



EXPORT CONTROL 201: EXPORTING PARTS & COMPONENTS AFTER EXPORT CONTROL REFORM

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PROFESSIONAL BACKGROUND

- **Seattle-based head of Dorsey & Whitney's National Security Law Group and co-head of its Asian Law Group**
- **International technology, national security lawyer with >30 years experience in cross-border trade, investments**
- **Advisor to many corporations, state and private universities, institutes and engineering societies on export control, embargo issues**
- **Frequent speaker, writer, commentator on U.S. export control laws and export control policy advisor to U.S. Commerce Department; PECSEA member**
- **White House Fellow, former Justice Department official and federal prosecutor**



EXPORT CONTROL 201

AGENDA FOR TODAY

- **Export Control Reform (ECR) background**
- **Central ECR concepts**
 - Revision of USML into “positive list” format
 - Generally speaking, removal of “catch-all” clauses
 - USML and 600 series frameworks
 - Required “order of review” process
 - New “specially designed” definitions in ITAR & EAR
- **ECR implications for U.S. producers of parts, components**
 - Need to adjust to post-ECR rule changes
 - Advisability of post-ECR commodity jurisdictions (CJs) or other official confirmation
 - Effective communications within supply chain

WHY ECR MATTERS TO EXPORTERS

ITAR Control

- Registration with DDTC (annual fees, data)
- Export licenses, technical assistance agreements (“TAAs”) needed for exports to virtually all end users, end uses in other nations
- No “license exceptions”
- Must include PO or contract
- Delays in sales, shipment, revenue recognition
- “Reach-through” rule and “ITAR-free” design-out

EAR Control

- No registration or payment of fees, data submission
- Export licenses needed only exports to certain end users, end uses in certain nations
- Many “license exceptions” available under EAR
- Do not need PO or contract
- No delays in sales, shipment, revenue recognition
- No “reach-through” rule → avoidance of “ITAR-free” design-out

ECR CHANGES FOR AEROSPACE PARTS & COMPONENTS SUPPLIERS

- **ECR changes have radically shifted, reduced export control burden on all tiers of aerospace industry**
 - Very sharp falls in ITAR licenses since ECR has taken effect shows how aerospace companies have quickly responded to jurisdiction shifts from ITAR to EAR jurisdiction
 - E.g., USML Cat. VIII (aircraft) and USML Cat. XIX (jet engines) changes have been in “Final Rule” since Oct. 15, 2013
 - E.g., USML Cat. XI (military electronics) changes have been in “Final Rule” since Dec. 30, 2014
 - Deepest effect felt upon suppliers of aerospace parts and components, especially under much narrower “specially designed” definition now used under ITAR, EAR
 - Elimination of all ITAR or EAR controls on almost all fasteners

ECR BACKGROUND

- **In August 2009, President Obama directed a broad-based review of U.S. export control system to identify additional ways to enhance U.S. national security**
 - “Munitions” items controlled under ITAR (Dept. of State)
 - “Dual use” items controlled under EAR (Dept. of Commerce)
- **Inter-agency review determined U.S. system needed to be reformed to:**
 - Increase interoperability with NATO and other close allies;
 - Reduce current incentives for companies in non-embargoed countries to design out or avoid U.S.-origin content; and
 - Allow U.S. export control system to focus its limited approval and enforcement resources on export transactions of greatest concern

ECR'S FOUR KEY GOALS

- **Current bifurcation of control rules between ITAR and EAR, divided administrative authorities cause undue burden on U.S. exporters**
- **ECR's four key ultimate objectives:**
 - Single “positive control” list
 - Single IT system to support licensing activity
 - Single licensing agency
 - Single enforcement authority
- **First two goals achievable by Presidential action alone**
- **Second two goals would require Congressional approval**

ECR STRUCTURAL APPROACH

- **To implement ECR's objectives, the U.S. needed to:**
 - Identify specific sensitive and other items to be kept on ITAR's U.S. Munitions List (USML) needing individual license reviews, even for ultimate end use by NATO and other regime allies
 - Reframe USML into “positive control list” format generally focused only on end systems, very specific subsystems thereof
 - Specify items with non-subjective criteria as much as possible
 - In general, revise USML to “look and feel” like EAR's Commerce Control List (CCL)
 - Amend EAR and CCL to control all formerly USML-controlled items no longer on revised USML to retain certain level of control as “military” items but with greater flexibility regarding exports to such allies

