



# US Export Control Compliance: Intermediate Workshop

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Export Controls Symposium 2022

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## Agenda

- Key Concepts in US Export Controls and Recent Developments
- “Contamination” Impact on Non-US Business
- ITAR vs EAR Jurisdiction and Classification Case Study



## 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):

[pmddtc.state.gov](http://pmddtc.state.gov)

## Other Items

Government Agency:

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

Legal Authority:

Export Control Reform Act (ECRA)

Implementing Regulations:

Export Administration Regulations  
(EAR)

Control List:

Commerce Control List (CCL)

Website (guidance):

[bis.doc.gov](http://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,  
Ukraine Regions  
SDN/SSI-driven programs

Website (guidance):

[treas.gov/offices/enforcement/ofac](http://treas.gov/offices/enforcement/ofac)

# Recent Developments

- ITAR
  - OGELs for retransfers within UK and reexports to Canada and Australia
  - Restructuring of the ITAR
- EAR
  - China: Use of “is informed” letters
  - Russia: Almost E:1 country
- CFIUS
  - Export control review of target required
  - Changes in ownership and reorganizations



## EAR § 734.14

- An actual shipment or transmission of an item subject to the EAR from one foreign country to another foreign country, including the sending or taking of an item to or from such countries in any manner
- Releasing or otherwise transferring “technology” or source code subject to the EAR to a foreign person of a country other than the foreign country where the release or transfer takes place (a “[deemed reexport](#)”)
- Transferring by a person outside the United States of registration, control, or ownership of certain spacecraft

## ITAR § 120.19

- An actual shipment or transmission of a defense article from one foreign country to another foreign country, including the sending or taking of a defense article to or from such countries in any manner
- Releasing or otherwise transferring technical data to a foreign person who is a citizen or permanent resident of a country other than the foreign country where the release or transfer takes place (a “[deemed reexport](#)”)
- Transferring registration, control, or ownership of any aircraft, vessel, or satellite subject to the ITAR between foreign persons

# Deemed Reexport Home Country

## EAR

- Foreign person's most recent country of citizenship or permanent residency

## ITAR

- All countries in which the foreign person has held or holds citizenship or holds permanent residency



# Deemed Reexport

- You are reexporting technology subject to the ITAR or EAR by allowing access to the US content at your facility
  - Employees
  - Contractors
  - Visitors
  - Customers
  - Suppliers
  - Others
- Any release outside of the United States of technology or source code subject to the ITAR or EAR to a foreign person of another country is a **deemed reexport** to the **home country**
- Technology and source code are released through:
  - Visual inspection by a foreign person; or
  - Oral or written exchanges with a foreign person.

# Authority for Deemed Reexports

## EAR

- BIS vetting
  - 750.7(a)(3) any national employee at facility on the license
  - Reexport license
- Self-vetting
  - 734.20(a) authorized to home country by exception or NLR
  - 734.20(b) NATO, EU +
  - 734.20(c) Substantive contacts + NDA or BPSS

## ITAR

- DDTC vetting
  - 124.8(a)(5) TAA territory
  - GC
- Self-vetting
  - 126.18(c) Substantive contacts + NDA or BPSS
  - 126.18(d) NATO, EU +

# Transfer and Retransfer

## EAR § 734.16 Transfer (in-country)

- Transfer (in-country) is a change in end use or end user of an item within the same foreign country

## ITAR § 120.51 Retransfer

- A change in end use or end user, or a temporary transfer to a third party, of a defense article within the same foreign country
- A release of technical data to a foreign person who is a citizen or permanent resident of the country where the release or transfer takes place

# Reexports and Retransfers/Transfers

## EAR

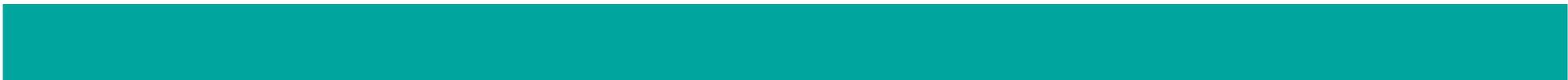
- Export License (can cover reexports and transfers)
- Reexport or retransfer license
- Use license exception (e.g., STA or RPL)
- NLR

