

# U.S. Reexport Controls

Peter Lichtenbaum  
Covington & Burling LLP  
November 6, 2017

COVINGTON

BEIJING BRUSSELS LONDON LOS ANGELES NEW YORK SAN FRANCISCO  
SEOUL SHANGHAI SILICON VALLEY WASHINGTON

[www.cov.com](http://www.cov.com)

## Exports and Deemed Exports



## Reexports and In-Country Transfers



**Reexport Controls Embody the  
Extraterritoriality of U.S.  
Export Controls**

## Extraterritorial Reach of U.S. Export Controls

### Thales Proudly Brands its Spacebus as ITAR-Free

*"[Thales] describes its Spacebus 4000C2 as the West's first commercial communications satellite without so much as a U.S. bolt, screw or piece of insulation subject to U.S. [ITAR] control. The company said it has sold eight such 'unrestricted' satellites to international customers, five of them already launched by China . . ."* (Reuters)

### 2013 – Thales Press Release

*"Thales confirmed today that it is no longer using the term 'unrestricted' to describe certain variants of its Spacebus 4000 satellite. In consultation with the U.S. Department of State, Thales learned that beginning around the year 2000, a number of U.S. space component manufacturers and exporters had misclassified hardware as if it were commercial or dual-use...[but t]hese hardware items were in fact defense articles controlled for export by the Department of State under the ITAR."* (Thales Statement)



### Later in 2013 – Aeroflex pays \$8m to DDTC

*"Aeroflex said that from 2001 to 2003 it shipped... application-specific integrated circuits to France for use on the Spacebus 4000 platform. . . . These items were subsequently launched from the People's Republic of China."* (Space News)

COVINGTON

3

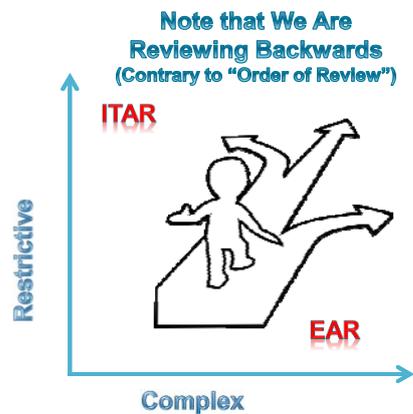
## Presentation Overview

### I. EAR Reexport Determinations

- What is "subject to the EAR"
- De minimis
- Direct products
- Reexport challenges
- Licensing and exceptions

