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BUREAU OF INDUSTRY AND SECURITY

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# Export Administration Regulations Updates

## BAFA/U.S. Export Control and Compliance Update 2017

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(E2C2)

# Topics



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- Brief overview of U.S. Export Controls
- Framework under USML to CCL
- Key issues for re-exporters: EAR Updates
  - Applications for re-exporters
  - *De minimis* rule
  - Incorporating U.S. export control items
- Sanctions

# Primary U.S. Export Control Regulations



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## International Traffic in Arms Regulations (ITAR)

- Administered by U.S. Dept. of State, Directorate of Defense Trade Controls
- 22 C.F.R. Parts 120-130
- Covers **defense articles** (commodities, software, and technical data) and defense services

USML  
to CCL

## Export Administration Regulations (EAR)

- Administered by U.S. Dept. of Commerce, Bureau of Industry and Security
- 15 C.F.R. Parts 730-774
- Historically covered mostly commercial and dual-use commodities, software, and technology; some services related to proliferation
- **Now also includes less-sensitive military items and commercial spacecraft items**

# Primary U.S. Export Control Regulations



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## International Traffic in Arms Regulations (ITAR)

- U.S. Munitions List (USML)
  - Describes, as specifically as possible, those items providing a critical military or intelligence capability
- Applies to exports, reexports, and retransfers, as well as temporary imports into the U.S.
- “See-through” rule for most U.S.-origin ITAR content incorporated in non-U.S. made item
- License generally always required, regardless of type of item or destination

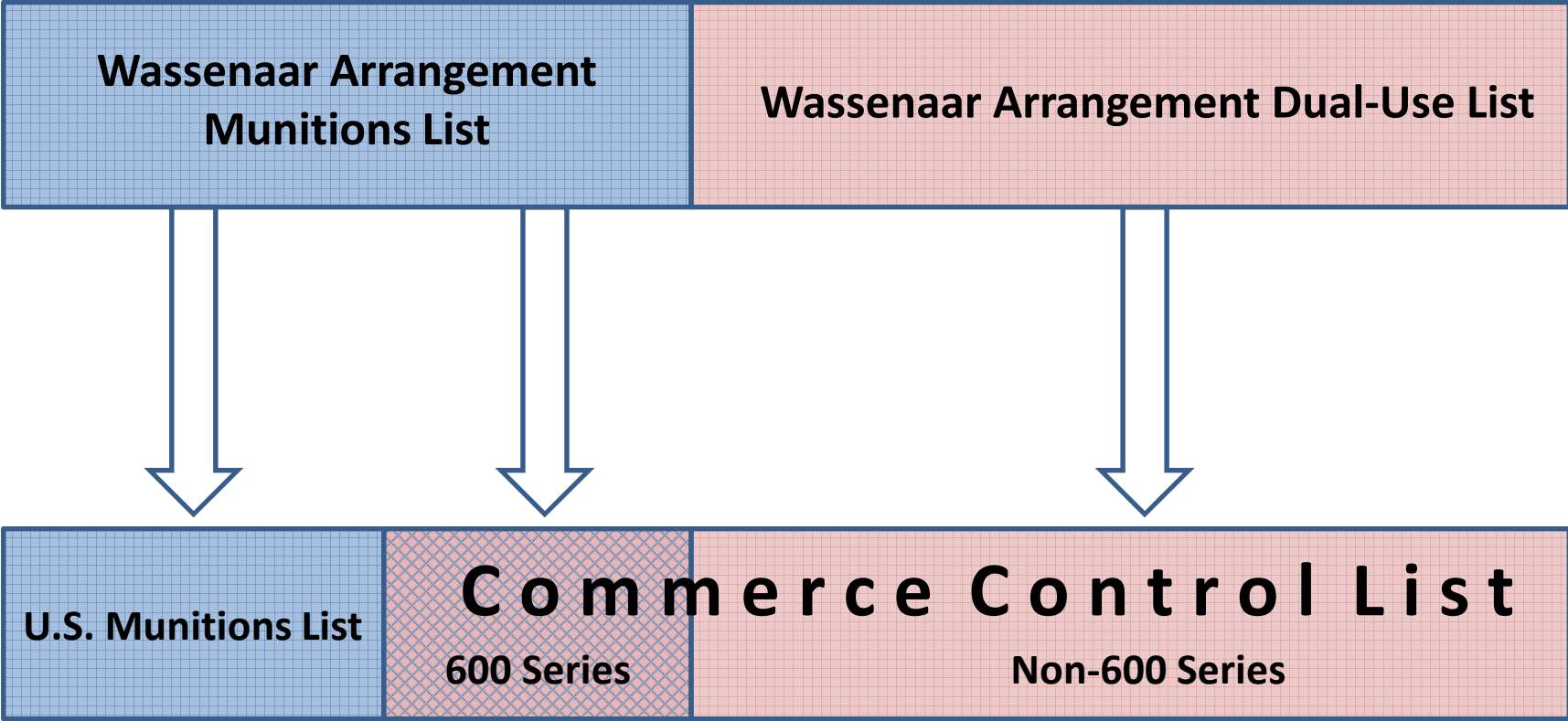
## Export Administration Regulations (EAR)