## ITAR

- Agreement or license (can cover reexports and retransfers)
- GC
- Exemption (e.g., 123.9(e) or 126.5)
- OGELs 120.22(b); 87 FR 43366

## Agenda

- Key Concepts in US Export Controls and Recent Developments
- “Contamination” Impact on Non-US Business
- ITAR vs EAR Jurisdiction and Classification Case Study

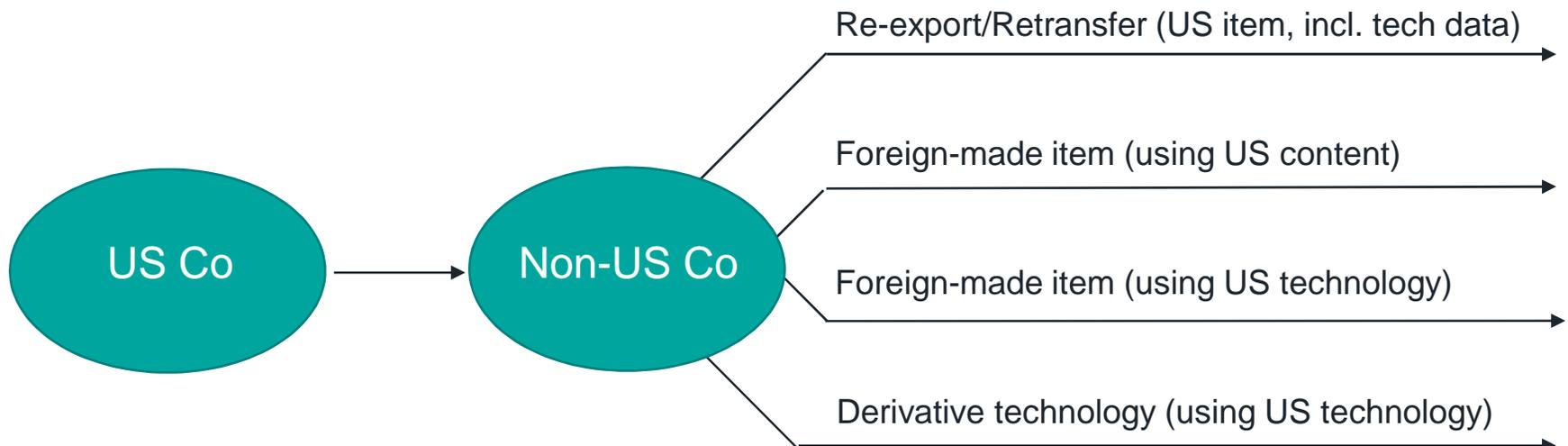


# Extraterritorial Application of Export Controls

- 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.
    - May 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

# Scope of US Export Controls

- ITAR governs:
  - All exports from the United States
  - Reexports and retransfers of US-ITAR content
- EAR governs:
  - All exports from the United States
  - Certain, not all, reexports and retransfers of US-EAR content



