

Reexport Controls Under the EAR

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Topics

- Reexports or transfers of U.S.-origin items in the form received
- Reexports or transfers of non-U.S.-made items incorporating U.S. content (*de minimis*)
- Reexports or transfers of direct products of U.S. technology or software
- Other reexport topics (primarily ECR-related)



General Prohibitions 1-3

- You may **not** without a License or License Exception:
 - No. 1: Export or reexport controlled items to listed countries.
 - No. 2: Reexport non-U.S.-made items incorporating more than the allowed *de minimis* levels of controlled U.S.-origin content
 - No. 3: Reexport non-U.S.-made direct product of U.S. technology or software



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Reexporting U.S.-Origin 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.
- When reexporting U.S.-origin items in the form received, use the classification of the U.S.-origin item



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Reexport or Transfer of Items Incorporating U.S. 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 non-U.S.-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.

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Incorporation

- U.S. items are “incorporated” when they are:
 - Essential to the functioning of the non-U.S. equipment;
 - Customarily included in the sale of non-U.S.-made items; and
 - Reexported with the non-U.S.-made items.



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“Controlled content” for *de minimis* purposes

- Controlled content = U.S.-origin items that require a license to the ultimate destination of the non-U.S.-made item
- EAR99 items may be controlled content to certain destinations; do not count content eligible for License Exception GBS or NLR (no license required) to new destination
- Use the fair market value of U.S.-origin controlled content to calculate *de minimis* percentage



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ITAR content in non-US-made Items

- Regardless of whether the non-U.S.-made item is military or commercial, the ITAR's see-through rule will generally apply
- Certain Exception: *“The articles described in this paragraph are subject to the EAR when, prior to export, reexport, retransfer, or temporary import, they are integrated into and included as an integral part of an item subject to the EAR.”*
 - USML Category VIII(h)(2)-(5), (7), (13), (14), (17)-(19), and (21)-(26) when incorporated into a 9A610 military aircraft
 - USML Category XV(c)(3) and (e) when incorporated into an item subject to the EAR




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ITAR content in non-US-made Items

- When the applicable USML carve-out note to the see-through rule applies, then the ITAR content is “controlled content” for purposes of *de minimis* calculations.
 - See-through carve-out items




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Satellite Considerations: US content calculation

- The ITAR Cat XV Note to paragraph (c) and Note 2 to paragraph (e).
 - “The articles described in this paragraph are subject to the EAR when, prior to export, reexport, retransfer, or temporary import, they are integrated into and included as an integral part of an item subject to the EAR (see note 2 to paragraph (e)(17) of this category).”
- Therefore, if the ITAR content is Cat XV (c) or (e) and incorporated into a 9A515 satellite or system, then it is “subject to the EAR” and must be counted as US controlled content for *de minimis* purposes.




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Satellite Considerations: Jurisdiction & licensing

- If the satellite, foreign or domestic, contains a Cat XV item other than (c) or (e), then the ITAR item remains ITAR and would require export or retransfer authorization from DDTC.
 - The satellite remains subject to the EAR and only the ITAR part requires DDTC authorization, so you would list the satellite as a paragraph (x) item on the ITAR application.




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Satellite Considerations: U.S. controlled content destination

- ▶ “Spacecraft” have two potential countries of ultimate destination, the country where a space launch occurs and the country that will have control over the “spacecraft” after launch.
- ▶ The 0% *de minimis* threshold for D:5 countries applies to both the country of launch and the country of control.




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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)



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Ineligible for *De minimis* or 0%

- Certain 9E003 technology
- Certain components of high performance computers destined to certain countries
- 5E002 technology and certain encryption commodities and software
- QRS11 sensor in commercial standby instrument or flight control system, or aircraft with such a system
- 6A003.b.4.b cameras when incorporated into a non-U.S. origin military commodity



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Ineligible for *De minimis* or 0%

- “600 series” or 9x515 items, as follows:
 - If enumerated in .a - .x entry, no *de minimis* when non-U.S.-made items are destined to Country Group D:5
 - If enumerated in .y entry: no *de minimis* when non-U.S.-made items are destined to China or Country Groups E:1 or E:2
- See-through carve-out items destined to Country Group D:5



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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 .a through .x paragraphs 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)	25% <i>de minimis</i> rule
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D:5 (U.S. arms embargoed)	0% <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.



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De minimis for “600 series” .y

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, <u>except</u> E:1, E:2 plus China	Not subject to the EAR
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E:1, E:2 plus China	0% <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.



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De minimis for Non- “600 series”/9x515/see-through carve-out

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

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.



