

Introduction to the US Export Administration Regulations

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September 4, 2019



Agenda

- I. Beginning Concepts
- II. Scope of the EAR
- III. The 10 General Prohibitions
- IV. Commodity Jurisdiction and Export Control Classification
- V. Technology Controls
- VI. EAR Licensing and License Exceptions
- VII. Enforcement, Violations, Penalties, and Voluntary Self-Disclosures



I. Beginning Concepts

US Export Controls

Defense Articles / Services	Dual-Use, Military, and Other Items	Transactions Involving Sanctioned Countries and Persons
<p><u>Government Agency:</u> US Department of State, Directorate of Defense Trade Controls (DDTC)</p>	<p><u>Government Agency:</u> US Department of Commerce, Bureau of Industry and Security (BIS)</p>	<p><u>Government Agency:</u> US Department of the Treasury, Office of Foreign Assets Control (OFAC)</p>
<p><u>Legal Authority:</u> Arms Export Control Act (AECA)</p>	<p><u>Legal Authority:</u> Export Control Reform Act of 2018 (ECRA)</p>	<p><u>Legal Authority:</u> International Emergency Economic Powers Act (IEEPA); Trading with the Enemy Act (TWEA)</p>
<p><u>Implementing Regulations:</u> International Traffic in Arms Regulations (ITAR)</p>	<p><u>Implementing Regulations:</u> Export Administration Regulations (EAR)</p>	<p><u>Implementing Regulations:</u> OFAC Sanctions Regulations</p>
<p><u>Control List:</u> US Munitions List (USML)</p>	<p><u>Control List:</u> Commerce Control List (CCL)</p>	<p><u>Selected Programs:</u> E.g., Cuba, Syria, Iran, N.Korea SDN-driven programs</p>
<p><u>Website (guidance):</u> pmdrtc.state.gov</p>	<p><u>Website (guidance):</u> bis.doc.gov</p>	<p><u>Website (guidance):</u> treas.gov/offices/enforcement/ofac</p>

Other US Agencies Involved in Export Controls

- US Department of Homeland Security (DHS): Customs and Border Protection (CBP)
- DHS: Immigration Customs Enforcement (ICE)
- Department of Energy (DOE)
- US DoD: Defense Technology Security Administration (DTSA)
- US DoD: Defense Security Cooperation Agency (DSCA)

- Controls stem from international treaties and multilateral obligations
 - Wassenaar Arrangement (dual-use and conventional weapons)
 - Missile Technology Control Regime
 - Australia Group (chemicals)
 - Nuclear Suppliers Group
 - Chemical Weapons Convention
 - Biological Weapons Convention
 - UN Security Council Resolution 1540 (2004)
- Also, unilateral controls
 - Antiterrorism
 - Short supply (e.g., unprocessed Western Red Cedar, crude oil (previously), certain natural gas products)
 - Crime control

- The application of export controls depends on:
 - **WHERE:** Place of export?
 - Example: Every person or article in U.S., including non-U.S. nationals and foreign-origin products, are subject to U.S. export controls
 - **WHO:** Nationality of the exporter?
 - Example: A U.S. national or a U.S. company is subject to U.S. export controls, even when all export activities occur outside of U.S.
 - Can also be subject to the local country's export controls
 - **WHAT:** Origin of the goods and/or technology being exported?
 - Example: U.S.-origin items remain subject to U.S. controls even after they leave the U.S.
 - May also be subject to the local country's export controls