ECR IMPLEMENTATION

- Each implementation of ECR has required “proposed rule” amending ITAR to be published in Federal Register by DDTC and corresponding “proposed rule” amending EAR to be published in Federal Register by BIS
- Each “proposed rule” has open public comment period
- Following close of comment period, agencies review suggestions and criticisms and then produced “final rule” with an effective date, also published in Federal Register
- ECR process has been steadily unrolling with such “proposed rules” and “final rules” since mid-2013
 - “First Rule” affected USML Cat. VIII (aircraft) and added new USML Cat. XIX (jet engines); both changes became effective on October 15, 2013

ECR STATUS (May 2016)

USML Category	ECCNs	Status
I: Firearms	0Y601	Proposed rule TBD
II: Artillery	0Y602	Proposed rule TBD
III: Ammunition	0Y603	Proposed rule TBD
IV: Launch Vehicles/Missiles	0Y604 9Y604	Final rule Jan. 2, 2014; effective July, 1, 2014
V: Explosives/Propellants	1Y608	Final rule Jan. 2, 2014; effective July 1, 2014
VI: Vessels of War	8Y609	Final rule July 8, 2013; effective Jan. 6, 2014
VII: Tanks/Military Vehicles	0Y606	Final Rule July 8, 2013; effective Jan. 6, 2014
VIII: Aircraft	9Y610	Final rule Apr. 16, 2013; effective Oct 15, 2013
IX: Training Equipment	0Y614	Final rule Jan. 2, 2014; effective July 1, 2014
X: Personal Protective Equip.	1Y613	Final rule Jan. 2, 2014; effective July 1, 2014
XI: Electronics	3Y611 9Y620	Final rule July 1, 2014; effective Dec. 30, 2014

ECR STATUS (June 2015) (cont.)

USML Category	ECCNs	Status
XII: Sensors/Night Vision	TBD	Proposed rule May 5, 2015
XIII: Miscellaneous	0Y617	Final rule July 8, 2013; effective Jan. 6, 2014
XIV: Toxicological Agents	1Y607	Proposed rule June 17, 2015
XV: Spacecraft/Satellites	9Y515	Interim final rule May 13, 2014 effective June 27, 2014 (for rad-hard ICs) effective Nov. 10, 2014 (for all other items)
XVI: Nuclear	N/A	Final rule Jan. 2, 2014; effective July 1, 2014
XVII: Classified	N/A	Final rule Apr. 16, 2013; effective Oct 15, 2013
XVIII: Directed Energy Weapons	TBD	Proposed June 17, 2015
XIX: Gas Turbine Engines	9Y619	Final rule Apr. 16, 2013; effective Oct 15, 2013
XX: Submersible Vessels	8Y620	Final rule July 8, 2013; effective Jan. 6, 2014
XXI: Not Otherwise Enumerated	N/A	Final rule Apr. 16, 2013; effective Oct 15, 2013

STANDARD "ORDER OF REVIEW" (SUPPLEMENT NO. 4 TO EAR PART 774)

- Review applicable revised USML category or categories
 - Check for specifically enumerated items
 - Check for presence of any residual "catch-all" controls under new ITAR definition of "specially designed"
- If item not found enumerated under any USML category, then review CCL entries
 - Review characteristics of item to determine applicable CCL category and product group
 - Review any applicable "600 series" ECCNs
 - Specifically enumerated items
 - "Catch-all" controls and EAR definition of "specially designed"
 - Review any applicable non-"600 series" ECCNs

DETERMINING CORRECT JURISDICTION OF PARTS AND COMPONENTS

- **Post-ECR USML categories rewritten to remove “catch-all” paragraphs and to express only in “positive list” format**
 - USML no longer controls generic parts, components, accessories, attachments
 - If particular parts or components are to remain ITAR-controlled, then post-ECR USML category specifies them explicitly
- **New common term within post-ECR ITAR USML and EAR CCL: “*parts, components, accessories, attachments, and associated equipment*”**
- **Post-ECR USML also controls “*specially designed*” parts or components per rigorous new parallel “*catch-and-release*” definition written into both revised ITAR and EAR**

NEW ITAR, EAR DEFINITION OF “SPECIALLY DESIGNED”

- **New common definition in ITAR, EAR of “*specially designed*” is based on a “catch-and-release” construct**
 - Examine to see if “catch” rules apply
 - Examine to see if “release” exclusions apply
- **Application of new definition requires answering series of yes/no questions that lead to objective determination whether item is “*specially designed*” within ECR sense**
- **Express definition is found in Part 772 of EAR**
- **EAR offers online decision tree tool available at: <http://www.bis.doc.gov/index.php/specially-designed-tool>**