# 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/E:1, E:2

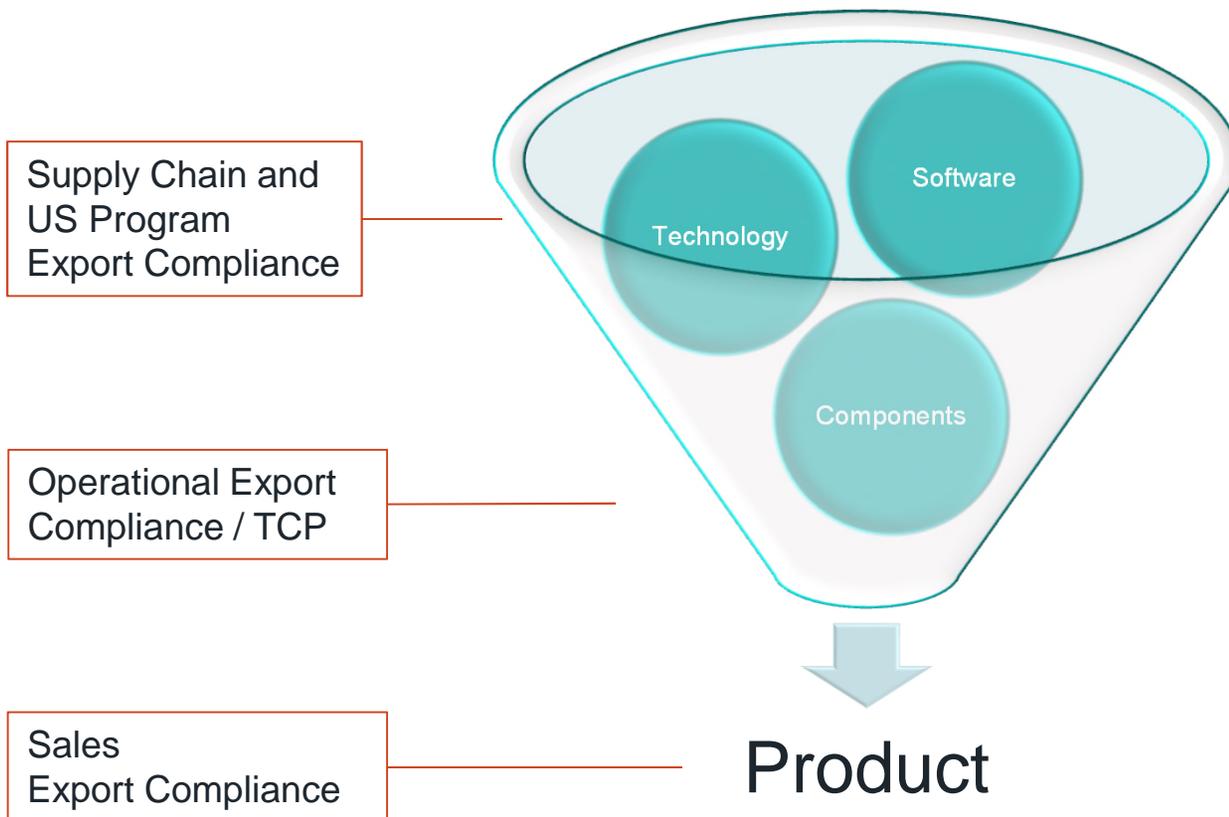
25% - to all others

- General Rule:
  - If the foreign-made item is destined for Iran, Syria, Cuba 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 – National Security Foreign Direct Product (FDP) Rule

- Foreign-made items subject to the EAR
  - Foreign-made direct products of US origin technology or software
  - Foreign-produced items from a plant or using production equipment that is the direct product of US origin technology or software
- Certain conditions required
  - 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 foreign-made items destined for D:1, E:1 and E:2 countries
- Special rules
  - 9x515: 9D515 software or 9E515 technology → 9x515 direct product
  - 600 Series: 600 series software or technology → 600 series or 0A919 direct product

# 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

# Implement Procedures to Comply with US Export Control Laws

- Intake procedure for goods, technology and software from the US
  - Export jurisdiction and classification (ITAR, EAR, ECCN or EAR99)
  - Export authority
  - Implement through supplier / partner questionnaire
- Technology Control Plan to handle ITAR and EAR-controlled items at your facility
  - Control physical access to ITAR and EAR controlled items by employees or visitors
  - Using IT system to control virtual access to ITAR and EAR controlled items by employees or visitors
  - Screen employee nationality to avoid “deemed export”
  - Assess storage of controlled items, such as location of servers
- Procedure to determine whether reexport / retransfer requires prior approval form DDTC or BIS
- Procedures for screening customers / partners and to screen transactions
  - Sanctioned or prohibited countries
  - Screen parties and financial institutions, owners and principals. <https://www.trade.gov/data-visualization/csl-search>
    - 50% rule
    - Enhanced screening: know who is the owner
  - Proscribed end-uses/rs, including military end-uses and end-users
  - Diversion “red flags”