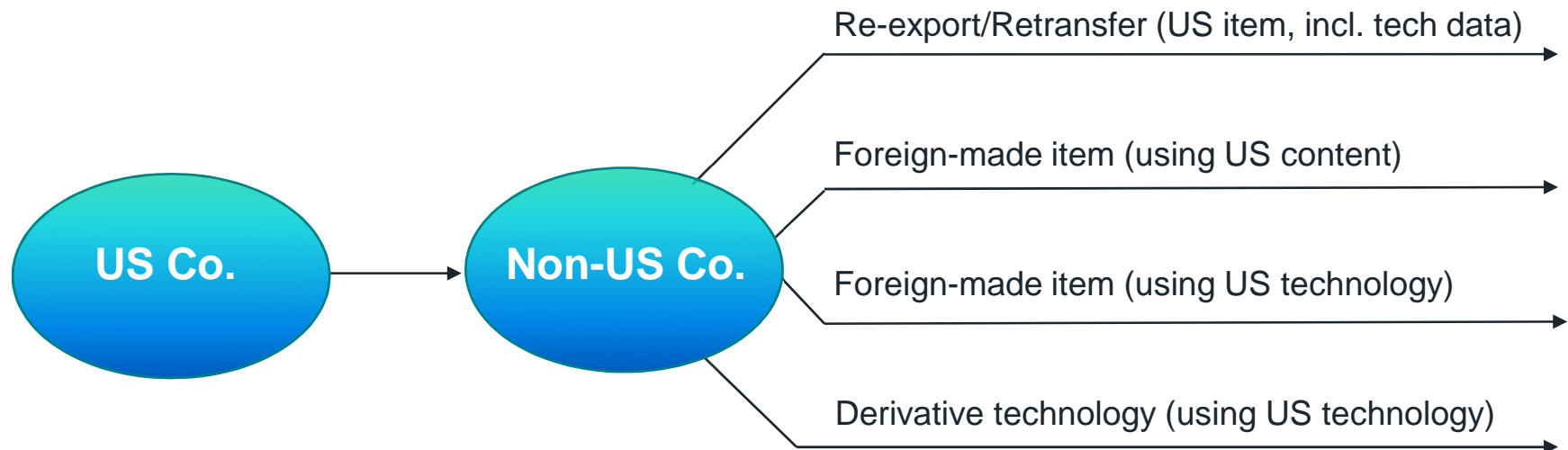
II. Scope of the EAR

What Are “Exports” And “Re-exports” Under The EAR?

- **“Export”** means:
 - (1) an actual shipment or transmission of items out of the United States;
 - (2) a release of technology or source code (but not object code) to a foreign national in the United States (a “deemed” export); or
 - (3) a transfer by a person in the United States of registration, control, or ownership of a spacecraft subject to the EAR, in certain circumstances.
- A **“re-export”** is an export (as above) that occurs outside of the United States.
- NOT sending items to the United States

Scope of US Export Controls

- ITAR governs:
 - All exports from the United States
 - All Reexports and retransfers of US-content
- EAR governs:
 - All exports from the United States
 - Reexports and retransfers with important exceptions



What Items Are “Subject To The EAR”?

- Items listed on the CCL are “subject to the EAR”
- The following items also are generally “subject to the EAR”
 - All items in the U.S., including in a U.S. Foreign Trade Zone or moving in transit through the U.S. from one foreign country to another.
 - All U.S.-origin items wherever located.
 - Certain foreign items when controlled U.S. content is above de minimis levels.
 - Foreign-made commodities that incorporate controlled U.S.-origin parts, components, materials or other commodities
 - Foreign-made commodities that are “bundled” with controlled U.S.-origin software
 - Foreign-made software that is commingled with controlled U.S.-origin software
 - Foreign-made technology commingled with controlled U.S.-origin technology
 - Certain foreign-made direct products of U.S.-origin technology or software.
 - Certain commodities produced by any plant or major component of a plant located outside the U.S. that is a direct product of U.S.-origin technology or software.

What Items Are **NOT** “Subject To The EAR”?

- Items that are exclusively controlled by another US Government agency (e.g., DDTC, OFAC, DOE, NRC, PTO)
- Foreign-made items that have less than the *de minimis* percentage of controlled US content based on principles described in EAR Section 734.4
- Most pre-recorded and printed media in the public domain
- Publicly available information and software
 - Includes publicly available encryption source code that is printed (subject to reporting requirements), but not in electronic form
 - Information is “published” when it becomes generally accessible to the interested public in any form
- Information and software that:
 - arises during, or results from, fundamental research
 - appears in patents or open (published) patent applications
 - are non-proprietary system descriptions
 - are certain telemetry data

- For most products, re-exports to all countries, to include terrorist-supporting countries listed in Part 740, Supplement 1, Country Group E:1, are permitted when the following *de minimis* levels exist:
 - Re-exports of a foreign-made commodity incorporating controlled U.S.- origin commodities valued at **10% or less** of the total value of the foreign-made commodity;
 - Re-exports of foreign-made software incorporating controlled U.S.-origin software valued at **10% or less** of the total value of the foreign-made software; or
 - Re-exports of foreign technology commingled with or drawn from controlled U.S.- origin technology valued at **10% or less** of the total value of the foreign technology.

- For most products, re-exports to all countries NOT listed in Country Group E:1 are permitted when the following *de minimis* levels exist:
 - Re-exports of a foreign-made commodity incorporating controlled U.S.-origin commodities valued at **25% or less** of the total value of the foreign-made commodity;
 - Re-exports of foreign-made software incorporating controlled U.S.-origin software valued at **25% or less** of the total value of the foreign-made software; or
 - Re-exports of foreign technology commingled with or drawn from controlled U.S.-origin technology valued at **25% or less** of the total value of the foreign technology.

- For all countries except those in Country Group D:5, the *de minimis* rule is 25% or less of U.S.-origin 600-series content
- The *de minimis* rule for Country Group D:5 countries (i.e., U.S. arms embargo countries) is 0%
 - Country Group D:5 contains the countries subject to U.S. arms embargos and is equivalent to the countries listed in ITAR 126.1.