- Commerce Control List (CCL)
  - Describes dual-use items (including 9x515 spacecraft items)
  - Describes less-sensitive military items (600 series items)
- Applies to exports and reexports, as well as some in-country transfers; does not apply to temporary imports into the U.S.
- Application of *de minimis* for most U.S.-origin EAR content incorporated in non-U.S. made item
- License required based on four factors: type of item, country of destination, end use, end users

# Primary U.S. Export Control Regulations



## Comparison of U.S. and Wassenaar Arrangement Control Lists





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# Framework under U.S. Munitions List (USML) to Commerce Control List (CCL)

# Order of Review

(Supp. No. 4 to part 774)



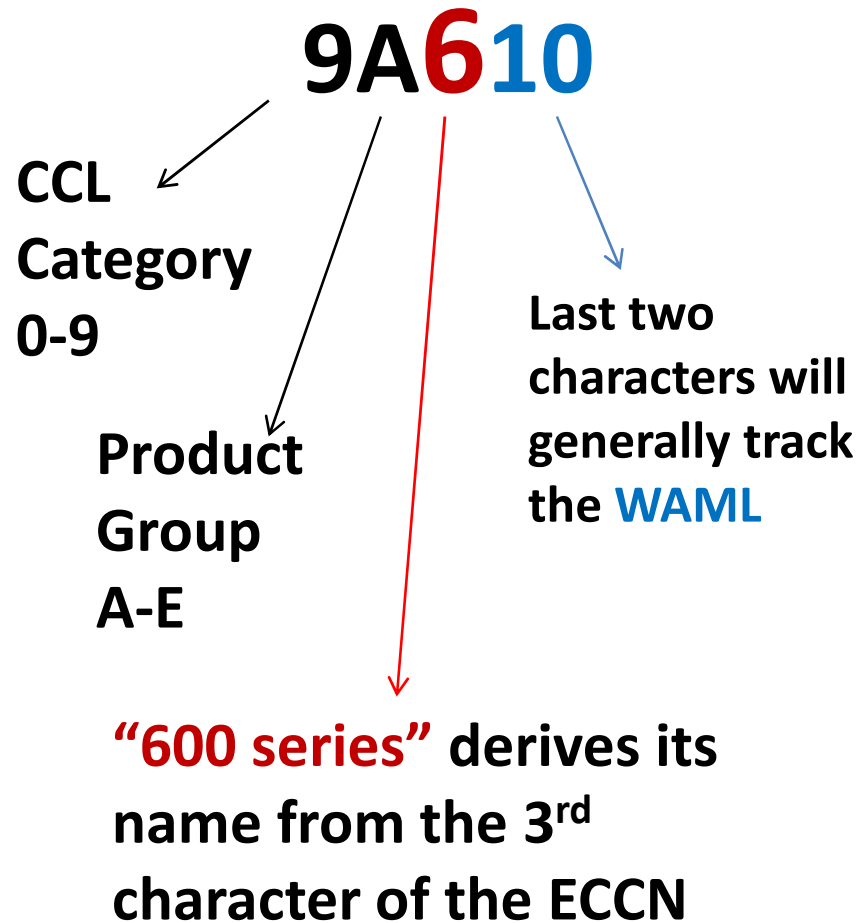
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- Review the USML
  - Specifically enumerated items
  - “Catch-all” controls and ITAR definition of “specially designed”
- If not on the USML, review the CCL
  - Review characteristics of item to determine applicable CCL category and product group
  - Review applicable 600 series and 9x515 ECCNs
    - Specifically enumerated items
    - “Catch-all” controls and EAR definition of “specially designed”
    - Note: certain dual-use ECCNs supersede 9A515.x
  - Review applicable non-600 series/9x515 ECCNs

# CCL 600 Series Framework



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Former USML items (and -018 items) listed in the “Items” paragraph.

