



# **Navigating U.S. Dual-Use Export Controls**

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# Why Export Controls?



- To meet international commitments
- To ensure national security
- To meet U.S. foreign policy objectives



# U.S. Department of Commerce Export Controls



- Authorized by:
  - The Export Administration Act of 1979, as amended
  - The International Emergency Economic Powers Act, as amended
- Gives the Department export licensing jurisdiction over exports and reexports of dual-use “items”
- Broad licensing jurisdiction but narrow licensing requirements



# Department of Commerce Dual-Use Export Controls Apply to:



- All items in the United States
- All U.S.-origin items, wherever located
- Certain foreign-made items incorporating controlled U.S. content
- Certain foreign-made direct products
- Activities of U.S. persons



# **Licensing Jurisdiction and Commodity Classification**

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# Two Sets of Regulations, Two Regulating Agencies



- **Export Administration Regulations (EAR)**
  - Administered by the U.S. Department of Commerce, Bureau of Industry and Security (BIS)
  - Control “dual-use” items (*i.e.*, items that may have both commercial and military applications)
- **International Traffic in Arms Regulations (ITAR)**
  - Administered by the U.S. Department of State, Directorate of Defense Trade Controls (DDTC)
  - Control items specifically designed, developed, configured, modified or adapted for a military application



# Jurisdiction vs. Classification

## The Key Elements



- Licensing Jurisdiction
  - Is the item subject to Department of State (ITAR) or Department of Commerce (EAR) licensing jurisdiction
- Commodity Classification
  - Specific to dual-use items that are subject to the EAR
  - Item fits within the technical parameters of an Export Control Classification Number (ECCN) or is EAR99
  - Assumes that a jurisdiction determination has been made, and has been made correctly



# Commodity Jurisdiction Request



- Used to obtain an official government determination when there is uncertainty as to whether an item is subject to the licensing jurisdiction of the Department of Commerce or the Department of State
- Commodity Jurisdiction (CJ) Requests are submitted directly to the Department of State
- CJ Requests are evaluated by the Departments of Commerce, Defense and State
- The Department of State makes the final determination



# Commodity Classification Request



- Used to obtain official government confirmation of a dual-use item's ECCN or EAR99 status
- Commodity Classification Requests are submitted directly to the Department of Commerce
- Commodity Classification Requests are evaluated by the Department of Commerce only
- The Department of Commerce makes the final determination



# Jurisdiction vs. Classification Summary



- Jurisdiction determination comes first
- Classification is first step for items determined to be subject to the EAR
- Both jurisdiction and classification can be done by the manufacturer
- If government help is sought, provide a complete submission and keep involved in the process



# **Bases for Commerce Controls**

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# Commerce Control List



- Based on the multilateral export control regimes
  - Wassenaar Arrangement
    - Conventional arms and dual-use goods and technologies
  - Missile Technology Control Regime (MTCR)
    - Unmanned delivery systems capable of delivering weapons of mass destruction
  - Australia Group (AG)
    - Chemical and biological weapons
  - Nuclear Suppliers Group (NSG)
    - Nuclear weapons



# Commerce Control List



- The U.S. has adopted the EU List
- Therefore, in most cases, multilaterally-controlled items are classified in the same way
  - Control numbers differ only in format
    - 9E3 becomes 9E003
    - “Related controls” explain when items are subject to the licensing jurisdiction of the Department of State



# U.S. Unilateral Controls and EAR99 Classifications



- The U.S. maintains some unilateral controls, which are incorporated into the Commerce Control List (CCL)
- When an item is not controlled on the CCL, it is classified as EAR99 – provided it is not subject to the licensing jurisdiction of another agency



# **Commerce Licensing Requirements**

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# Determining if a License is Required



- Is item subject to the EAR?
- Confirm classification
- Reason(s) for control
- Country Chart – Is there an “X” in the box?
- Possible License Exception
- License Application Submission



# Commerce License Requirements Based on Reason(s) for Control



- All items on the CCL are controlled for specific reasons (e.g., NS, MT, CB, NP)
- The Export Control Classification Number (ECCN) identifies the reason(s) for control
- With the control reason(s) and the country of the consignee, the Commerce Country Chart fixes the licensing requirement



# Reasons for Control



## Regime/Convention-based

- CB = Chemical & Biological Weapons
- CW = Chemical Weapons Convention
- EI = Encryption Item
- FC = Firearms Convention
- NP = Nuclear Nonproliferation
- NS = National Security
- MT = Missile Technology
- UN = United Nations

## Unilateral

- AT = Anti-Terrorism
- CC = Crime Control
- RS = Regional Stability



# Commerce Country Chart (Supplement No. 1 to Part 738)



Commerce Country Chart

Reason for Control

Countries	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Convention	Crime Control			Anti Terror
	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
Guyana	X	X		X		X	X	X	X	X	X	X		X	
Haiti	X	X		X		X	X	X	X	X	X	X		X	
Honduras	X	X		X		X	X	X	X	X	X	X		X	
Hong Kong	X	X		X		X		X	X	X		X		X	
Hungary	X					X	X	X	X						
Iceland	X			X		X	X	X	X						
India	X	X	X	X	X	X	X	X	X	X		X		X	
Indonesia	X	X		X		X	X	X	X	X		X		X	



# License Exceptions Part 740



- Authorization to export or reexport, under stated conditions, items subject to the EAR that would otherwise require a license
- Two types:
  - List driven
  - Transaction driven



# General Prohibitions



- 1-3 – License required by virtue of reasons for control
- 4 – Denial orders
- 5 – Prohibited end-users
- 6 – Embargoed destinations
- 7 – Proliferation activities
- 8 – In transit and/or unladen
- 9 – Violation of license terms
- 10 – Proceeding with knowledge of potential violation



# **Reexport Controls and Technology and Software Transfers**

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# What is Subject to Commerce Reexport Controls?



