

BIS 2022

Topics

De Minimis Rules

Direct Product Rules

Compliance

U.S. Department of Commerce,



Place Conference on Export Controls & Policy

De minimis

Incorporation, U.S. controlled content and the EAR

De minimis rules

Ineligible for de minimis

"600 series"/9x515/see-through carve out items

Non-"600 series"/9x515/see-through carve out

Calculations of de minimis

Second Incorporation Rule

Discrete Product

□ Discrete Product

□ Discrete Product

□ Calculations ⊕ The Export Conference on Exp







Incorporation

- U.S. items are "incorporated" when they are:
 - Essential to the functioning of the foreign equipment;
 - Customarily included in the sale of foreign-produced items; and
 - ➤ Reexported with the foreign-produced items.

Supplement No. 2 to part 734, Note to paragraph (a)(1)

5

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"Controlled content" for De minimis Purposes

- **Controlled content** = incorporated U.S.-origin items that require a license to the ultimate destination of the foreign-produced item
 - EAR99 items may be controlled content to certain destinations;
 - ➤ Do not count:
 - Incorporated commodities eligible for License Exception GBS
 - Incorporated items eligible for NLR (no license required)
 - Incorporated commodities controlled for Short Supply reasons
 - NEW: Items that meet the criteria in § 746.8(a)(5)
 - To Russia or Belarus
 - From Supp no 3 to part 746 country
 - AT only and 9A991

Supplement No. 2 to part 734, paragraph (a)(1)







Not Considered Controlled Content

- o <u>.y items in "600 series" or 9x515</u>, unless destined to
 - o Crimea and covered regions of Ukraine (§746.6),
 - o Russia & Belarus (except for § 746.8(a)(5) exclusion), or
 - o Venezuela (§ 742.6(a)(7));
 - Note: .y not eligible for de minimis to Country Group E:1, E:2, or China.
- o EAR99 items, unless destined to
 - o Country Group E:1, E:2,
 - Crimea and covered regions of Ukraine (except EAR99 food and medicine, or certain software) (§746.6),
 - o Russia for industry sector related (see §746.5(a)(1)(ii))
 - o Russia & Belarus (see § 746.10 luxury goods).

- Items controlled for (AT) reasons only, unless destined to
 - o Country Group *E:1* or *E:2*;
 - Crimea and covered regions of Ukraine (except certain software) (§746.6); or
 - o Russia & Belarus (except for § 746.8(a)(5) exclusion).

7



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De minimis Rules

- 0%: § 734.4(a)
 - Often applies to specific U.S. content destined for certain destinations
 - Some restrictions apply to all destinations
- 10%: § 734.4(c)
- 25%: § 734.4(d)
- Additional steps for certain encryption items described in § 734.4(b)
- Calculation guidance: Supp. No. 2 to part 734







Ineligible for *De minimis or 0%: § 734.4(a)*

- Certain 9E003 technology
- Certain foreign high-performance computers when destined to certain countries (Computer Tier 3 or Cuba, Iran, North Korea and Syria)
- Certain foreign-produced encryption technology
- Non-ITAR foreign-produced military commodities that incorporate one or more of the commodities described in ECCN 0A919.a.1 when destined for a country listed in Country Group D:5
- "600 series" & 9x515, .a through .x, destined to Country Group D:5
- y items in "600 series" & 9x515, destined to Country Groups E:1, E:2 or China

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De minimis for "600 series," 9x515 and see-through carve out items

The "600 series" and 9x515 *de minimis* rule – items identified in <u>.a</u> <u>through .x paragraphs</u> of the ECCN, as well as *see-through carve-out items*

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

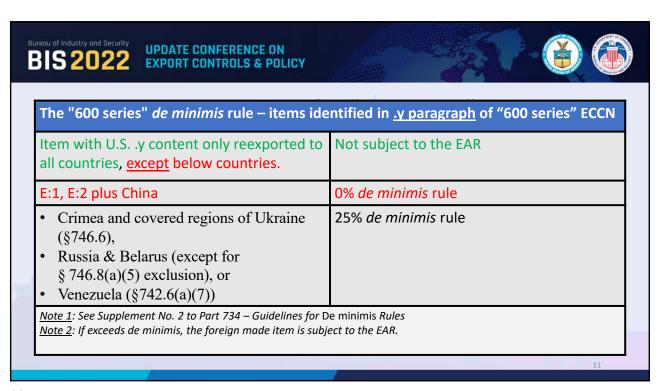
25% de minimis rule

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

0% de minimis rule

<u>Note 1</u>: 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.