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De minimis Calculation

- Performing *de minimis* calculation:

$$\frac{(\text{Fair Market Value of U.S.-origin controlled content})}{(\text{Fair market dollar value of non-US-made product})} \times 100$$

- Compare commodity/commodity, software/software, technology/technology
 - For commodities, can also include “bundled” software
- Consult Supp. No. 2 to part 734 for additional guidance



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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



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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 Australian Trout acoustic towed hydrophone array \$6,000.00







Calculation example


U.S.-origin FPGA \$600

Australian hydrophone \$6000

De minimis Percentage = $.1 \times 100 = 10 \%$






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Fair Market Value Considerations

- What if a buyer of the FPGA is a subsidiary or a regular customer and the price is reduced by 50% to \$300?
 - You must use the Fair Market value of the FPGA \$600
- What if there is a regional price for the FPGA of \$500 to Australia?
 - You may use the regional price of \$500.
- What if the hydrophone has never been sold and has no FMV?
 - Use comparable FMV for a similar product or you can use the production cost.





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De minimis Analysis

- What if a hydrophone cost \$2,000, what would be the *de minimis* percentage if it were destined to Australia?
 - No U.S. controlled content, because the FPGA is eligible for LE GBS to Australia.
- What if the cost of a hydrophone is \$2,400 what would be the *de minimis* percentage if it were destined for Russia?
 - 25%
- Is it subject to the EAR?
 - No, because it has to be ABOVE 25% to be subject to the EAR when destined to Russia.




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Second Incorporation Rule

- Policy interpretation of BIS
- Cannot be applied to “600 series” U.S.-origin content or U.S.-origin ITAR see-through carve-out items.
- Can only be applied if the first incorporation results in a non-U.S.- made discrete product
- *The Rule: De minimis* rule applies to U.S.-origin controlled content incorporated into a non-U.S.- origin-made item, thus does not apply to a non-U.S.-origin-made item incorporated into another non-U.S.-origin-made item.



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Second Incorporation Rule Example

- U.S.-origin microprocessor chip (3A001.a.3)
- Chip is incorporated into a non-U.S.-made 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 non-U.S.-made CPU is incorporated into a non-U.S.-made computer (4A003), which is not subject to the EAR because of the 2nd incorporation rule.



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Direct Product Rules



Reexport or Transfer of Direct Products 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 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.
- “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.



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“600 series” Direct Product Rule

The “600 series” direct product rule

Is the non-U.S.-made direct product of:	Yes
(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?	
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 Country Group D:1, D:3, D:4, 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.



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9x515 Direct Product Rule

The 9x515 direct product rule

Is the non-U.S.-made direct product of:	Yes
(i) U.S. controlled 9x515 technology or software <u>or</u>	
(ii) A plant or major component of a plant that is a direct product of U.S. controlled 9x515 technology or software?	
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.



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The NON-("600 series," 0A919 & 9x515) direct product rule

Is the non-U.S.-made direct product of:	Yes
(i) U.S. controlled technology or software that requires a written assurance as a supporting document for a license, see Supp No. 2 to 748 (o)(3)(i), or as a precondition for the use of LE TSR § 740.6 <u>or</u>	
(ii) A plant or major component of a plant that is a direct product of U.S. controlled technology or software that meets the criterion in (i)?	
Is the non-U.S.-made direct product a NS controlled item?	Yes
Is the non-U.S.-made direct product being reexported or exported from abroad to a destination listed in Country Group D:1 or E:1?	Yes

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



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Determining Classification of Non-U.S.-Made Items Subject to the EAR

- When exporting from aboard non-U.S.-made items that are subject to the EAR under *de minimis* or the direct product rules – classify the non-U.S.-made item.
 - Use the applicable “600 series” ECCN when the non-U.S.-made item would be a “600 series” item if in the U.S.
 - Use the applicable non-“600 series” ECCN or EAR99 when the non-U.S.-made item would not be USML or a “600 series” item if in the U.S.
 - Use 0A919 when meeting the criteria described on the next slide