III. The 10 General Prohibitions

The 10 General Prohibitions

- **General Prohibition 1**
Export and re-export of controlled items to listed countries.
- **General Prohibition 2**
Re-export and export from abroad of foreign-made items incorporating more than a de minimis amount of controlled US content.
- **General Prohibition 3**
Re-export and export from abroad of the foreign-produced direct product of U.S. technology and software.
- **General Prohibition 4**
Engaging in actions prohibited by a denial order
- **General Prohibition 5**
Export or re-export to prohibited end-uses or end-users.

The 10 General Prohibitions

- **General Prohibition 6**
Export or re-export to embargoed country.
- **General Prohibition 7**
Financing, Contracting, Service, Support, etc. in Support of Proliferation Activities.
- **General Prohibition 8**
In transit shipments and items to be unladen from vessels or aircraft.
- **General Prohibition 9**
Violation of any order, terms, and conditions.
- **General Prohibition 10**
Proceeding with transactions with knowledge that a violation has occurred or is about to occur.

Key Issues Under the 10 General Prohibitions

- Classification of the item
- Destination of the export or re-export
- Ultimate end-user
- Ultimate end-use
- Conduct involved in the transaction (especially relevant when proliferation activities are involved – see G.P. 7, support of proliferation activities)

Export Compliance Requirements – Implementing the 10 GPs

- Controlled Products and Technology
 - Identify controlled products (procedure / form)
 - Lock-down controlled technology
 - Implement measures to prevent inadvertent releases of controlled technology
 - Obtain licenses for exports that require prior government authorization
- Export Screening
 - All customers (procedure / form)
 - Export transactions (procedure / form)