ITAR §120.41 “SPECIALLY DESIGNED”

“**CATCH**” under paragraph (a): (1) Commodities or software with properties “peculiarly responsible” for achieving controlled performance levels, characteristics, or functions described in the USML; or (2) parts, components, accessories, attachments, or software for use in or with a defense article

“**RELEASE**” under paragraph (b) if part or component is:

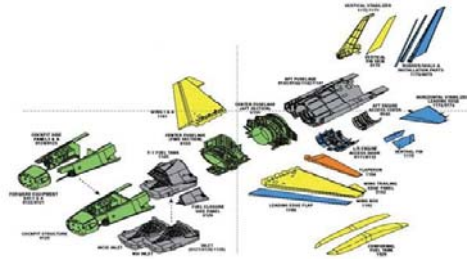
- 1) Subject to EAR as determined by a CJ from DDTC
- 2) A fastener,(e.g., nut, washer, spacer, etc.), regardless of form, fit
- 3) One with same function, performance capabilities and equivalent form and fit as commodity or software used in or with commodity “in production” and not enumerated on USML
- 4) Developed for both commodities on USML and not on USML
- 5) Developed as general purpose commodity or software

EXAMPLES OF ECR EFFECT ON USML CATEGORY VIII AND ECCN 9A610

Revised USML “ More Positive List”	New ECCN 9A610 in CCL 600 Series		
	(“a-w” items) Specifically enumerated end-items, “parts,” “components,” “accessories,” & “attachments”	(“x” items) “Specially designed” “parts,” “components,” “accessories,” and “attachments”	(“y” items) Specifically enumerated commodities (primarily “parts,” “components,” “accessories,” and “attachments”) that are “specially designed”
<ul style="list-style-type: none"> • F-15, F-16 • Assembled engines • Weapons pylons • Mission systems • Bomb racks • Missile launchers • Fire control computer • Fire control radar 	<ul style="list-style-type: none"> • Aircrew life support and safety equipment • Parachutes/paragliders • Controlled opening equipment of automatic piloting systems, designed for parachuted loads • T-1 aircraft 	<ul style="list-style-type: none"> • Wings, rudder, fin, panels • Fuselage – forward, center, aft • Cockpit structure • Forward equipment bay • Control surfaces, activation and control systems 	<ul style="list-style-type: none"> • Aircraft tires • Hydraulic system filters • Hydraulic and fuel hoses, fittings, clips, couplings, brackets • Cockpit panel knobs, switches, buttons, dials

EXAMPLES: LISTED F-16 PARTS & COMPONENTS IN USML CAT. VIII

- Tail boom stabilator, automatic rotor blade folding systems [(h)(3)]
- Aircraft wing folding systems, parts & components [(h)(4)]
- Tail hooks, arresting gear, parts & components [(h)(5)]
- Missile rails, weapon pylons, pylon-to launcher adapters, unmanned aerial vehicle (UAV) launching systems, external stores support systems, parts & components [(h)(6)]
- Damage/failure-adaptive flight control systems [(h)(7)]
- Threat-adaptive autonomous flight control systems [(h)(8)]
- Certain non-surface based flight control systems, certain radar altimeters [(h)(9)(10)]
- Air-to-air refueling systems and hover-in-flight refueling systems, parts & components [(h)(11)]
- UAV flight control systems and vehicle management systems with swarming capability [(h)(12)]



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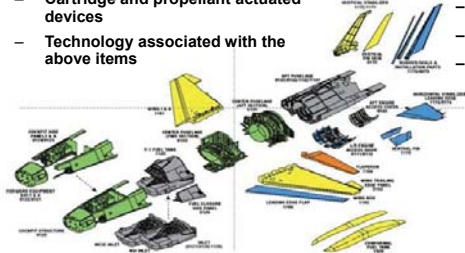
EXAMPLES: F-16 PARTS & COMPONENTS NOW UNDER CCL AFTER ECR

ECCN 9A610.x

- “Specially Designed” parts and components not on USML or listed elsewhere, such as:
 - Wings, rudder, fin, panels
 - Wing box
 - Internal & exterior fuel tanks
 - Engine inlets & ducting
 - Fuselage - forward, center and aft
 - Cockpit structure
 - Forward equipment bay
 - Cartridge and propellant actuated devices
 - Technology associated with the above items

ECCN 9A610.y

- Specific list of AT-controlled items
- Aircraft tires
- Certain check valves
- Certain filter and filter assemblies
- Certain steel wear brake pads
- Hoses, lines, couplings, brackets
- Certain cockpit panel knobs and switches
- Fire extinguishers
- Analog gauges & indicators
- Cockpit mirrors
- Underwater beacons