- Items located outside the United States:
  - U.S.-origin items, wherever located
  - Certain foreign-made items, if:
    - The value of the U.S. content exceeds the *de minimis* percentage (See Supplement No. 2 to part 734 for the *de minimis* calculation)
    - The foreign product is the direct product of U.S. technology or software



# Reexports of U.S.-Origin Items



- Classification
- Reason(s) for control
- Country Chart:
  - If no “X” in the box
  - And no GP 4-10 issues
  - Then no license is required
- If “X” in the box, then
  - License Exception
  - Or license application



# Reexports of Foreign Made Items



- Exports of foreign-made items from one foreign country to another may be subject to the EAR if the foreign-made items:
  - Have controlled U.S.-origin content that exceeds the *de minimis* limits
  - Are direct products of NS controlled U.S.-origin technology or software, and are going to a Country Group D:1 or E:2 end-user



# *De Minimis* for Reexports



- Foreign-made items incorporating, commingled with, or drawn from controlled U.S.-origin items
  - Exceeding 10% for Cuba, Iran, Libya, North Korea, Sudan and Syria
  - Exceeding 25% for all other destinations
- Same percentages for commodities, technology, or software (*i.e.*, no “mixing”)
- One time report for technology and software



# *De Minimis* One Time Report



- Submitted prior to reexport relying on calculations
- Includes:
  - Classification (ECCN)
  - Performance characteristics and features
  - Percentage of U.S. content
  - Calculations
  - Method for calculating the Fair Market Value
  - Contact info: name, title, address, phone, fax



# EAR99 and *De Minimis*



- EAR99 items are calculated as controlled for U.S. content when exporting to an embargoed destination
- Most EAR99 items are calculated as controlled for U.S. content when exporting to Syria



# Foreign Produced Direct Product



- Of U.S. technology or software
- Of a complete plant or any major component of a plant, if such plant or component is the direct product of U.S. technology



# Foreign Produced Direct Product



- U.S. technology or software controlled for National Security (NS) requires a letter of assurance for a license, or License Exception TSR
- Foreign-produced direct product is controlled for (NS) reasons
- Requires a license for reexporting to Country Groups D:1 and E:2 (See Supplement No. 1 to part 740)



# Technology and Software Transfers



- Classification
- Reason(s) for Control
- License requirement
- License Exception
- General Prohibitions
- Letter of explanation
- Validity periods



# **U.S. Embargoes and Terrorist Supporting Countries**

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# U.S. Embargoes



- The U.S. maintains comprehensive embargoes against
  - Cuba
  - Iran
  - Sudan
- Export license required, no matter the item



# Terrorist Supporting Countries



- Countries designated by the U.S. Secretary of State as having repeatedly provided support for acts of international terrorism:
  - Cuba
  - Iran
  - North Korea
  - Sudan
  - Syria
- Strict export license requirements



# Department of the Treasury Office of Foreign Assets Control



- The Department of the Treasury's Office of Foreign Asset Controls (OFAC) administers and enforces economic and trade sanctions against targeted:
  - Foreign governments
  - Individuals (e.g., terrorists narcotics traffickers)
  - Entities (e.g., charities linked to terrorist groups, drug front companies)
  - Practices (e.g., WMD proliferation, trade in non-certified rough diamonds)



# Licensing Authorities for Reexports to Embargoed Destinations and Terrorist Supporting Countries



- Reexports of EAR99 items to Iran?
  - by a non-U.S. persons BIS
  - by a U.S. Person OFAC
- Reexports of CCL items to Iran? OFAC
- Reexports of all items to Sudan? OFAC
- Reexports of CCL items to Sudan? BIS & OFAC
- Reexports of all items to Cuba? BIS
- Reexports of all items to Syria? BIS
- Reexports of all items to North Korea? BIS



# Commerce Services Available to Foreign Parties



- Verifies commodity classifications
- Issues reexport licenses
  - Actual reexports
  - Deemed reexports of technology
- Provides answers to questions of policy and interpretation of the EAR



# How to Obtain More Information



- BIS Website:  
[www.bis.doc.gov](http://www.bis.doc.gov)
- DDTC Website:  
[www.pmdotc.state.gov](http://www.pmdotc.state.gov)
- OFAC Website:  
[www.treasury.gov/offices/enforcement/ofac](http://www.treasury.gov/offices/enforcement/ofac)
- CJ Guidelines:  
[www.pmdotc.state.gov/revised\\_cjguidelines.htm](http://www.pmdotc.state.gov/revised_cjguidelines.htm)
- Commodity Classification Guidance:  
[www.bis.doc.gov/licensing/exportingbasics.htm](http://www.bis.doc.gov/licensing/exportingbasics.htm)



# How to Obtain More Information



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