Order of review:

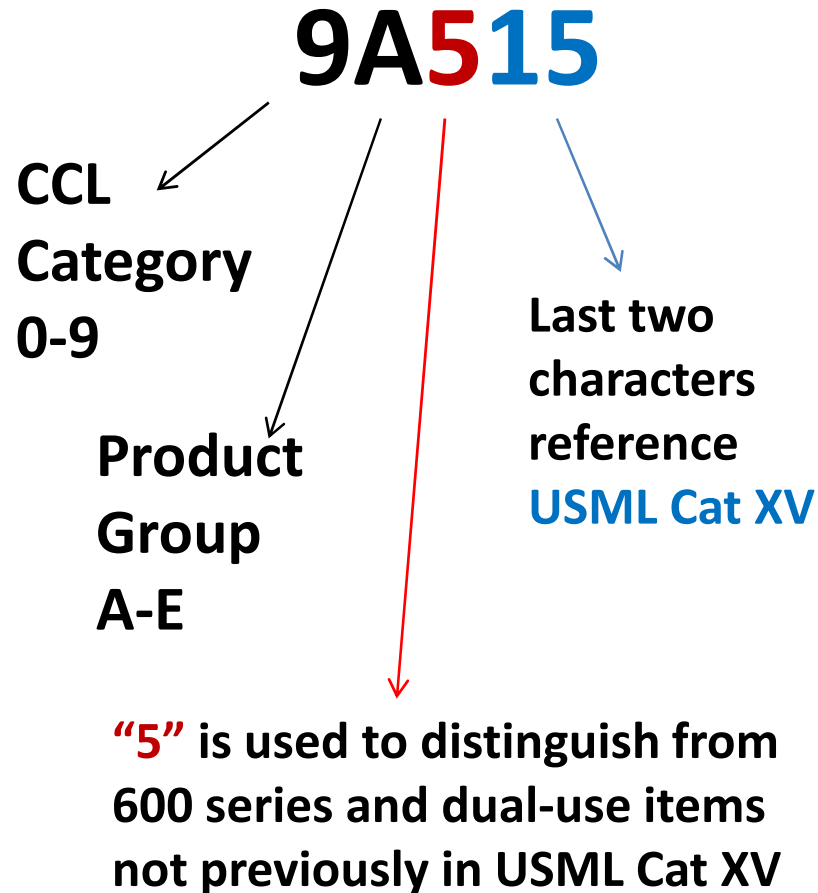
- **.a - .w**: specifically enumerated end items, materials, parts, components, accessories, and attachments
  - Some items may be “specially designed”
- **.y**: specifically enumerated commodities (primarily parts, components, accessories, attachments) that are “specially designed”
- **.x**: “specially designed” parts, components, accessories, and attachments that are not specifically enumerated



# 9x515 Framework



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- .a - .w: specifically enumerated end items, materials, parts, components, accessories, and attachments
  - Some items may be “specially designed”
- .x: “specially designed” parts, components, accessories, and attachments that are not specifically enumerated
- .y: items that would otherwise be within scope of 9A515.x but that have been identified in interagency-cleared CCATS (§ 748.3(e))
  - Currently one type of item listed in 9A515.y

# Additional Controls for 600 Series and 9x515 – § 744.21



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- Section 744.21 currently imposes a license requirement for exports, reexports, or transfers (in-country) of certain items subject to the EAR when one knows such items are intended, entirely or in part, for a military end use in China or for a military end use or military end user in Russia or Venezuela
- All 600 series and 9x515 items (including .y items) will require a license when destined for China, Russia, or Venezuela – see new § 744.21(a)(2)
- Exports, reexports, or transfers within Russia for use in, with, or for the International Space Station are not within the scope of the prohibitions