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NOTE: 600 SERIES AND COUNTRY RESTRICTIONS IN NEW EAR § 744.21

- ECR changes notwithstanding, new EAR § 744.21 imposes license requirement for exports or reexports of certain items subject to EAR when one knows such items are intended, in whole or in part, for a military end use or military end user in China, Russia or Venezuela
- Accordingly, all 600 series items (including .y items) will still require a BIS export license when destined for China, Russia, or Venezuela
 - See new § 744.21(a)(2)
 - Former ITAR § 126.1 “policy of denial” will carry over to China, Venezuela
 - Current Russian embargo due to Ukraine situation

BIS AUTHORIZATIONS

- Three forms of BIS authorizations for “600 series” exports:
 - No License Required (NLR) under EAR rules
 - Reexports to Canada of all 600 series items currently finalized or proposed
 - Reexports of 600 series .y items to all destinations, except Country Group E:1, China, Russia, and Venezuela
 - Any applicable EAR “license exceptions”
 - Issued BIS export license (subject to any express conditions)
- Generally, reexports or in-country transfers require same type of authorization as direct exports from U.S.

AVAILABLE EAR LICENSE EXCEPTIONS FOR 600 SERIES EXPORTS

- EAR “license exceptions” permit exports to certain persons in certain places for certain uses with no BIS export license
- EAR §740.2(a)(13) enumerates specific available EAR license exceptions for new “600 series” items:
 - LVS: § 740.3
 - TMP: § 740.9
 - RPL: § 740.10
 - GOV: § 740.11
 - TSU: § 740.13
 - **STA: § 740.20**
 - BAG: § 740.14 (*only for certain personal protective equipment of U.S. persons*)

STA – STRATEGIC TRADE AUTHORIZATION (EAR § 740.20)

- STA requirements for all items subject to EAR, even for items that are not 600 series items:
 - Applicable ECCN must authorize use of STA
 - All ECCN “Reasons for Control” applicable to transaction must authorize use of STA: NS, CB, NP, RS, CC, SI
 - Must be export to eligible country, such as the 36 Country Group A:5 nations (§ 740.20(c)(1))
 - Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey, and United Kingdom
 - Country Group A:6 nations not eligible for STA exports of 600 series items controlled for NS reasons (§ 740.20(c)(2))
 - Albania, Hong Kong, India, Israel, Malta, Singapore, South Africa, Taiwan

COMMODITY JURISDICTION (CJ)

- **Commodity Jurisdiction (CJ) is official, legally binding determination if an item or service is controlled by ITAR**
 - Derived from Arms Export Control Act (AECA)
 - Prescribed by ITAR § 120.4
 - Online guides for CJs available at DDTC website
- **DDTC CJ response involves an interagency process**
 - Multiple agencies review, especially on technical content of CJ request, strategic reasons for type of control
 - Similar to but not same as Commodity Classification Request (CCR) filed with Bureau of Industry and Security
 - By law, only a DDTC CJ can rule definitively if an item is ITAR-controlled or not

COMMODITY CLASSIFICATION REQUEST

- **Commodity classification request (CCR) is BIS method for definitive, binding classification under EAR**
 - Originally provided under Export Administration Act (EAA)
 - Prescribed in EAR § 748.3(b)
 - Online guides for CCRs on BIS website
- **BIS CCR response (CCATS) involves interagency process**
 - Multiple agencies review, especially on technical content of CCR, strategic reasons for type of control
 - Similar to but not same as CJ filed with DDTC
 - Remember: by law, only a DDTC CJ can rule definitively if an item is ITAR-controlled or not, so CCATS won't do that

FEDERAL AGENCY FAQ WEBSITES

DDTC:

<http://test.pmdtcc.state.gov/faqs/ecr.html>

BIS:

<http://www.bis.doc.gov/index.php/2012-03-30-17-54-11/ecr-faqs#subcat149>
<http://www.bis.doc.gov/index.php/2012-03-30-17-54-11/ecr-faqs#subcat149>

DDTC FREQUENTLY ASKED QUESTIONS

Q: Will DDTC issue an opinion as to whether an item is "Specially Designed"?

A: Absent doubt, as described in ITAR section 120.4, this is a determination that the exporter or manufacturer must make. DDTC has provided a tool on our ECR website that will help you make such determinations. DDTC will answer questions concerning the application of the specially designed criteria. Those that desire a formal written response from DDTC on general issues regarding the definition should submit a request for advisory opinion. If there is doubt about the application of the definition to a particular item, then, consistent with the provisions of ITAR section 120.4, one may submit a request for a commodity jurisdiction determination. However, DDTC will not issue CJ determinations that confirm the accuracy of self determinations made pursuant to the Specially Designed criteria in ITAR §120.41.