## Agenda

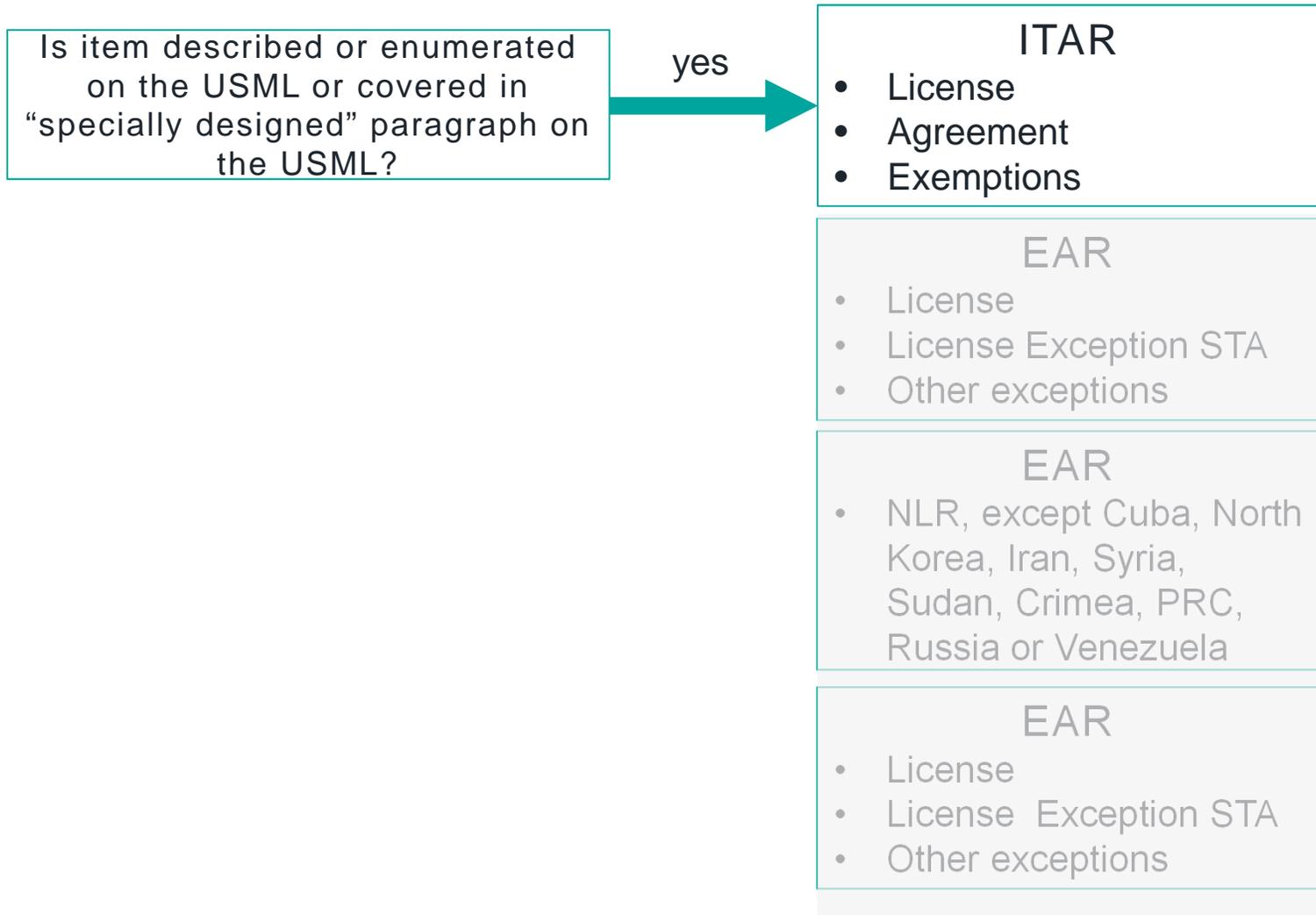
- Key Concepts in US Export Controls and Recent Developments
- “Contamination” Impact on Non-US Business
- ITAR vs EAR Jurisdiction and Classification Case Study