# Definition of “Specially Designed”



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- Definition of “specially designed” is based on a catch-and-release construct
- Requires answering a series of yes/no questions that lead to an objective determination whether an item is “specially designed”
- Definition is found in Part 772 of the EAR
- Online decision tree tool available at [www.bis.doc.gov/index.php/specially-designed-tool](http://www.bis.doc.gov/index.php/specially-designed-tool)



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# Key Issues for Re-exporters

# Application of EAR to Items Outside of the U.S.



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- Outside of the United States, the following items are subject to the EAR:
  - U.S.-origin items subject to the EAR, wherever located
  - Non-U.S. origin items incorporating certain amounts of U.S.-origin controlled content
  - Non-U.S. origin items that are the direct product of certain U.S.-origin technology or software

# Application of EAR to Items Outside of the U.S.



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- Reexports or transfers of items in the form received
  - If the item is a U.S.-origin item and subject to the EAR, it remains subject to the EAR regardless of how many times it is reexported, transferred, or sold.
  - Therefore, any subsequent reexports or transfers (in-country) must be done in accordance with the EAR, including any items received prior to their movement from the USML to the CCL under Export Control Reform.
  - The same concept applies to a U.S.-origin item subject to the ITAR.

# Application of EAR to Items Outside of the U.S.



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- Reexports or transfers of non-U.S. origin items incorporating U.S.-origin content
  - Unlike the ITAR, the EAR do not have a “see-through” rule.
  - The EAR include a *de minimis* rule based on the percentage by value of U.S.-origin **controlled content** in a foreign-made item.
  - A non-U.S. made item located outside the U.S. that **incorporates** controlled U.S.-origin content that does not exceed the **applicable *de minimis* percentage** for a particular country is not subject to the EAR.
  - A non-U.S. made item located outside the U.S. that **incorporates** controlled U.S.-origin content that exceeds the **applicable *de minimis* percentage** for a particular country is subject to the EAR.

# Application of EAR to Items Outside of the U.S.



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The “600 series” and 9x515 *de minimis* rule – items identified in .a through .x paragraphs of the ECCN, as well as ITAR content not subject to “see-through” rule

Item with U.S. content reexported to all countries, except D:5 (see also ITAR §126.1), E:1 and E:2

25% *de minimis* rule

D:5 (U.S. arms embargoed), E:1 and E:2

0% *de minimis* rule

Note 1: See Supplement No. 2 to Part 734 – Guidelines for De minimis Rules

Note 2: If exceeds de minimis, the foreign made item is subject to the EAR.



# Application of EAR to Items Outside of the U.S.



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The "600 series" *de minimis* rule – items identified in y paragraph of "600 series" ECCN

Item with U.S. .y content only reexported to all countries, except E:1, E:2 plus China

Not subject to the EAR

E:1, E:2 plus China

0% *de minimis* rule

Note 1: See Supplement No. 2 to Part 734 – Guidelines for De minimis Rules

Note 2: If exceeds *de minimis*, the foreign made item is subject to the EAR.

# Application of EAR to Items Outside of the U.S.



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The *de minimis* rule for all other items subject to the EAR, *i.e.*, non-“600 series,” ECCN 9x515

U.S.-origin controlled content reexported to all countries, <u>except</u> Country Group E:1	25% <i>de minimis</i> rule
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Country Group E:1	10% <i>de minimis</i> rule
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Note 1: See Supplement No. 2 to Part 734 – Guidelines for De minimis Rules

Note 2: If exceeds **de minimis**, the foreign made item is subject to the EAR.

# Controlled content



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- **Controlled content** = US-origin items that require a license to the ultimate destination of the foreign product.
  - EAR99 items are considered “controlled content” for certain sanctioned countries.
  - Do not count: License Exception GBS or items that do not require a license to the ultimate destination of the foreign product (NLR designated items).
- **U.S.-origin** = Items produced, assembled or enhanced in the United States.