10











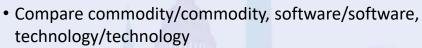
De minimis Calculation

• Performing *de minimis* calculation:

(Fair Market Value of U.S.-origin controlled content)

100

(Total Fair Market value of non-US-made product)



> For commodities, can also include "bundled" software

Consult Supp. No. 2 to part 734 for additional guidance

13

13

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Bundling Software with Commodities

- U.S.-origin software may be "bundled" with non-U.S.-made commodities
 - ➤ Eligible software is configured for a specific commodity, but is not necessarily physically integrated into the commodity
 - ➤ Eligible software is controlled for AT reasons only or is EAR99
- Notes to paragraphs (c)(1) and (d)(1)









Calculation Example

- U.S.-origin field programmable gate array (FPGA) integrated circuit 3A001.a.7 \$600.00.
- Used for beam forming in processing equipment specially designed for German Trout acoustic towed hydrophone array \$6,000.00



15

15

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Calculation Example

U.S.-origin FPGA \$600



German hydrophone \$6000

De minimis Percentage = .1 x 100 = 10 %

16







Second Incorporation Rule

- Policy determination of BIS
- Cannot be applied to "600 series" U.S.-origin content or U.S.-origin see-through carve-out items.
- Can only be applied if the first incorporation results in a non-U.S.- made discrete product

17

17

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Discrete Product

- The first incorporation must be complete and result in a discrete product.
- The U.S.-origin content in the **first** discrete product must be counted in a *de minimis* calculation until that product's **second** incorporation is complete.

18







Discrete Product

- Evidence of a discrete product
 - ➤ The foreign-produced item is regularly sold as stand-alone product or as an identifiable replacement component or assembly.
- Evidence that the foreign-produced item is not a discrete product
 - ➤ Purchaser is involved in the design of the foreign-produced item

19

19

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Second Incorporation Rule Example



- U.S.-origin microprocessor chip (3A001.a.3)
- Chip is incorporated into a foreign-produced Central Processing Unit (CPU) card (4A003.c) and is subject to the EAR because of the *de minimis* rule.



The CPU is sold from stock outside the U.S.



 The foreign-produced CPU is incorporated into a foreign-produced computer (4A003), which is not subject to the EAR because of the 2nd incorporation rule.



20







One-Time Report

- Only required for technology commingling
- Include:
 - ➤ ECCN of technology
 - Fair Market Value in U.S. dollars
 - ➤ If using man-hours, how you tracked man-hours
 - > De minimis calculation and percentage
- Method any reasonable method will be considered

21

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Saturday, May 16, 1959

shall endorse it, return one copy to the owner or operator prior to the departure of the aircraft, and retain a copy for his records. Upon return of the aircraft to the United States, the endorsed copy of the certification shall be surrendered to the Collector of Customs at the port of entry. If the port of entry is not the same as that from which the aircraft departed, the Collector of Customs at the

- FEDERAL REGISTER

Foreign-Direct Product Rules



Foreign-"Direct Product" rules

§ 734.9(b) National Security FDP rule

§ 734.9(c) 9x515 FDP rule

§ 734.9(d)"600 series" FDP rule

§ 734.9(e) Entity List FDP rule

§ 734.9(f) Russia/Belarus FDP rule

§ 734.9(g) Russia/Belarus-MEU FDP rule

23

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Direct Products of U.S. Technology or Software

- Pursuant to ITAR
 §§123.9(a) and
 124.8(a)(5), defense
 articles produced or
 manufactured abroad
 pursuant to a TAA or MLA
 require the approval of
 DDTC before being
 transferred to any enduser, end-use, or
 destination other than as
 stated on the export.
- Under the EAR, certain non-U.S.made items, located outside the
 U.S., that are the direct product of
 certain U.S. controlled technology
 or software are subject to the EAR
 when exported from abroad or
 reexported to certain countries.

