

Understanding How the ITAR and the  
EAR Apply to Contaminated UK  
Products and Technology, Including  
EAR *De Minimis* and Direct Product  
Rules

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# US EXPORT CONTROLS

From EAR to ITARnity  
*Ever-challenging US Export Controls Compliance*

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# Agenda

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- ITAR and EAR Contamination of UK Products
- Video Case Studies
- Problem Solving

# ITAR Contamination of Defense Articles

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- Any person who intends to export or to import temporarily a defense article must obtain the approval of DDTC prior to the export or temporary import, unless the export or temporary import qualifies for an exemption under the provisions of this subchapter.

§ 123.1(a)

- Definition

§ 120.6 **Defense Article.** *Defense article* means any

- Item or technical data designated in § 121.1 (USML)
- 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

# ITAR Contamination of Defense Articles

- US defense articles are always subject to ITAR, even after foreign incorporation ( § 123.9)
- Re-exports and retransfers of defense articles require prior approval from DDTTC
  - Re-exports: actual shipment from one country to another
  - Retransfer: change in end-use or end-user or transfer to a third party (in same country)
- Destination control statement
  - Must be placed on commercial invoice for exports, re-exports and retransfers, together with:
    - Country of ultimate destination
    - End-user
    - License or other approval number or exemption citation
- DDTTC approval required to:
  - Transfer non-US products containing US content

“These items are controlled by the U.S. Government and authorized for export only to the country of ultimate destination for use by the ultimate consignee or end-user(s) herein identified. They may not be resold, transferred, or otherwise disposed of, to any other country or to any person other than the authorized ultimate consignee or end-user(s), either in their original form or after being incorporated into other items, without first obtaining approval from the U.S. government or as otherwise authorized by U.S. law and regulations.”

# ITAR Contamination of Defense Articles

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- Foreign-made items based on or derived from US origin technical data or software subject to ITAR
- Required provision in a technical assistance agreement - § 124.8(5)
  - “The technical data or defense service exported from the United States in furtherance of this agreement and any defense article which may be produced or manufactured from such technical data or defense service may not be transferred to a foreign person except pursuant to § 126.18, as specifically authorized in this agreement, or where prior written approval of the Department of State has been obtained.”
- DDTC approval required to:
  - Retransfer of technical data received under a TAA
  - Transfer of defense articles (products or data) produced with the technical data received under a TAA
  - Except:
    - § 126.18 for employees
    - As specifically authorized in this agreement (e.g., retransfer to end-user)
    - Where prior written approval of the Department of State has been obtained

# Discussion: Impact of Modifying a UK Product to Meet US Requirements

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UK Co offers a military product to the MOD and other governments. There is an opportunity to offer the military product to the US Army. The product offered to the US Army is not materially different than the versions sold to other governments, but some modifications are necessary to meet the specific requirements specified by the US Army.

- What is the impact on the UK product after modifications?
- What is the impact on future UK products for other non-US applications?
- Which employees can have access to the US technology? Or the modified UK technology?
- What is the impact on allowing visitors to the facility where product is made?

# EAR Contamination of Items

( § 734.3(a))

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- All items in the US
- 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