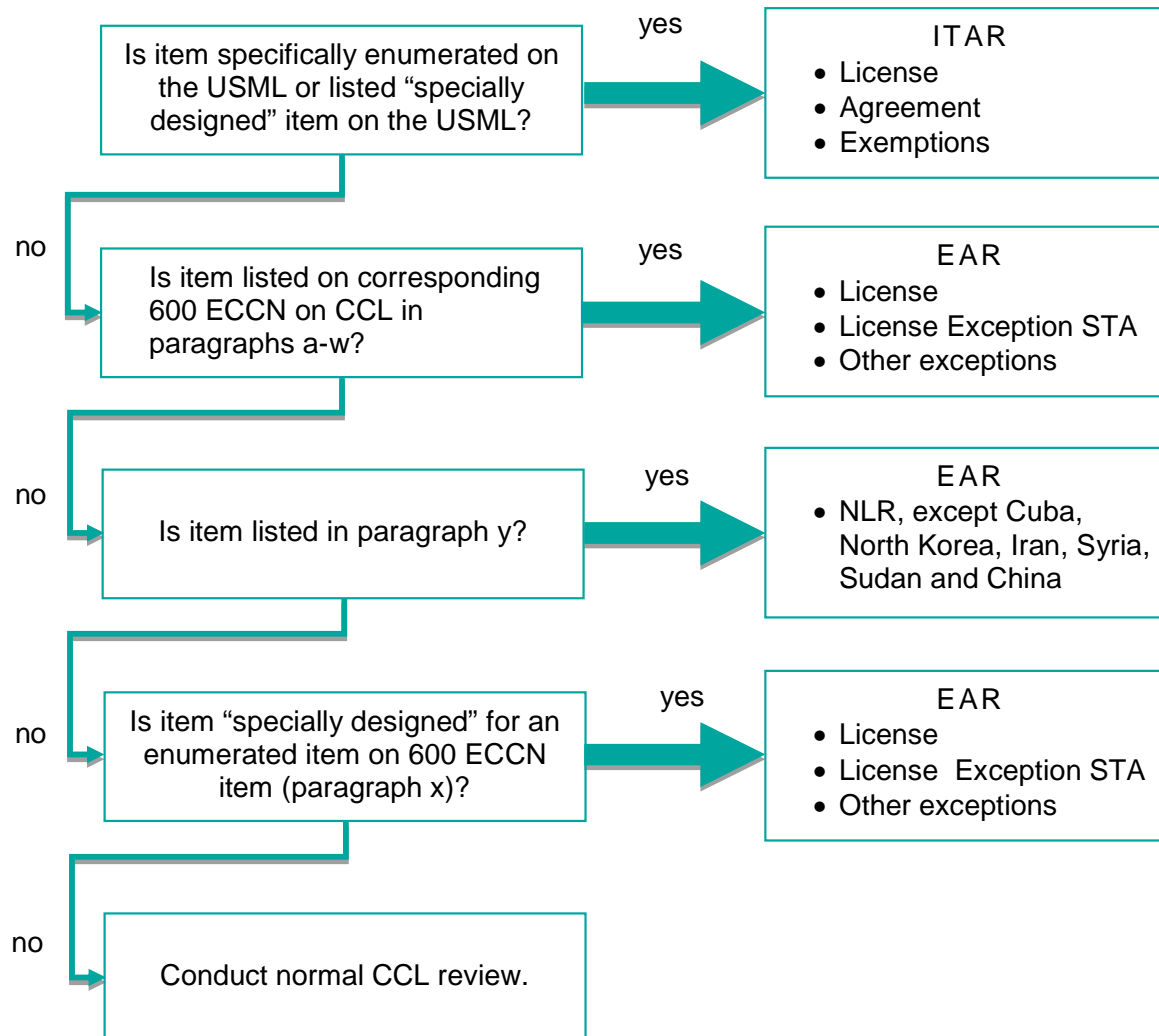


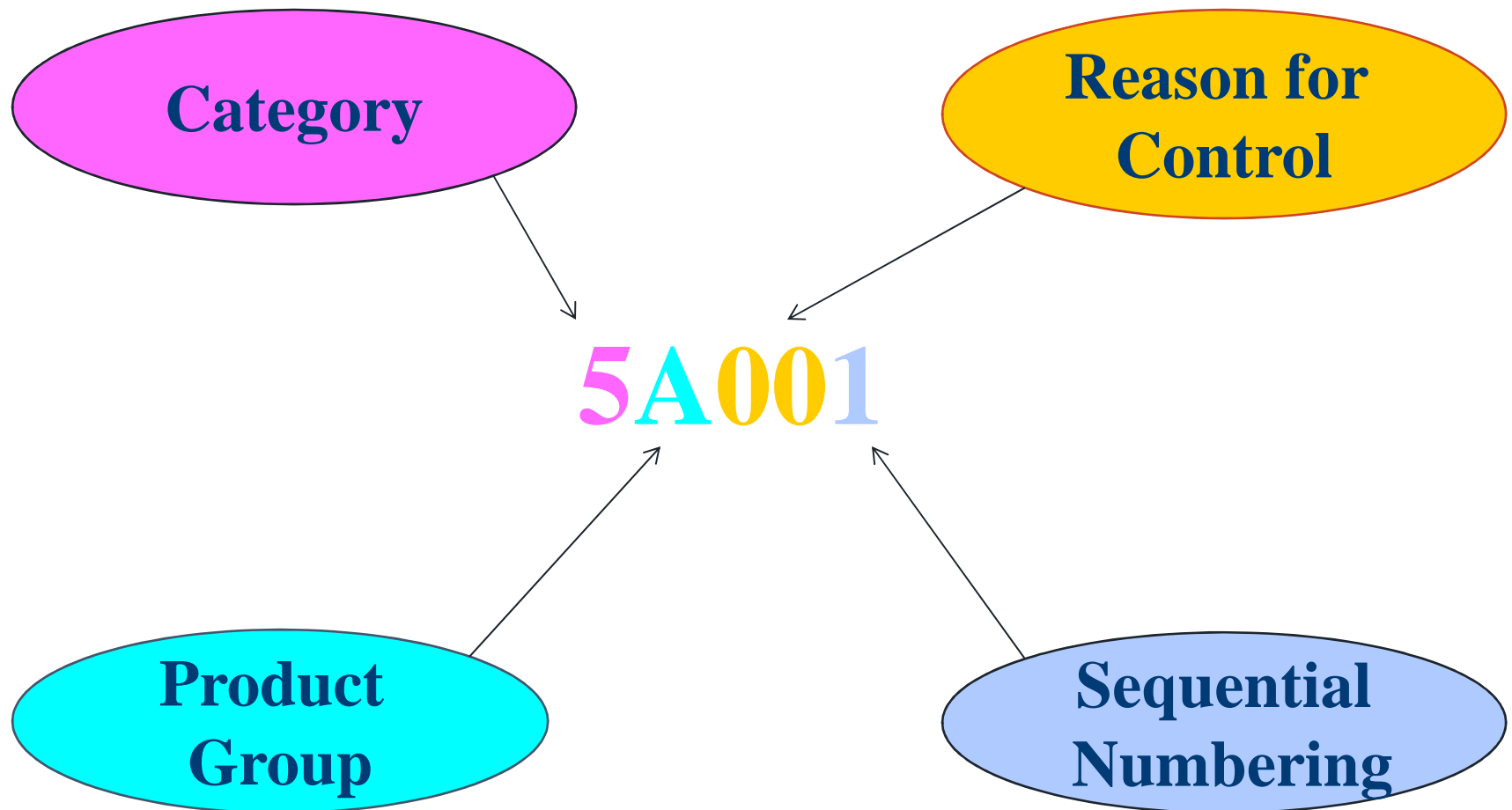
IV. Commodity Jurisdiction and Export Control Classification