25

25

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Definitions

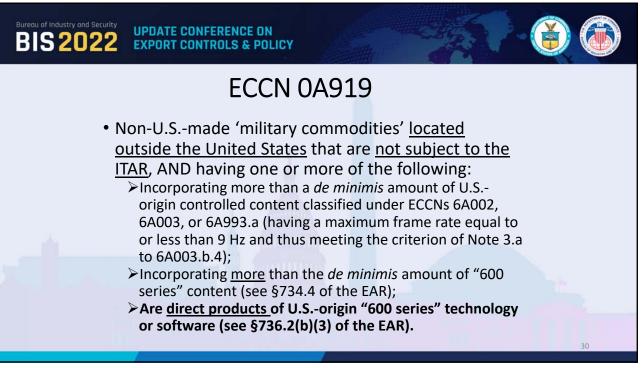
- "Direct product": The immediate product (including processes and services) produced directly using technology or software.
- 'Major Component': A major component of a plant located outside the United States means "equipment" that is essential to the "production" of an item, including testing "equipment."
 - > Equipment. This is a combination of parts, components, accessories, attachments, firmware, or software that operate together to perform a function of, as, or for an end item or system. Equipment may be a subset of "end items" based on the characteristics of the equipment. ...
- *U.S. Origin (unofficial):* An item produced, refurbished, assembled, or upgraded in the United States.

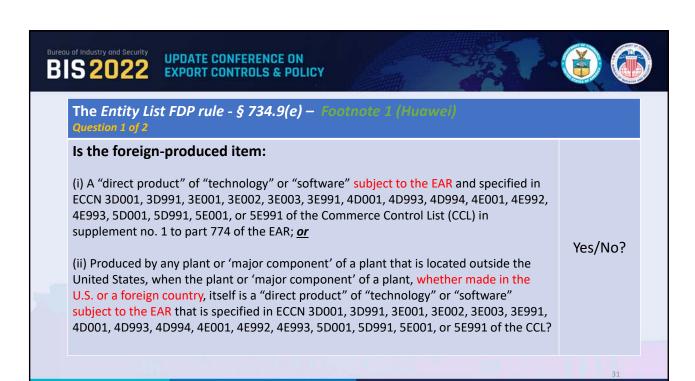
26



















The Russia/Belarus FDP rule - § 734.9(f) - Question 1 of 2

Is the foreign-produced item <u>not</u> designated as EAR99 and:

- (i) A "direct product" of **U.S.-origin** "technology" or "software" subject to the EAR and specified in any ECCN in **product groups D or E** of the CCL; <u>or</u>
- (ii) Produced by any plant or 'major component' of a plant that is located outside the United States, when the plant or 'major component' of a plant, whether made in the United States or a foreign country, itself is a "direct product" of **U.S.-origin** "technology" or "software" subject to the EAR that is specified in any ECCN in **product groups D** or **E** of the CCL.

Yes/No?

33

33

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The Russia/Belarus FDP rule - § 734.9(f) – Question 2 of 2