# EAR – *De Minimis* Rule

Delivered value of US-origin content  
controlled to ultimate destination

Ex-works value of non-US made  
product incorporating US content

≤

0% - 600 series to D:5  
10% - to sanctioned/AT  
25% - to all others

- 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



# EAR – Second Incorporation Rule

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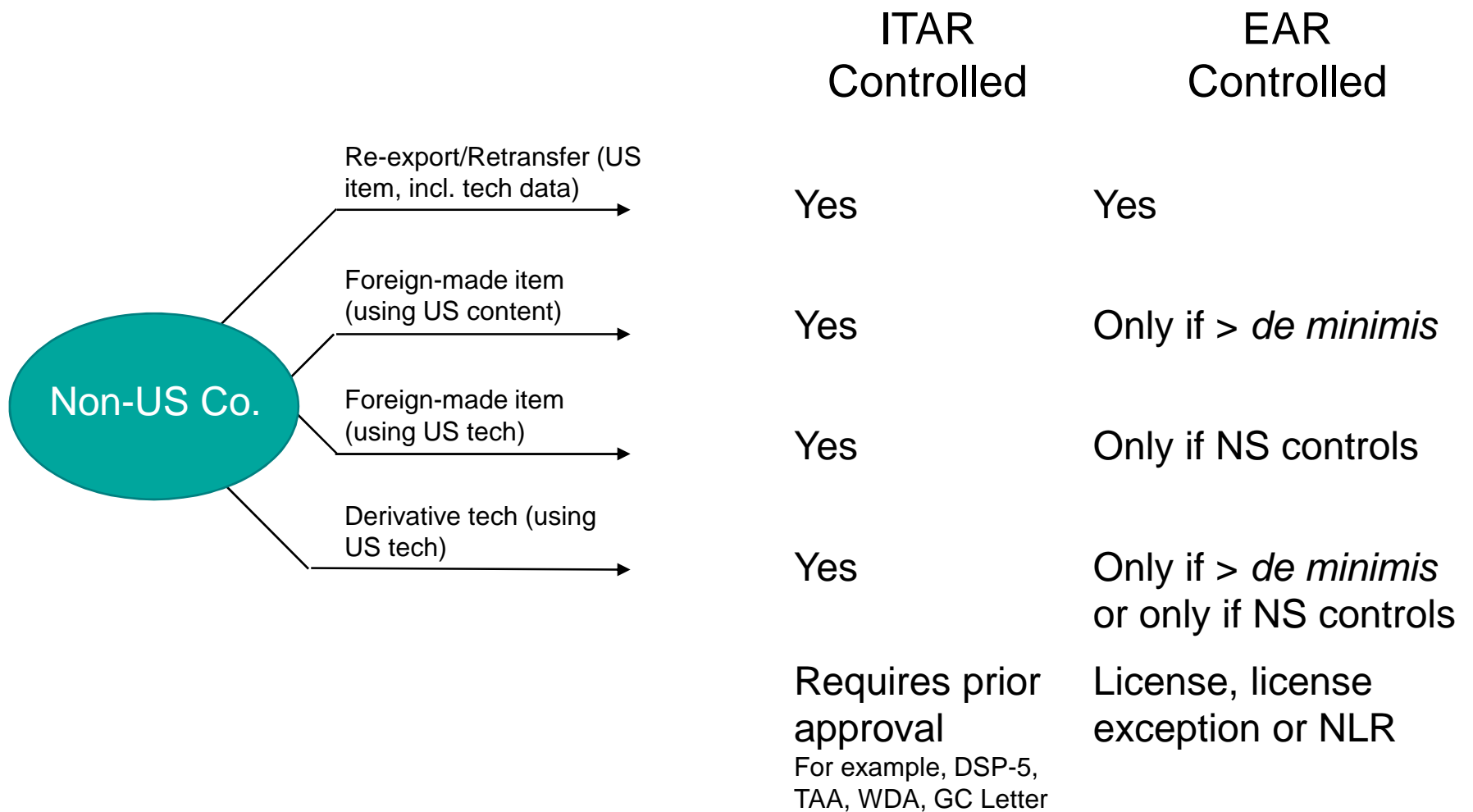
- US-origin components that are incorporated into a foreign-made discrete product will not be counted in *de minimis* calculations when the foreign-made discrete product of which they are part is itself incorporated into a subsequent foreign-made item (i.e., after the second foreign incorporation)
  - First incorporation must be completed resulting in a foreign-made discrete product before a “second incorporation” can occur
  - First item must be purchased in an arm’s-length transaction or regularly sold by itself, either as a stand-alone product or as an identifiable replacement
  - If purchaser participated in the design or manufacture of the first item or chose the parts that were to go into the foreign product, then that indicates that the first item was in fact part of a larger manufacturing or production process and therefore not a discrete or completed product
- UK purchaser does not need to inquire as to US content of non-US made item

# EAR – Direct Product Rule

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- 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
  - **Applies to certain D and E countries**
- Example: UK Item sent to US for testing. Testing results received from the US indicate that change should be made to the design.
  - The revised design and drawings are the direct product of the US testing results
  - The modified UK item is NOT the direct product and is not subject to the EAR

# ITAR and EAR Contamination



# Impact of Doing Business with Organization on Entity List

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- Applies to the export, reexport and transfer (in country) of items specified on the Entity List to the Entity List designated organization
  - For the Huawei Listed Entities, the items specified is *all items subject to the EAR*
- Only the actual organization that is listed on the Entity List is subject to the Entity List restrictions (consider risk of diversion)
- The EAR does contemplate obtaining an export (reexport or transfer) license to export items specified on the Entity List to a designated organization. However, the Entity List establishes a License Review Policy, which is often a presumption of denial.
- Does not prevent buying items from the Entity List designated organization. Restrictions apply to supplying items.