# Jurisdiction and Classification Case Study

- Your company, **Tactix**, receives a component from US supplier, **SuppEAR**, for incorporation into the life support system that you produce, a UK product.
- The Tactix life support system was developed for use in the Eurofighter Typhoon.
- The SuppEAR component represents 35% of the value of the finished life support system
- SuppEAR advises that its component is under the EAR and is ECCN 9A610.x
- A UK supplier produces fasteners to connect SuppEAR component. UK supplier must modify the fasteners using US technology
- A third country supplier produces a component unique to the life support system. The third country supplier must modify using US technology

# Order of Review



# Is SuppEAR Component ITAR Controlled?

- USML Category VIII – Military Aircraft

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

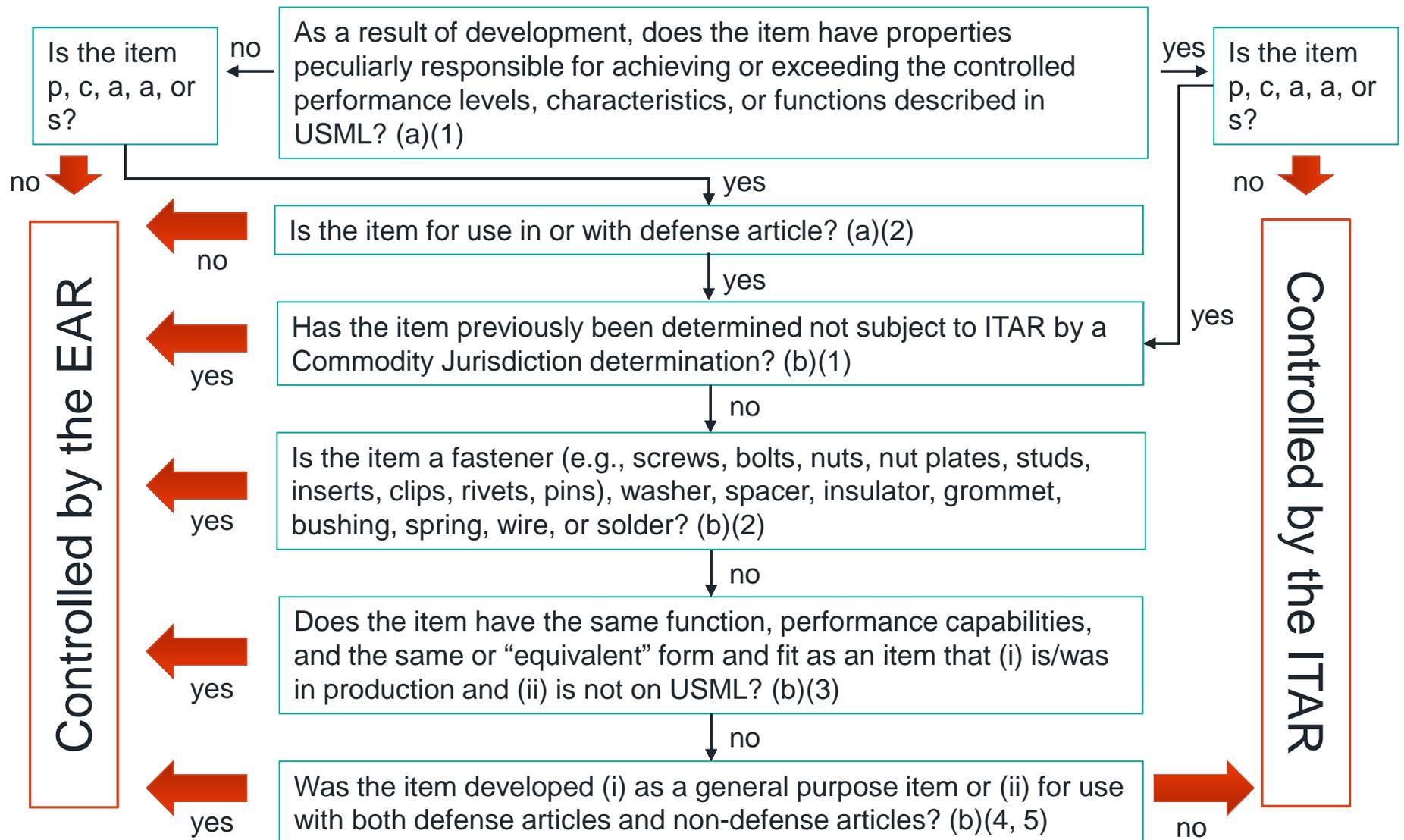
(1) Parts, components, accessories, and attachments **specially designed** for the following U.S.-origin aircraft: The B-1B, B-2, B-21, F-15SE, F/A-18 E/F, EA-18G, F-22, F-35, and future variants thereof; or the F-117 or U.S. Government technology demonstrators. Parts, components, accessories, and attachments 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 Component