EAR Supp. No. 4 to part 744

1. Review the USML
 - a. Specifically enumerated items
 - b. “Catch-all” controls and ITAR definition of “**specialty designed**”
2. If not on the USML, review the CCL
 - a. Review characteristics of item to determine applicable CCL category and product group
3. Review applicable 600 series ECCNs
 - a. Specifically enumerated items
 - b. “Catch-all” controls and EAR definition of “**specialty designed**”
4. Review applicable non-600 series ECCNs
5. If not on the CCL, EAR99

Order of Review (Cont'd)





10 Categories of the CCL

0. Nuclear Materials, Facilities & Equipment and Miscellaneous
1. Materials, Chemicals, “Microorganisms” and Toxins
2. Materials Processing
3. Electronics (Design, Development and Production)
4. Computers
5. Telecommunications-PART 1 and Information Security-PART 2
6. Sensors and Lasers
7. Navigation and Avionics
8. Marine
9. Aerospace and Propulsion

5 Product Groups

- A. Equipment, Assemblies and Components
- B. Test, Inspection and Production Equipment
- C. Materials
- D. Software
- E. Technology

CCL Product Groups

5A101

**Equipment,
Assemblies and
Components**

5B101

**Test, Inspection and
Production
Equipment**

5C101

Materials

5D101

Software

5E101

Technology

Reasons for Control

- **AT:** Anti-Terrorism
- **CB:** Chemical & Biological Weapons
- **CC:** Crime Control
- **FC:** Firearms Convention
- **MT:** Missile Technology
- **NP:** Nuclear Nonproliferation
- **NS:** National Security
- **RS:** Regional Stability
- **SS:** Short Supply
- **EI:** Encryption

B. "TEST", "INSPECTION" AND "PRODUCTION EQUIPMENT"

5B001 Telecommunication test, inspection and production equipment, "components" and "accessories," as follows (see List of Items Controlled).

LICENSE REQUIREMENTS

Reason for Control: NS, AT

Control(s)	Country Chart (See Supp. No. 1 to part 738)
NS applies to entire entry	NS Column 2
AT applies to entire entry	AT Column 1

REPORTING REQUIREMENTS See §743.1 of the EAR for reporting requirements for exports under License Exceptions, and Validated End-User authorizations

LIST BASED LICENSE EXCEPTIONS (SEE PART 740 FOR A DESCRIPTION OF ALL LICENSE EXCEPTIONS)

LVS: \$5000

GBS: Yes

CIV: Yes

SPECIAL CONDITIONS FOR STA

STA: License Exception STA may not be used to ship 5B001.a equipment and "specially designed" "components" or

Commerce Country Chart

Supp. No. 1 to Part 738

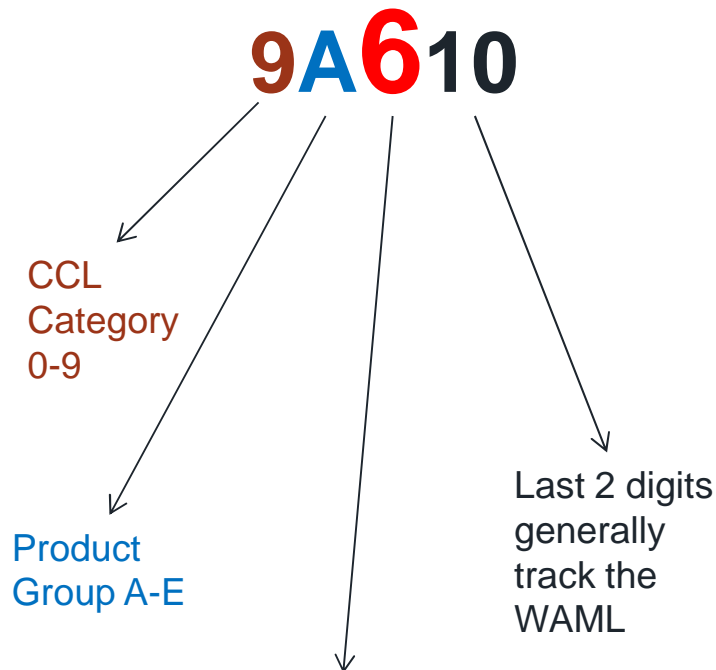
SUPPLEMENT NO. 1 TO PART 738—COMMERCE COUNTRY CHART

[Reason for control]

Countries	Chemical and 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
Afghanistan	X	X	X	X		X	X	X	X	X		X		X		
Albania ^{2 3}	X	X		X		X	X	X	X	X						
Algeria	X	X		X		X	X	X	X	X		X		X		
Andorra	X	X		X		X	X	X	X	X		X		X		
Angola	X	X		X		X	X	X	X	X		X		X		
Antigua and Barbuda	X	X		X		X	X	X	X	X	X	X		X		
Argentina	X					X		X	X		X	X		X		
Armenia	X	X	X	X		X	X	X	X	X		X	X			
Aruba	X	X		X		X	X	X	X	X		X		X		
Australia ³	X					X		X	X							
Austria ³⁴	X					X		X	X			X		X		
Azerbaijan	X	X	X	X		X	X	X	X	X		X	X			
Bahamas, The	X	X		X		X	X	X	X	X	X	X		X		
Bahrain	X	X	X	X		X	X	X	X	X		X		X		
Bangladesh	X	X		X		X	X	X	X	X		X		X		