# The Entity List

Control Policy: End-User and End-Use Based

Supplement No. 4 to Part 744 – page 74

COUNTRY	ENTITY	LICENSE REQUIREMENT	LICENSE REVIEW POLICY	FEDERAL REGISTER CITATION
	HiSilicon Optoelectronics Co., Ltd., Wuhan, Hubei, China.	For all items subject to the EAR, see §§ 736.2(b)(3)(vi) <sup>1</sup> and 744.11 of the EAR, EXCEPT <sup>2</sup> for technology subject to the EAR that is designated as EAR99, or controlled on the Commerce Control List for anti-terrorism reasons only, when released to members of a “standards organization” (see §772.1) for the purpose of contributing to the revision or development of a “standard” (see §772.1).	Presumption of denial.	84 FR 22963, 5/21/19. 85 FR 29853, 5/19/20. 85 FR 36720, 6/18/20. 85 FR 51603, 8/20/20.
	HiSilicon Technologies Co., Ltd (HiSilicon), Bantian Longgang District, Shenzhen, 518129, China.	For all items subject to the EAR, see §§ 736.2(b)(3)(vi) <sup>1</sup> , and 744.11 of the EAR, EXCEPT <sup>2</sup> for technology subject to the EAR that is designated as EAR99, or controlled on the Commerce Control List for anti-terrorism reasons only, when released to members of a “standards organization” (see §772.1) for the purpose of contributing to the revision or development of a “standard” (see §772.1).	Presumption of denial.	84 FR 22963, 5/21/19. 85 FR 29853, 5/19/20. 85 FR 36720, 6/18/20. 85 FR 51603, 8/20/20.

- A license is required, to the extent specified on the Entity List, to export, reexport, or transfer (in country) any item subject to the EAR when an entity that is listed on the Entity List is a party to the transaction
- License exceptions may not be used unless authorized in the Entity List entry for the entity that is party to the transaction
- Applications for licenses required by this section will be evaluated as stated in the Entity List entry for the entity that is party to the transaction
- Fn1 makes the entity subject to the “Designated Entity” direct product rule
- Fn2 refers to exception for ongoing security research critical to maintaining the integrity and reliability of existing and currently fully operational network and equipment.

# Foreign Direct Product Rule (Entity List)

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- Secretary of Commerce Wilbur Ross explained the expansion of the restrictions as necessary because earlier US Department of Commerce actions had “led them [Huawei] to do some evasive measures. They were going through third parties,” Secretary Ross added, “The new rule makes it clear that any use of American software or American fabrication equipment is banned and requires a license.”
- This rule prevents non-US organizations from exporting items to or for Huawei if:
  - Based on certain Specified Technology or Software
  - Produced using equipment based on certain Specified Technology or Software
- Specified Technology or Software = ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991 of the CCL

# Foreign Direct Product Rule (Entity List)

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- You may not reexport, export from abroad, or transfer (in-country) without a license or license exception any foreign-produced item when there is “knowledge” that
  - The foreign-produced item will be incorporated into, or will be used in the “production” or “development” of any “part,” “component,” or “equipment” produced, purchased, or ordered by any Designated Entity; or
  - Any Designated Entity is a party to any transaction involving the foreign-produced item, e.g., as a “purchaser,” “intermediate consignee,” “ultimate consignee,” or “end-user.”
    - Designated Entity = any entity with a footnote 1 designation in the license requirement column of the Entity List
- AND the foreign produced item is
  - A direct product of Specified Technology or Software; or
  - Produced by any non-US plant or major component of a plant that itself is a direct product of Specified Technology or Software

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- **Video Case Studies**
- Problem Solving



# Case Study: Export Jurisdiction and Classification of Non-US Made Items (EAR)

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- Given:
  - SuppEAR life support system component is ECCN 9A610.x
  - Component is 35% of the value of the life support system
- Classifications
  - Tactix life support system incorporates SuppEAR component
    - Is the life support system subject to the EAR?
    - What is the export classification of the life support system?
  - In country fasteners: requires modification of the fasteners to connect the SuppEAR component
    - What is the export classification of the fastener?
    - Is the fastener subject to the EAR?
  - Third country component (unique to life support systems): requires minor modifications to physically connect with the SuppEAR component (no change in function or purpose)
    - What is the export classification of the component?
    - Is the component subject to the EAR?