DDTC FREQUENTLY ASKED QUESTIONS

Q: May a foreign company self-determine that an item previously shipped on a USML license is no longer ITAR controlled? Or must it wait for the U.S. supplier to confirm the change of control in writing?

A: Foreign persons may self-determine the jurisdiction of the item. There is no requirement for a confirmation in writing. However, if doubt exists on the jurisdiction of an item, then the foreign person should contact the original exporter or manufacturer for clarification.

BIS FREQUENTLY ASKED QUESTIONS

Q.18: Are there any 'releases' under paragraph (b) for insignificant "parts" or minor "components"?

A.18: In developing the objective criteria for "specially designed," the U.S. Government avoided using subjective criteria, such as the term insignificant as part of the 'release' criteria under paragraph (b). However, paragraph (b)(2) does specify certain "parts," and minor "components," such as fasteners, screws, and bolts that, because of their insignificance are specified as not being "specially designed." This applies regardless of what they were developed for, which materials they are made of, or what item they are used in.

BIS FREQUENTLY ASKED QUESTIONS

Q.20: The “component” I am classifying was “developed” twenty years ago. I am not the original equipment manufacturer (OEM), so I don’t have “knowledge” of what it was “developed” for, but I do “know” it is currently used in basic consumer items in “production” that are designated EAR99 or in ECCNs that are only controlled for AT reasons on the CCL. Are there any ‘releases’ under “specially designed” that address this scenario?

A.20: The "production" 'release' under paragraph (b)(3) may be applicable. This question is not an uncommon fact pattern where a "part," "component," "accessory," or "attachment" was developed decades ago. Criteria under paragraph (b)(3)(i) and (ii) identify when a "part," "component," "accessory," "attachment" or "software" has moved into the lowest controlled items in "production" and therefore warrants 'release' from "specially designed."

BIS FREQUENTLY ASKED QUESTIONS

Q.30: If I develop a “part,” or “component” for use in different types of commodities, such as machine tools, medical equipment and aircraft, is there a paragraph (b) ‘release’ for such general purpose commodities or software?

A.30: Yes, paragraph (b)(5) ‘releases’ a general purpose commodity or software where the "part," "component," "accessory," "attachment" or "software," was "developed" with no "knowledge" that it was for a particular item or type of item.

CUSTOMER RELATIONS POST-ECR

- **Major aerospace, defense customers may make simple cost-benefit decision for parts, components in its defense systems**
 - Current systems still in commercial production: will remark supply chain documents post-ECR
 - Legacy systems no longer in commercial production but still supported: will not remark supply chain documents post-ECR
- **Parts and components suppliers should have clear, candid conversations with customers on post-ECR compliance**
 - Some may insist on continuation of pre-ECR treatment absent supplier persuasion, proof that post-ECR changes save time, reduce costs
 - Some may not have affirmative policy and will just allow supplier to decide, communicate its own post-ECR approach

“BEST PRACTICE” TIP

- **Both DDTC and BIS emphasize exporter’s right to make “self-classification” decisions in post-ECR era, but exporters (and customers) used to pre-ECR rules may not be entirely comfortable with own judgment**
 - Can work with external compliance consultants
 - Can work with in-house or external legal counsel
- **BUT, even after ECR, only legally binding method is formal U.S. Government classification ruling**
 - If main ECR shift seems to move item from USML to CCL but exporter is in some doubt, then file CJ at DDTC
 - If reasonably confident about movement from USML to CCL but exporter is in doubt about proper ECCN or paragraph within ECCN, then file CCR at BIS

CONCLUSION

- **Surprising both supporters and critics, historic ECR has now taken root across most of the aerospace and defense industry**
 - After transition, ECR lowers exporter's compliance costs and burdens
 - ECR speeds up exporter's order acceptance, shipment and revenue recognition
 - ECR defeats negative rhetoric of "ITAR-free" supply
 - ECR encourages, supports inter-operability of U.S. with its allies
 - ECR redirects government regulatory and enforcement resources to actual strategic needs
- **Individual producers of aerospace, defense parts and components should take full advantage of ECR**
 - Need to be proactive in understanding when, how to apply ECR
 - Need to protect compliance record with CJ, CCR filings when helpful or required for effective customer communications

THANK YOU!

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