- Previously, *USML items, and items designed, developed, configured, adapted, or modified for military or space applications* were presumptively defense articles under DDTC jurisdiction.
- ECR changed analysis
- Why? To enhance national security, the Administration determined that the export control system needed to be reformed to:
 - Increase interoperability with NATO and other allies;
 - Reduce the current incentives for companies in non-embargoed countries to design out or avoid US-origin content; and
 - Allow the Administration to focus resources on the transactions of greatest concern.

- USML revisions (ongoing) to transform USML into a “positive list,” as opposed to an illustrative list
- Items no longer on the USML become subject to the EAR’s “600 series” ECCNs
- Licenses from Commerce are required to export and re-export most 600 series items worldwide (minus Canada), unless an EAR license exception is available
- New license exception **STA** available for export, re-export, and transfer (in-country) of “600 series” items in 37 countries if (a) for ultimate end use by a government of such countries, (b) return to the US, or (c) in connection with an existing authorization
 - Make defense trade supply to NATO countries and other close allies more efficient
 - Shared compliance obligations under STA



"600 series" derives its name from the 3rd character of the ECCN

- Former USML Items (and-018 items) listed in the "items" paragraph
- Order of review:
 - **.a - .w**: specifically enumerated end items, materials, parts, components, accessories, and attachments
 - Some items may be "specially designed"
 - **.y**: specifically enumerated parts, components, accessories, and attachments that are "specially designed"
 - **.x**: "specially designed" parts, components, accessories, and attachments that are not specifically enumerated

“Specially Designed”

- Codified in EAR § 772.1
 - Definition is common to both the ITAR and EAR, with slight differences
- Requires answers to a series of yes/no questions that lead to an objective determination of whether an item is “specially designed”
- New definition of “specially designed” is based on a catch-and-release construct

**See DDTC and BIS online decision tree tools*

“Catch” Provisions (“EAR” Rule)

- Paragraph (a)(1)
 - “Catches” any item (including end items, materials, parts, components, accessories, attachments, and software (not technology)) that, as a result of “development,” has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions described in the relevant ECCN or USML paragraph.
 - “Peculiarly responsible” means that there is a direct and proximate causal relationship that is central or special for achieving or exceeding performance levels
 - Must have resulted from “development” (i.e., design, design research, design analysis, etc.)
- Paragraph (a)(2)
 - “Catches” any part, component, accessory, attachment, or software that is used in or with a commodity or defense article ‘enumerated’ or otherwise described on the CCL or the USML

“Release” Provisions (EAR Rule)

- Not “specially designed” if it:
 - (b)(1): CJ or CCATS determination rules it is controlled in an ECCN that does not have specially designed as criteria for control or is EAR99;
 - (b)(2): is, regardless of form or fit, a fastener (e.g., screws, bolts, nuts, nut plates, studs, inserts, clips, rivets, pins), washer, spacer, insulator, grommet, bushing, spring, wire, or solder;
 - (b)(3): has the same function, performance capabilities, and the same or “equivalent” form and fit as a commodity or software used in or with an item that: (i) is or was in production (not development) and (ii) is not enumerated on the CCL or USML or is described in an ECCN controlled only for AT reasons;
 - (b)(4): was developed with knowledge that it is or would be for use in or with both (i) items described in an ECCN and (ii) items not enumerated on the CCL or USML or is described in an ECCN controlled only for AT reasons;
 - (b)(5): was developed as a general purpose commodity or software, i.e., with no knowledge for use in or with a particular commodity or type of commodity; or
 - (b)(6): was developed with knowledge that it is for use in items (i) in an ECCN controlled for AT-only reasons and also EAR99 items, or (ii) exclusively for use in or with EAR99 items.

V. Technology Controls

What is Technology under the EAR?

- **“Technology”** is information necessary for the “development”, “production”, “use,” operation, installation, maintenance, repair, overhaul, or refurbishing (or other terms specified in ECCNs on the CCL that control “technology”) of an item.
 - “Development” is related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts.
 - “Production” refers to all production stages, including product engineering, manufacture, integration, assembly (mounting), inspection, testing, quality assurance.
 - “Use” includes operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing.

NOTE: Information that is not within the scope of this definition of “technology” is not subject to the EAR.