- Specially designed for listed aircraft?
- For example, what if it can be used on F/A-18 and Typhoon?



# 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.

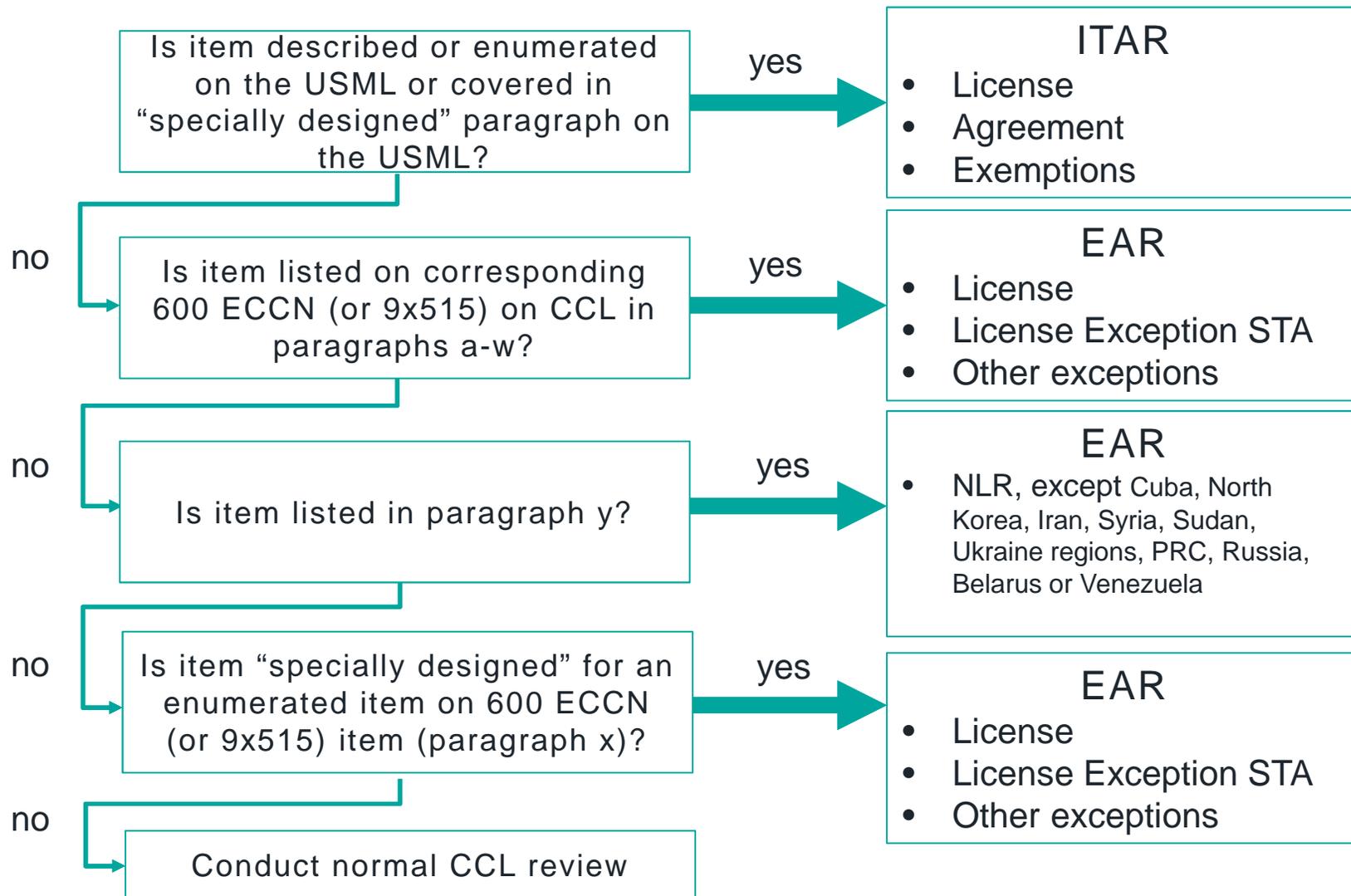
## (b)(3) - Same Function, Performance Capabilities, and the Same or “Equivalent” Form and Fit

