by Tactix)**
- **STA**

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Contamination Impact on Non-US Business



- **Supply chain or US program**
 - Subject to ITAR or EAR?
 - Export Classification?
 - Applicable US export authority?
 - Conditions / provisos?
- **Operations**
 - Employee access
 - Visitor access
 - Use of subcontractors and consultants
 - Collateral product contamination risk
- **Sales**
 - Are non-US products subject to ITAR or EAR?
 - ITAR or EAR classification of Products?
 - Restrictions on sales

EAR Contamination of Items (§734.3(a))

All items in the United States

All US origin items wherever located

Foreign-made items that incorporate controlled US-origin item

- Unless the controlled US content qualifies as de minimis

Foreign-made direct products of US origin technology or software, provided:

- Direct product is controlled for NS reasons; and
- Technology or software is controlled for NS reasons
- The term "direct product" means the immediate product (including processes and services) produced directly by the use of technology or software

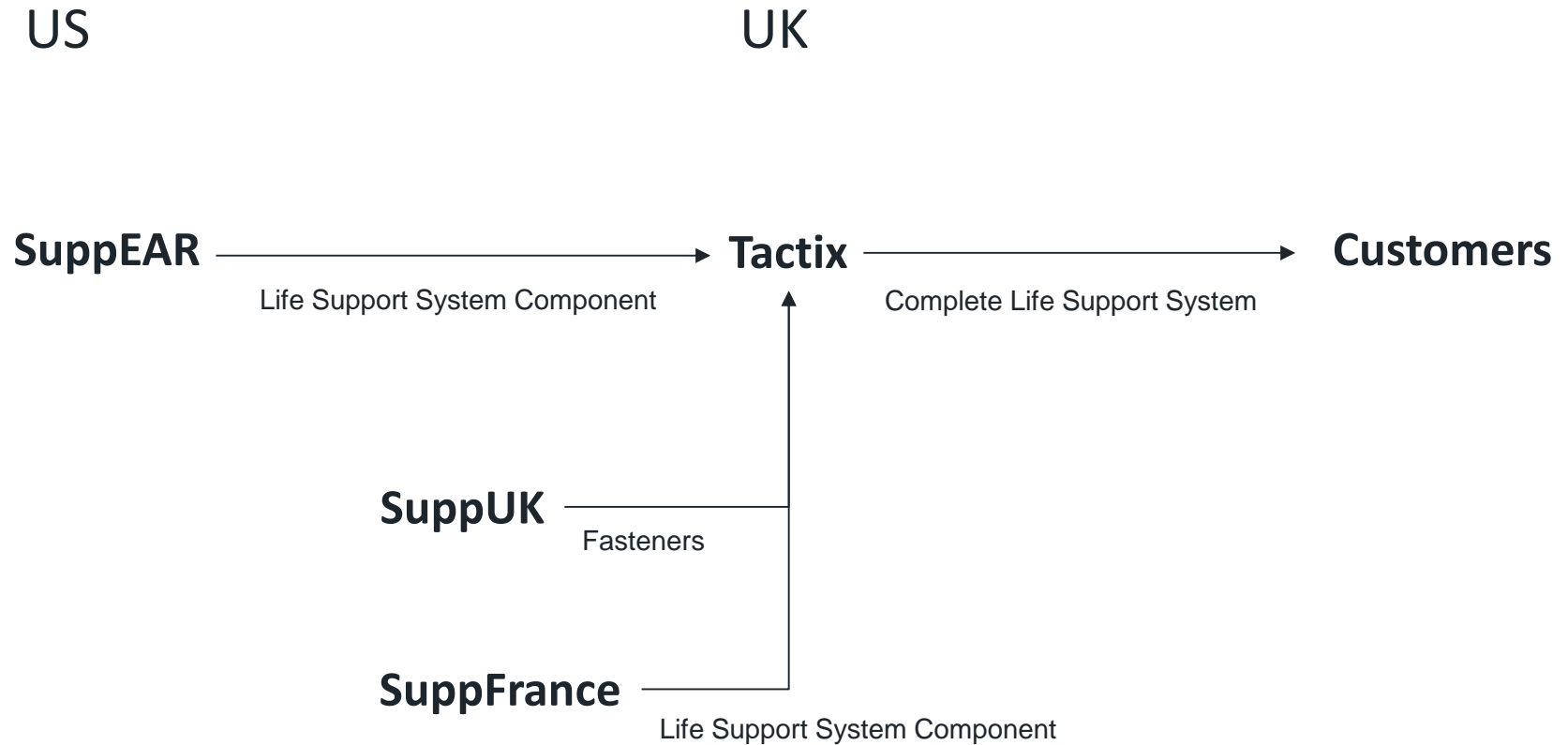
$$\frac{\text{Delivered value of US-origin content controlled to ultimate destination}}{\text{Ex-works value of non-US made product incorporating US content}} \leq \begin{array}{l} 0\% - 600 \text{ series to D:5} \\ 10\% - \text{to sanctioned/AT} \\ 25\% - \text{to all others} \end{array}$$