Technology May Take Many Forms

- Technology may be tangible or intangible
- Includes: written or oral communications, blueprints, drawings, photographs, plans, diagrams, models, formulae, tables, engineering designs and specifications, computer-aided design files, manuals or documentation, electronic media or information revealed through visual inspection

***Note**, the modification of the design of an existing item creates a new item and technology for the modified design is technology for the development or production of the new item

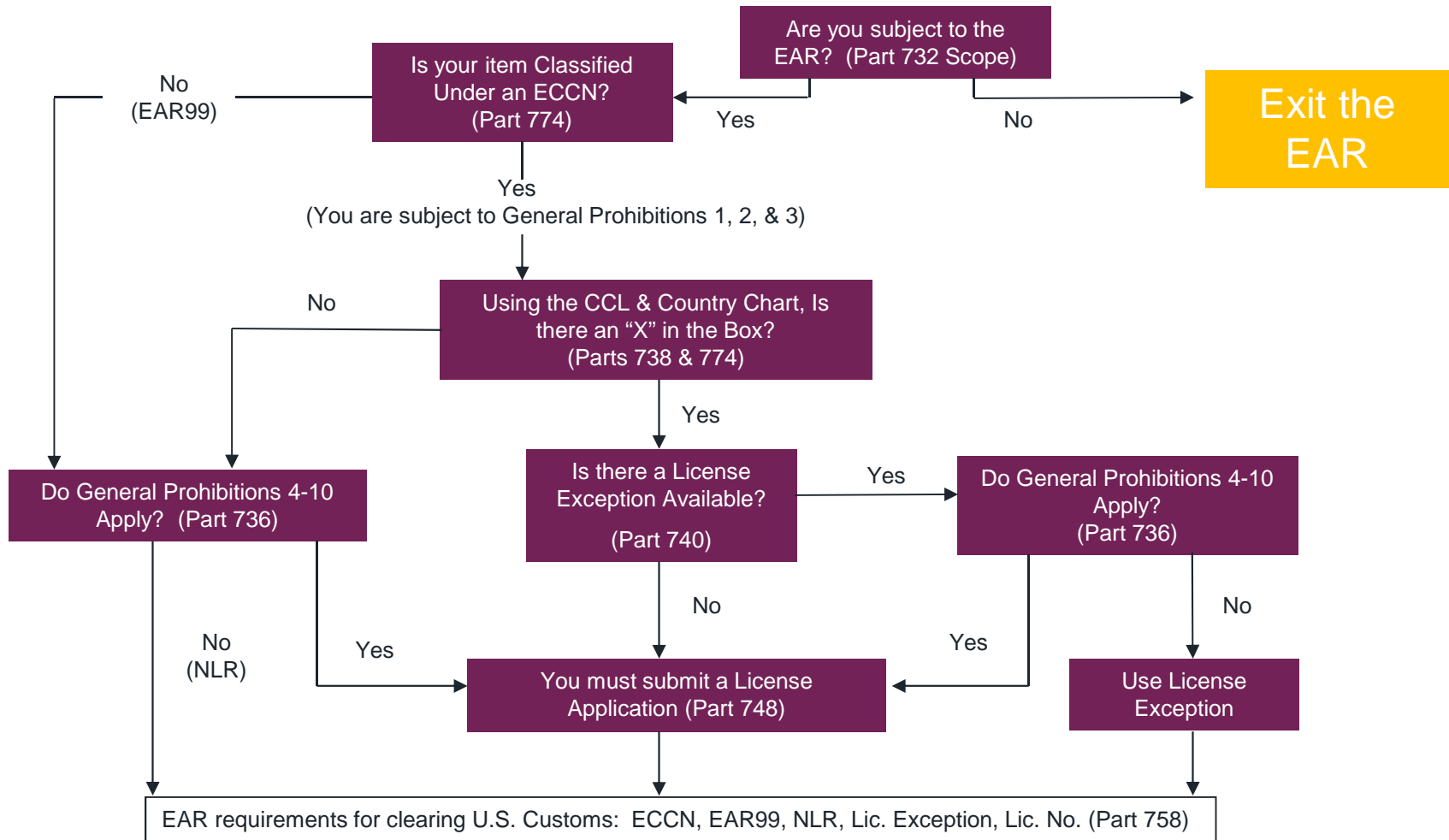
Ways That Technology Can be Released

- Generally, any release of technology or source code subject to the EAR to a foreign person is a **deemed export** to the foreign person's most recent country of citizenship or permanent residency.
- Technology may be released in numerous ways.
 - Physical or electronic access to technical data by foreign nationals in the United States
 - Oral exchanges of information with foreign nationals in the United States or abroad.
 - Visual inspection by foreign nationals of U.S.-origin equipment and facilities.
 - Observation by foreign persons of application to situations of personal knowledge or technical experience
- In practice
 - Employment of foreign person
 - Facility visit
 - Accessing data on a server



VI. EAR Licensing and License Exceptions

EAR Licensing Requirements



No License Required (NLR)