- 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

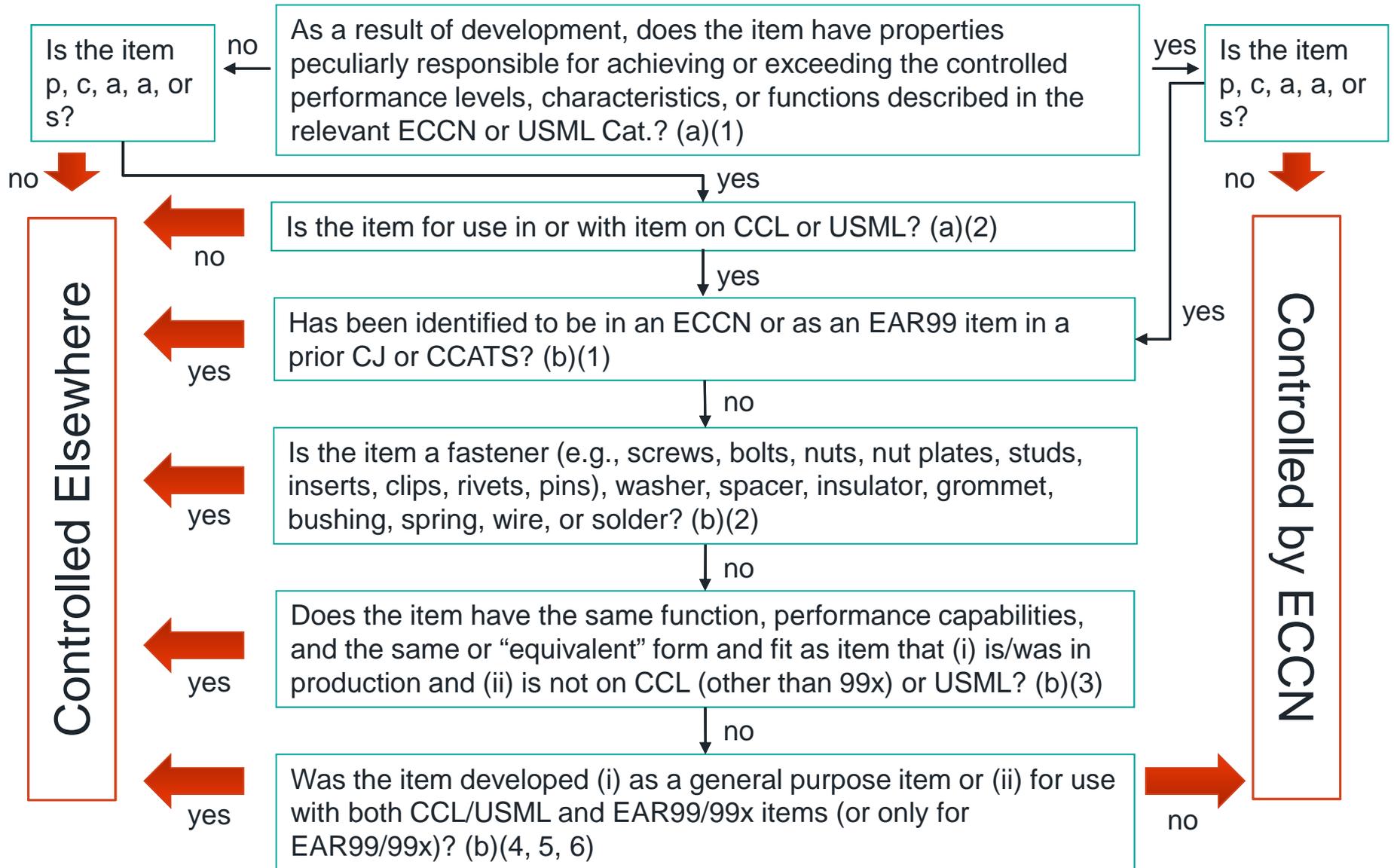
- a. 'Military Aircraft' "specially designed" for a military use that are not enumerated in USML paragraph VIII(a)
- g. Aircrew life support equipment, aircrew safety equipment and other devices for emergency escape from aircraft controlled by either USML paragraph VIII(a) or ECCN 9A610.a
- x. "Parts," "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?
- ✓ SuppEAR Component?
- ✓ UK Supplier fasteners?
- ✓ 3<sup>rd</sup> Country Supplier component?