# Content not eligible for *de minimis*



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- U.S.-origin “600 series” & 9x515 content when the foreign-made items are destined to Country Group D:5 of Supp. No. 1 to Part 740.
- Certain 9E003 technology
- Certain U.S.-origin components of high performance computers
- Encryption 5E002, and encryption commodities and software that don't meet the eligibility criteria in §734.4(b)
- Foreign made military commodities that incorporate cameras classified under ECCN 6A003.b.4.b



# Calculation



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*De minimis* Percentage = 100 x

Fair market value of U.S.-origin controlled  
content

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Fair Market dollar value of foreign item

# One-time *de minimis* report for technology

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- Percentage of U.S. content by value
- Description of your calculations
- Values, assumptions, methodologies
- Export price of U.S. content
- Description and fair market value of the foreign technology

E-Mail Report to:  
[RPD2@bis.doc.gov](mailto:RPD2@bis.doc.gov)

# Application of EAR to Items Outside of the U.S.



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- Direct product of U.S. technology or software
  - Under § 124.8(5) of the ITAR, any defense article produced or manufactured from ITAR technical data or defense service requires DDTC approval prior to transfer to any non-U.S. person.
  - Under the EAR, certain foreign-made items that are located outside the U.S. that are the direct product of certain U.S.-origin technology or software are subject to the EAR when exported from abroad or reexported to *certain* countries.
  - 600 series and 9x515 items are subject to a broader direct product rule (additional country and product scope) than other items subject to the EAR.
  - Non-U.S. made items subject to the EAR because of this rule are subject to the same license requirements to the new country of destination as if they were of U.S. origin.

# Incorporation



- Items are considered to be incorporated when they are:
  - They are essential to the functioning of the foreign equipment,
  - They are customarily included in the sale of foreign-made items, **and**
  - They are reexported with the foreign produced item.



# Application of the EAR to Items Outside of the U.S.



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## The “600 series” direct product rule

Is the non-U.S.-made direct product of:  (i) U.S. controlled “600 series” technology or software <u>or</u>  (ii) A plant or major component of a plant that is a direct product of U.S. controlled “600 series” technology or software?	Yes
Is the non-U.S.-made direct product a “600 series” or 0A919 item?	Yes
Is the “600 series” or 0A919 non-U.S.-made direct product being reexported or exported from abroad to a destination listed in <b>Country Group D:1, D:3, D:4, D:5, E:1 or E:2</b> ?	Yes

*Note: If “yes” to all three questions, then the non-U.S.-made item is subject to the EAR.*

# Application of the EAR to Items Outside of the U.S.



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## The 9x515 direct product rule

Is the non-U.S.-made direct product of:

(i) U.S. controlled 9x515 technology or software or

(ii) A plant or major component of a plant that is a direct product of U.S. controlled 9x515 technology or software?

Yes

Is the non-U.S.-made direct product a 9x515 item?

Yes

Is the 9x515 non-U.S.-made direct product being reexported or exported from abroad to a destination in **Country Group D:5, E:1 or E:2**?

Yes

*Note: If “yes” to all three questions, then the non-U.S.-made item is subject to the EAR.*

# ECCN 0A919



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- *Related Definition* in ECCN 0A919 of “military commodities” is key to understanding this ECCN.
- Foreign made item that is subject to the EAR is what is being classified against CCL parameters not U.S. origin content.
- Foreign made military commodities that are classified in “600 series” are not classified under ECCN 0A919.
- *Related Controls* in ECCN 0A919 important in understanding relationship with ITAR.

# DDTC Authorizations: ITAR § 120.5(b) Approvals

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- You may receive items subject to the EAR (including 600 series or 9x515 items) under a DDTC license or other approval in accordance with ITAR § 120.5(b)
- You may also reexport or transfer items subject to the EAR (including 600 series items) in accordance with ITAR § 120.5(b)
- Reflected in EAR § 734.3(e)



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# Recent EAR developments

# Definitions Rules



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- EAR final rule generally tracks proposed rule
- ITAR interim final rule includes definitions of export, reexport, release, and retransfer
- Rules published June 3, 2016; effective September 1
  - EAR: 81 FR 35586
  - ITAR: 81 FR 35611
  - Rules and EAR FAQs available at:  
<http://www.bis.doc.gov/index.php/regulations/federal-register-notices#fr35586>

# Scope: Revised Definitions



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- EAR: revision of Scope, Part 734
- Largely retains scope of controls but streamlines and clarifies
- Harmonizes substance and structure with ITAR where possible
- Technology, Software Not Subject to the EAR:
  - Published (§734.7)
  - Results from Fundamental Research (§734.8)

# Scope: Revised Definitions



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- Export (includes deemed export) (§734.13)
- Reexport (includes deemed reexport) (§734.14)
- Release (§734.15)
- Transfer (in-country) (§734.16)
  - A change in end use or end user of an item within the same foreign country
- Export of encryption software (§734.17)
- Transfer of access information (§734.19)