# Case Study: Export Jurisdiction and Classification of Non-US Made Items (EAR)

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**contenten>blers**

**CE Case Study 4. Item Received From SuppEAR**

# Case Study: direct product rule

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**contenten>blers**

**CE Case Study 9: Fasteners**

**CE Case Study 9: Third country component**

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- ITAR and EAR Contamination of UK Products
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- **Problem Solving**

# Problem Solving Case Studies

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- Case Study 1: The Comet Engine
- Case Study 2: The Comet Engine Goes ITAR-free
- Case Study 3: The Comet Engine Fan Blade Assembly
- Case Study 4: The Comet Engine Fuel Ignition Sprayer

# Case Study 1: The Comet Engine

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- Aero Propulsion plc (UK) has designed a new military drone gas turbine engine, called the Comet. Aero Propulsion has contracted with Forge America, Inc. (US) to produce forgings and castings for use in the combustion chamber of the Comet.
- Forge America recommended minor modifications to the drawings to more efficiently produce the items.
- Aero Propulsion incorporated these changes into the standard drawings for the forgings and castings.
- Aero Propulsion also purchased a small amount of 600 series components (estimated less than 10% of all materials) from other suppliers in the US.
- Aero Propulsion is ready to send a first article of the Comet to a French contractor/customer for testing.

# Case Study 1: The Comet Engine

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Is the Comet Engine listed on the USML or CCL?

- [Cat. XIX(c) Gas turbine engines . . . specially designed for unmanned aerial vehicle systems.]

Explain whether any of the US origin components are subject to the ITAR or the EAR.

- [Forging/casting. Cat. XIX(f)(2) Hot section components (i.e., combustion chambers . . . ) specially designed for gas turbine engines controlled in this category.
- 120.6 – Defense Articles. It also includes forgings, castings, . . . that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles.
- 600 Series parts subject to EAR.]

Is any approval required from DDTC or BIS to export the Comet to France? If so, what approval?

- [ITAR: DSP-5, DSP-5 in furtherance of TAA, (possibly, GC if not covered in DSP-5) / EAR: de minimis US controlled content.]

## Case Study 2: The Comet Engine Goes ITAR-free

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- After first article testing in France, the customer has asked Aero Propulsion to make the Comet “ITAR free.” Aero Engines has identified an alternative source for the forgings and castings in Germany and wants to send the supplier the data package from Forge America.
- Aero Propulsion also took a closer look at its EAR content and found that the Comet uses more US content than originally thought. Approximately 7% of the content is comprised of components classified as 9A619.x. Another 20% of the content is comprised of components classified as EAR99.
- In addition, Aero Propulsion found that several drawings of components for the Comet were modified based on test results received from a supplier in the US and classified as ECCN 9E619.a.



## Case Study 2: The Comet Engine Goes ITAR-free

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Is the data package to be sent to Germany controlled under the ITAR? If so, will the German made forging and casting be ITAR free?

- [Yes. Drawing based on comments / changes from US.
- No. Not ITAR free. Should revert to earlier drawing.]

Assuming the Comet is ITAR free, is the Comet still subject to US export controls? Explain why or why not.

- [Not subject to EAR. Still de minimis US content. Not direct product.]

# Case Study 3: The Comet Engine Fan Blade Assembly

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Aero Propulsion must replace the fan blade assembly in one of the engines exported to France.

The fan blade assembly includes ECCN 9A619.x components. While these components constitute a small portion of the entire engine, they constitute over 30 percent of the value of fan blade assembly.

In addition, the technical instructions for replacing the fan blade assembly are based in part on 9E619 technology from the US.

# Case Study 3: The Comet Engine Fan Blade Assembly

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Explain whether the fan blade assembly is subject to the EAR.

- [9A619.x components are controlled US content. More than de minimis.]

Explain whether the technical instructions are subject to the EAR.

- [9E619 technology is controlled for NS reasons. Technical instructions are the direct product. Probably also controlled for NS reasons. But, France is not a D or E country.]

If either is subject to the EAR, what are the options available to Aero Propulsion to replace the fan blade assembly in the UK or France? Which license exceptions are available?

- [Consider license exceptions STA or RPL or use BIS license. But, cannot use STA for 9A619 – note indicates not eligible.]

# Case Study 4: The Comet Engine Fuel Ignition Sprayer

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Aero Propulsion purchases the fuel ignition sprayer from Precision Parts Ltd. (UK). Precision Parts has advised Aero Propulsion that the fuel ignition sprayer that it has been supplying to Aero Propulsion is controlled under the EAR because it has more than a de minimis amount of US 600 series parts. However, Precision Parts has declined to advise Aero Propulsion of the exact ECCNs or percentage of US content in the fuel ignition sprayer. Up to this point, Aero Propulsion had assumed that the fuel ignition sprayer was a UK product.

How does this new information impact the application of the EAR to the Comet engine?

- [No impact, if the second incorporation rule applies.]