# EAR: Specially Designed Test



# Impact of ECCN 9A610.x Component

**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

<i>Control(s)</i>	<i>Country Chart (See Supp. No. 1 to part 738)</i>
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
RS applies to 9A610.y	China, Russia, or Venezuela (see §742.6(a)(7))

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

- BIS license required to export or reexport items under 9A610.g and .x because they are subject to NS Col. 1 controls
- Is a BIS license required to export the life support system?
- Is a BIS license required to reexport a SuppEAR component as a replacement part?
- What about the UK supplier fasteners and the 3<sup>rd</sup> country supplier component?

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



**CE Case Study 4. Item Received From SuppEAR** **contenten>blers**

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



## CE Case Study 9: Fasteners

# Key Take-aways

- Recent Developments
  - Almost complete embargo of Russia
  - Enhanced screening for China
  - Need to be involved in acquisitions, investments and corporate structure changes
- Key Concepts
  - Deemed reexports. Be aware of dual and third country nationals at facility.
  - Retransfers and reexports. Need to assess license requirements for US items and contaminated items.
- Contamination
  - Handle ITAR and EAR controlled items to avoid unintended contamination of UK products and technology
  - Self-classification is permitted
  - Always ask for export jurisdiction and classification
  - Beware EAR99 (and other EAR) components, originally they may have been ITAR and may be on UKML

# Key Take-aways

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- Contamination (cont.)
  - Always ask for copy of approval
  - UK companies are permitted to obtain reexport and retransfer approvals
- Generally
  - Knowledge is power, training, training, training (up and down)
  - Policies and procedures are paramount
  - Run regular audits
  - Communication with ALL parties to ensure importance of compliance is recognized
  - Network as often as possible with peers

# Tools to Strengthen Compliance

## The Trade Practitioner

- ✓ ITAR Practitioner’s Handbook
- ✓ Updates on US, UK and EU Export Controls and Sanctions
- ✓ European Regulation
- ✓ Trade Policy
- ✓ CFIUS and NSIA Actions

[www.TradePractitioner.com](http://www.TradePractitioner.com)

EGADD 3-day Workshops on US Export Controls

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\*We are currently winding down our operations in Moscow