# Scope: Revised Definitions



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- Activities that are not exports, reexports or transfers (§734.18)
  - Includes certain secured technology
- Activities that are not deemed reexports (§734.20)

# Published § 734.7



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- Same scope, simpler structure - “available to the public without restrictions upon its further dissemination” with illustrative examples
- Encryption restrictions retained
- Final rule also includes information released to researchers

# Fundamental Research §734.8



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- Streamlined definition: “research in science, engineering, or mathematics, the results of which ordinarily are published and shared broadly within the research community, and for which the researchers have not accepted restrictions for proprietary or national security reasons”
- Consistent with NSDD-189

# Release – New § 734.15



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- Visual or other inspection by a foreign national of items that reveals “technology” or “source code” subject to the EAR to a foreign person; or
- Oral or written exchanges with a foreign person of “technology” in the United States or abroad
- Any act causing the "release" of "technology" or "software," through use of "access information" or otherwise, to yourself or another person requires an authorization to the same extent an authorization would be required to export or reexport such "technology" or "software" to that person

# Deemed Reexport Considerations



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- Deemed reexports are releases of technology or software source code subject to the EAR, within a country outside of the United States, to persons who are not citizens or lawful permanent residents of that country (i.e., third-country nationals)
- If a BIS license authorizes the release of technology to an entity, the license also authorizes the release of the same technology to the entity's foreign persons (i.e., third-country nationals) as long as:
  - The foreign persons are permanent and regular employees who are not proscribed persons, and
  - No license condition limits or prohibits the release to foreign persons of specific countries or country groups

# Transfer (in-country) – New §734.16



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- 
- A change in end use or end user of an item within the same foreign country
  - ITAR term “retransfer” will have same definition

# Cloud Computing & the Definitions Rule



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- The term “cloud” not used in regulatory text – changes affect cross-national data transmission and release to non-U.S. nationals.
- Primary citation in EAR is in a new section, § 743.18, “Activities that are not exports, reexports, or transfers.”
- Definitional changes included “encryption carve-out”
- Three basic requirements for the carve-out: “end-to-end” encryption, applicability of FIPS standards, and prohibition on storage in D:5/Russia

# BIS Guidance on Cloud Computing



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- Three Advisory Opinions on BIS's website:  
<https://www.bis.doc.gov/index.php/policy-guidance/advisory-opinions>
- Cloud Computing FAQs
- Three Advisories issues in 2009, 2011 & 2014:
  - 2009: User and Cloud Service Provider Responsibilities
  - 2011: Data Release to IT administrators
  - 2014: Cloud-based Storefronts



# Activities that are Not Deemed Reexports – New § 734.20



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- Codifies current website guidance, reflects §§ 124.16 and 126.18 of the ITAR
- Section 734.20(a): release not a deemed reexport if:
  - Entity is authorized to receive the “technology” or “source code” at issue, whether by a license, license exception, or NLR, *and*
  - Entity has “knowledge” foreign national’s most recent country of citizenship or permanent residency is that of a country to which export from the U.S. of the “technology” or “source code” at issue would be authorized by the EAR either under a license exception, or NLR

# Issuance of Licenses - § 750.7



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- Conforms EAR to website guidance, “boilerplate” on licenses
- Unless limited by a condition, the license authorizes what is described in the license application and any letters of explanation
- A license authorizing the release of technology to an entity also authorizes the release of the same technology to the entity’s foreign persons who are permanent and regular employees (and who are not proscribed persons) of the entity’s facility or facilities authorized on the license, except to the extent a license condition limits or prohibits the release of the technology to foreign persons of specific countries or country groups

# Destination Control Statement

## § 758.6 (effective 11/15/16)



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- Commerce and State harmonized the text of destination control statement and document it is required on (the commercial invoice).

“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.”

# Destination Control Statement

## § 758.6 (effective 11/15/16)



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- On what document should it be included?
  - Commercial invoice
- What must be included?
  - Statement
  - For 9x515 and “600 series”, ECCN also required
- When is it required?
  - For all shipments (i.e., exports in tangible form) of items on the Commerce Control List, except for EAR99 items or items exported under License Exceptions GFT or BAG.