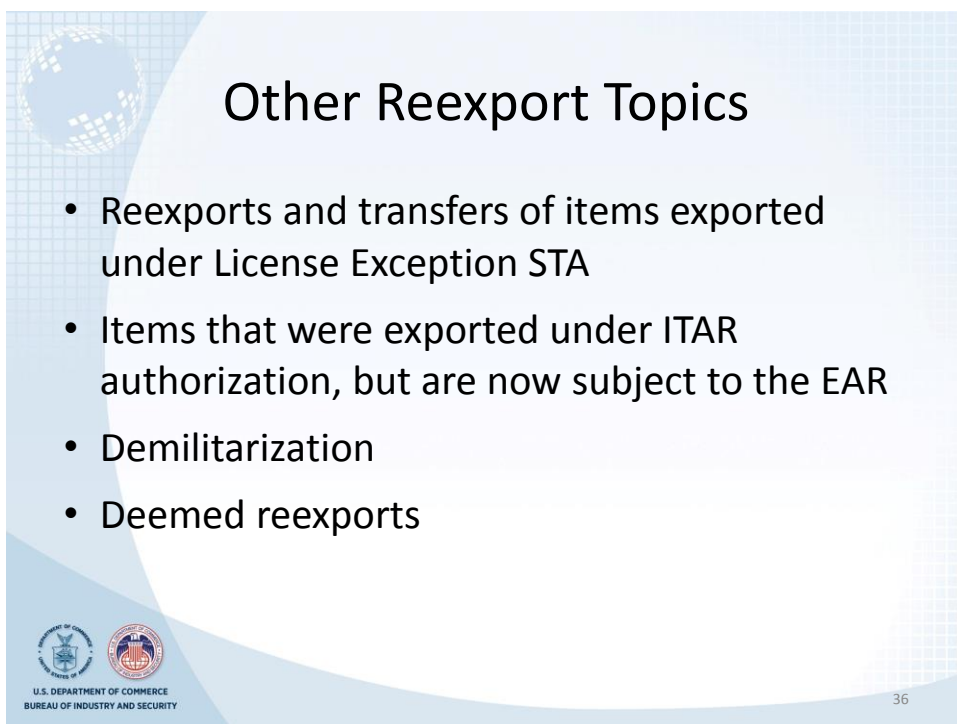
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ECCN 0A919

- Non-U.S.-made ‘military commodities’ located outside the United States that are not subject to the ITAR, AND having one or more of the following:
 - Incorporating cameras controlled under 6A003.b.3, .b.4.b, or .b.4.c.
 - Incorporating more than the *de minimis* amount of “600 series” content
 - Are direct products of U.S.-origin “600 series” technology or software




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Reexports/Transfers of Items Authorized under STA

- Cannot use License Exception APR § 740.16 (a) and (b)
- Subsequent use by the consignee of the EAR item must comply with the terms of License Exception STA, specifically § 740.20(b)(3)(ii), even if the EAR item is incorporated into a non-U.S.-made item, and the EAR item does not exceed the *de minimis* level of US-origin controlled content.




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Reexports/Transfers of Items Authorized under STA

- A 600 series item may be shipped to a destination in Country Group A:5 for incorporation into an item that will ultimately be used by the government of a country **outside Country Group A:5**, if:
 - the United States Government has authorized the ultimate end use,
 - the license or other authorization is in effect, and
 - the consignee verifies in writing that such authorization exists and has provided the license or other approval identifier to the exporter, reexporter or transferor (as applicable). See § 740.20(b)(3)(ii)(C)



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Moving “600 series” items through the supply chain under STA

- Additional prior consignee statements are not required for subsequent transfers (in-country)
- Subsequent reexports as part of the supply chain would need to be authorized under License Exception STA and would require a prior consignee statement (if not covered under existing prior consignee statement), assuming some other EAR authorization was not being relied on to authorize the reexport.



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Exported under ITAR, but now subject to the EAR

- DDTC transition plan for grandfathered DDTC approvals
- Perpetual reexports/retransfers under DDTC approval (e.g., authorized sales territory of an MLA or WDA)
- Return to U.S. for repair (i.e., temporary import)



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Demilitarization

- Demilitarization of a 600 series item
 - Classifying demilitarized items – destroyed vs. not destroyed
 - Authorization for subsequent reexport
 - Authorization for subsequent in-country transfer
 - When original authority was a DDTC or BIS license
 - When original authority was an EAR license exception



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BIS Authorization for Deemed Reexports

- Deemed reexports are releases of technology or software source code subject to the EAR, within a country outside of the U.S., to persons who are not citizens or lawful permanent residents of that country (i.e., third-country nationals)
 - Releases of technology or software source code that are controlled to the country of the person's most recently established citizenship or permanent residency require BIS authorization



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BIS Authorization for Deemed Reexports

- A BIS license authorizing the release of technology or software source code to an entity also authorizes the release to the entity's third-country nationals who are permanent and regular employees of the facility authorized on the license.
- However, if a license condition limits or prohibits the release to nationals of specific countries, then separate authorization is required for said nationals.

www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-reexport-guidance1



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BIS Authorization for Deemed Reexports

- BIS updated its policy to ensure that the EAR would not require a license for a deemed reexport if the ITAR would not require a license in the same scenario
- BIS has largely adopted the following:
 - ITAR § 124.16: *bona fide* regular and permanent employees who are nationals of NATO member states, EU member states, Australia, Japan, New Zealand, or Switzerland (release must take place in said countries)
 - ITAR § 126.18: *bona fide* regular and permanent employees who have undergone proper screening procedures

www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-reexport-guidance1



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