- NLR may be used for:
 - EAR99 Items, or
 - ECCNs where there is no “X” in the relevant part of the Country Chart, and
 - When the transaction does not require an export license based on any other licensing requirement (e.g., end-use/user requirement)

- Except in certain limited circumstances, common BIS filings must be made electronically via SNAP-R, including:
 - Export and Re-export License Applications (other than Special Comprehensive License or Special Iraq Reconstruction License applications)
 - Deemed Export and Re-export License Applications
 - Classification Requests (CCATS)
 - Encryption Review Requests
 - License Exception AGR (agricultural commodities) Notifications

- A License Exception is an authorization specified under EAR Part 740 that permits the exportation of a product, software, or technology without a license subject to certain conditions.
- License Exceptions can be used even if General Prohibitions One, Two, Three, or Eight would normally apply.
- License Exceptions cannot be used to overcome General Prohibitions Four, Seven, Nine, or Ten.
- To determine whether a License Exception can be used to overcome General Prohibitions Five or Six, you must review EAR Parts 744 (prohibited end users and end user) and 746 (embargoed countries).

- Use of a License Exception constitutes a certification that all terms, provisions, and conditions for the use of the License Exception have been satisfied.
- The three letter symbol for the License Exception must be indicated on the SED or AES transmission, except for License Exception TMP.
- A Destination Control Statement may need to be entered on commercial documents per EAR Section 758.6.
- Records relating to transactions for which License Exceptions are used must be maintained in accordance with the recordkeeping requirements of EAR Part 762.

- Temporary Imports, Exports, and Re-exports (TMP)
 - Authorizes various temporary exports and re-exports; exports and re-exports of items temporarily in the United States (tools of trade, Items for exhibition or demonstration, et al.)
- Servicing and Replacement of Parts and Equipment (RPL)
 - Authorizes exports and re-exports associated with one-for-one replacement of parts, components, accessories, and attachments or servicing and replacement of equipment.
- Shipments of Limited Value (LVS)
 - Authorizes the export and reexport in a single shipment of eligible commodities as identified by “LVS - \$(value limit)” on the CCL.
- Shipments to Country Group B Countries (GBS)
 - Authorizes exports and reexports to Country Group B.

- Technology and Software — Unrestricted (TSU)
- Authorizes the export operation technology and sales technology
 - "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.
 - "Sales technology" is data supporting a prospective or actual quotation, bid, or offer to sell, lease, or otherwise supply any item. Export or reexport is allowed to certain countries if ECCN is ONLY controlled for NS reasons.

VII. Enforcement, Violations, Penalties, and Voluntary Self-Disclosures

- 10 Prohibitions
- Causing, aiding, or abetting a violation
- Solicitation or attempt
- Conspiracy
- Ordering, buying, selling, transferring, transporting or taking other specified actions with respect to an item with knowledge that a violation has occurred, is about to occur, or is intended to occur in connection with the item concerned (same as G.P. # 10)
- Possession with intent to export illegally
- Engaging in a transaction with intent to evade the EAR
- Failure to comply with reporting or recordkeeping requirements
- Altering a license or other export control document
- Acting contrary to the terms of a denial order

“Knowledge”

- Most EAR prohibitions and civil violations are per se violations that do not require knowledge – e.g., exporting without a required license
- Some knowledge-based violations and license requirements – e.g. GP 7 (Providing services you know will assist proliferation activities), GP 10 (Engaging in transaction with knowledge that a violation of the EAR or a license or other authorization has occurred, is about to occur or is intended to occur with respect to the item concerned)
- Knowledge – “includes not only positive knowledge . . . but also awareness of a high probability of [a circumstance’s] existence or future occurrence”

- Civil monetary penalty of up to \$300,000 for each violation or twice the amount of the underlying transaction
 - A single transaction may involve multiple violations
- Denial of Export Privileges
 - May be imposed as penalty or protective measure
 - May include suspension or revocation of licenses, deny or restrict exports, or restrict any dealings in which person benefits from export or re-export of items subject to the EAR

- Under the Export Control Reform Act of 2018, an individual or corporate officer who knowingly participates in a violation can be sentenced to imprisonment for up to 20 years
- Individuals and corporations can be fined up to \$1 million
- Export control prosecutions often involve charges of violations of other criminal statutes – conspiracy, money laundering (for which an export controls violation is a predicate offense), obstruction of justice – with accompanying fines and other penalties

- Generally not required
- BIS “strongly encourages” disclosure to OEE if you believe you may have violated the EAR, or any order, license or authorization by BIS. 15 CFR 764.5
- Voluntary self-disclosure is a mitigating factor in determining what administrative sanctions, if any, will be sought by OEE.” 15 CFR 764.5(a)
 - “All voluntary self-disclosures meeting the requirements of 764.5 will be afforded ‘great weight,’ relative to other mitigating factors not designated as having ‘great weight’.” Supp. No. 1 to EAR Part 766.

QUESTIONS?

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