- General Rule:
 - If the foreign-made item is destined for 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 items enumerated or otherwise described in paragraphs .a through .x of a 9x515 or “600 series” ECCN when destined for a country listed in D:5 countries

Foreign-made direct products of US origin technology or software, provided:

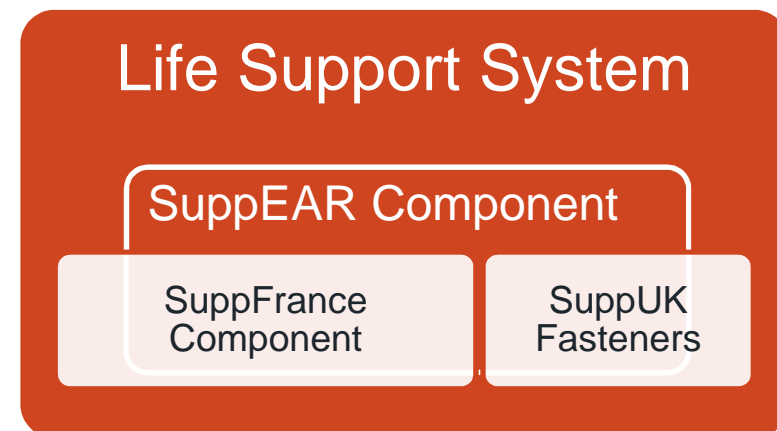
- Direct product is controlled for NS reasons
- Technology or software is controlled for NS reasons
- The term "direct product" means the immediate product (including processes and services) produced directly by the use of technology or software

Export Jurisdiction and Classification of Non-US Made Items (EAR)



Export Jurisdiction and Classification of Non-US Made Items (EAR)

- Given:
 - SuppEAR component is ECCN 9A610.x
- Classifications
 1. Tactix life support system
 - Assume US 9A610.x content is 35% of the value of the life support system
 2. SuppUK fasteners
 - Modified to accommodate the SuppEAR component
 3. SuppFrance component
 - Only form or fit difference compared to the their original components
- Questions:
 - Is each item above subject to the EAR?
 - If so, how is the item classified on the CCL?



Export Jurisdiction and Classification of Non-US Made Items (EAR)

- FIRRMA/ECRA
 - Emerging technologies likely will be controlled
- Jurisdiction and Classification
 - Follow order of review (starting with USML)
 - Only apply “specially designed” test when you see those two words
- Dealing with Foreign Partners
 - Inform them of export jurisdiction and classification
 - Inform them of export authorization and conditions
- Generally
 - Knowledge is power, training, training, training (up and down)
 - Communication with ALL parties to ensure importance of compliance is recognized
 - Policies and procedures are paramount
 - Run regular audits
 - Network as often as possible with peers