# Recent Regulatory Changes

*Since November 2016*



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- Clarifications and Revisions to Military Aircraft, Gas Turbine Engines and Related Items License Requirements
- Temporary Exports to Mexico Under License Exception TMP
- Removal of Special Iraq Reconstruction License
- Australia Group (AG) Implementation
- Russian Sanctions: Addition of Certain Entities to the Entity List, and Clarification of License Review Policy
- Nuclear Suppliers Group (NSG) Implementation

# Regulatory Changes

*Since November 2016*



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- Third Rule on Control of Spacecraft Systems and Related Items
- Notice of Inquiry on the Increase of Controls on Infrared Detection Items
- Revisions to Sudan Licensing Policy
- Support Document Requirements for Hong Kong
- Amendment Implementing the India–U.S. Joint Statement of June 7, 2016
- Other revisions: UN Arms embargoes, Burma, Nuclear Nonproliferation (NP2) controls, VEU and Entity List additions and removals



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# Recent EAR developments: Sanctions

# Hong Kong Import/Export License



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- On January 19, 2017, the Bureau of Industry and Security (BIS) updated the Export Administration Regulations (82 FR 6216) regarding U.S. exports to Hong Kong
- 90-day delayed effective date (April 19, 2017)
- Affects items controlled for National Security (NS), Missile Technology (MT), Nuclear Nonproliferation (NP column 1), Chemical and Biological Weapons (CB)



# Hong Kong Import/Export License



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- If Hong Kong law requires an import or export license for NS, MT, NP1, or CB items:
  - A copy of the Hong Kong import license must be obtained prior to shipping to Hong Kong under a BIS license or license exception
  - A copy of the Hong Kong export license must be obtained prior to shipping from Hong Kong under a BIS license or license exception

# Sudan



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- January 17, 2017 Amendments
  - OFAC general license authorizes all transactions formerly prohibited by the SSR.
  - BIS amended the EAR to create a presumption of approval for applications to export and reexport of:
    - Parts and Components for fixed-wing civil passenger aircraft and
    - Items intended for use in civil railways in Sudan.

# Sudan



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- Before Jan. 17, 2017
  - OFAC license required for EAR99 items destined for Sudan and
  - BIS and OFAC licenses necessary for most CCL items destined for Sudan
- After Jan. 17, 2017
  - no OFAC license required for any item subject to the EAR (CCL or EAR99) destined for Sudan
  - most CCL items destined for Sudan continue to require a BIS license.

# UN Arms Embargoes Rule



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- **On November 5, 2016, the Bureau of Industry and Security removed its controls on arms and related materiel to Cote d'Ivoire, Liberia, Sri Lanka, and Vietnam**
  - BIS made conforming changes to the Directorate of Defense Trade Controls (DDTC) UN arms embargoes regulations in Section 126.1 of the ITAR
  - This rule updated Country Group D:5 “U.S. Arms Embargoes Countries” listed in Supplement 1 to Part 740 of the EAR
  - This rule also revised Section 746.1 (b) (2) of the EAR

# UN Arms Embargoes Rule



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- **In addition, BIS updated the EAR to recognize the accession of India as a member of the Missile Technology Control Regime (MTCR)**
  - BIS removed India as a “MTCR adherent” from 742.5 of the EAR
  - BIS added India to Country Group A:2 in Supplement 1 to Part 740 of the EAR

# Cuba



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- On December 17, 2014, the United States Government announced Cuba policy changes intended to support the ability of the Cuban people to gain greater control over their own lives and determine their country's future
- Since then, BIS has published six amendments to the Export Administration Regulations (EAR) (15 CFR 730 *et seq.*) regarding exports and reexports to the island

# Contact Information



U.S. DEPARTMENT OF COMMERCE  
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## **600 Series Licensing and Classification Requests: Munitions Control Division**

- Tom DeFee, [thomas.defee@bis.doc.gov](mailto:thomas.defee@bis.doc.gov)
- Todd Willis, [todd.willis@bis.doc.gov](mailto:todd.willis@bis.doc.gov); 202-482-1477

## **Technical Product Questions**

- Aircraft, gas turbine engines, or ground vehicles: Jeff Leitz, [jeffrey.leitz@bis.doc.gov](mailto:jeffrey.leitz@bis.doc.gov); Dan Squire [daniel.squire@bis.doc.gov](mailto:daniel.squire@bis.doc.gov)
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