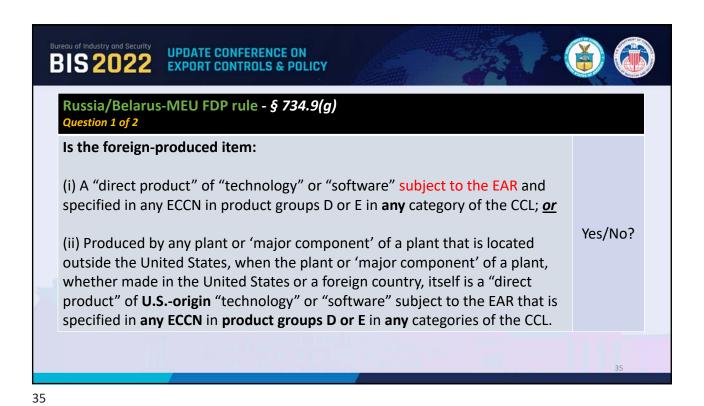
Do you have "knowledge" that:

(i) The foreign-produced item is **destined to** Russia or Belarus or **will be incorporated into** or **used in** the "production" or "development" of any "part," "component," or "equipment" *not designated as EAR99* and produced in or destined to Russia or Belarus;

Yes/No?

Note: If "yes" to <u>both</u> questions 1 and 2, then the foreign-produced item is subject to the EAR.

34



BIS 2022 UPDATE CONFERENCE ON EXPORT CONTROLS & POLICY Russia/Belarus-MEU FDP rule - § 734.9(g) Question 2 of 2 Do you have "knowledge" that: (i) The foreign-produced item will be incorporated into, or used in the "production" or "development" of any "part," "component," or "equipment" produced, purchased, or ordered by any entity with a footnote 3 designation in the license requirement column of the Entity List in Supplement No. 4 to part 744 of the EAR; or Yes/No? (ii) Any entity with a footnote 3 designation in the license requirement column of the Entity List in Supplement No. 4 to part 744 of the EAR is a party to any transaction involving the foreign-produced item, e.g., as a "purchaser," "intermediate consignee," "ultimate consignee," or "end-user." Note: If "yes" to both questions 1 and 2, then the foreign-produced item is subject to the EAR.







Determining Classification of FDPs Subject to the EAR

 When exporting from abroad FDPs that are subject to the EAR under de minimis or the direct product rules

...

Determine the license requirements for the FDPs

➤ **Note:** When a FDP contains an ITAR item, only the ITAR item is subject to ITAR controls.

37

37

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Licensing the Supply Chain

- Q5: If a distributor has a license to provide products to a footnote 1 designated entity, does the supplier need to get a separate license to cover the reexport or transfer of our products to the distributor?
- A5: Because the distributor has a license to provide the final product to the footnote 1 designated entity, the license requirement of the Entity List FDP rule is fulfilled and does not apply to the supplier. The distributor should communicate the existence of a license to the suppliers of the product and the suppliers should ensure they receive written confirmation of the license and any conditions.

38







Compliance

- Examine all transactions to determine
 - if any items exported/reexported to Russia, Belarus, China (or other affected countries) are produced with U.S.-controlled software or technology; or
 - if an Entity List footnote 1 or 3 entity is a party to the transaction.
 - ➤ Red Flags
- Audit supply chains to the extent possible to identify any U.S.-origin inputs in the production of items
- Obtain confirmation from suppliers regarding the origin of parts and components
- Keep good records

39

39







Contact Information

- <u>Email:</u> If contacting the Office of Exporter Services via e-mail, please include a telephone number to facilitate BIS's response to your request. Specific questions can be emailed to:
 - o ECDOEXS@bis.doc.gov
 - o OEXSsubmissions@bis.doc.gov
- <u>Telephone:</u> If you have any questions about export licensing requirements or submitting a license application, you may contact BIS's Office of Exporter Services at:
 - o (202) 482-4811 Outreach and Educational Services Division

(located in Washington, DC – open Monday-Friday, 8:30am-5:00pm ET)

- o (949) 660-0144 Western Regional Office
 - (located in Irvine, CA open Monday-Friday, 8:00am-5:00pm PT)
- o (408) 998-8806 Northern California branch
 - (located in San Jose, CA open Monday-Friday, 8:00am-5:00pm PT)
- Formal Advisory Opinions:
 - Request an Advisory Opinion: https://bis.doc.gov/index.php/component/rsform/form/22-advisory-opinion-request?task=forms.edit