### II. ITAR Reexport Determinations

- Scope of ITAR
- See-through rule (and carve outs)
- Reexport challenges



COVINGTON

4

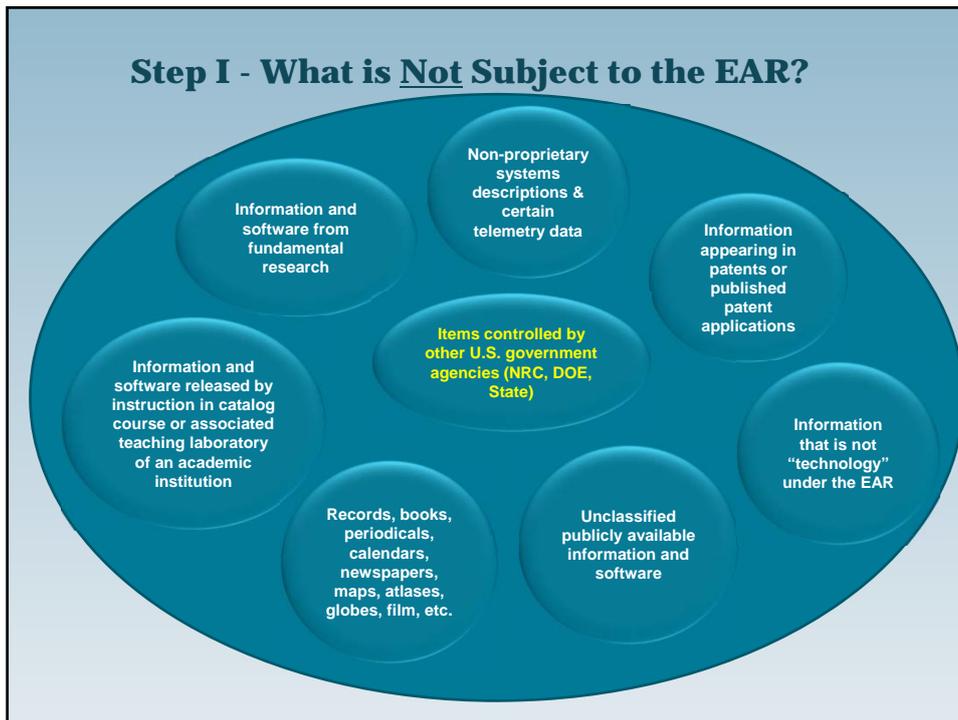
# Part I

## Reexport Controls under the EAR

### Step I - What Is Subject to the EAR?

Based on:		EAR §734.3 – “Items Subject to the EAR”
1	<b>U.S. geography</b>	Items in the U.S., including trade zones, or moving in transit through the U.S.
2	<b>U.S. origin</b>	All U.S.-origin items <u>wherever located</u> .
3	<b>U.S. content</b>	Non-U.S. items incorporating controlled U.S.-origin content, generally based on <i>de minimis</i> thresholds of 10% or 25%, but sometimes regardless of amount of U.S. content.
4	<b>U.S. know-how</b>	Non-U.S. items that are the “direct products” of sensitive U.S.-origin technology or software.

## Step I - What is Not Subject to the EAR?



## Step I - How Does the EAR Apply?

- If an item is subject to the EAR, it is controlled by the EAR with respect to:
  - Its export from the United States to another country.
    - Example: *U.S.-origin equipment is exported from the United States to Mexico.*
      - Concept includes "deemed exports" of technology or software source code in the United States to foreign persons.
      - Example: *Technology for the development of the equipment is exported in the United States to a Mexican national. This is a deemed export to Mexico.*
  - Its reexport from one country to another.
    - Example: *U.S.-origin equipment is reexported from Mexico to China.*
      - Concept includes "deemed reexports" of technology or software source code in a foreign country.
      - Example: *Technology that is exported to Mexico is shared there with a national of Brazil. This is a deemed reexport to Brazil.*
  - Its in-country transfer abroad.
    - Example: *U.S.-origin equipment is transferred from one end user in China to another, or from one end use in China to another.*

## Step I - *De Minimis*

**Non-U.S. items may be subject to the EAR based on their U.S.-origin content.**

- Verify export classification for all U.S.-origin content (EAR99 or CCL).
- Determine whether any of the content is controlled for the destination to which it is bound, by consulting EAR -- reason(s) for control and country chart.
- Consider special rules for software.
- Calculate the value of all controlled U.S.-origin content, as compared to the value of the overall item.

$\frac{\text{Fair Market Value of U.S.-origin, controlled content}}{\text{Fair Market Value of foreign-origin controlled content} \times 100} = \text{De Minimis Percentage}$
---

- Determine whether the item is subject to the EAR based on *de minimis* calculation.
  - Example: Controlled U.S.-origin content is worth \$100. The overall item is valued at \$500. The controlled U.S.-origin content = 20%.
- Consider recordkeeping and reporting requirements.
- Consult EAR § 734.4 and Supp. No. 2 for further detail on *de minimis*.

## Step I - *De Minimis*

Threshold Percentage Triggering U.S. Control	General Rules						
25%	<ul style="list-style-type: none"> <li>• Generally, a non-U.S. product is subject to the EAR if &gt;25% of its U.S.-origin content is controlled for export/reexport to the destination.</li> </ul>						
10%	<ul style="list-style-type: none"> <li>• This lower threshold as to U.S. content applies to Country Group E:1 countries (currently, Iran, Syria, Sudan, and North Korea).</li> </ul>						
0%	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 20%; text-align: center; background-color: #d9d9d9;"><b>Specific ECCNs</b></td> <td> <ul style="list-style-type: none"> <li>• Certain high-performance computers and semiconductors</li> <li>• Certain non-U.S. encryption incorporating U.S.-controlled encryption</li> <li>• Certain aircraft components, propulsion systems, thermal and other imaging cameras</li> </ul> </td> </tr> <tr> <td style="text-align: center; background-color: #d9d9d9;"><b>600 Series and 9x515</b></td> <td>Special rules apply to these former ITAR items, particularly with respect to sanctioned or destinations or countries subject to arms embargoes.</td> </tr> <tr> <td style="text-align: center; background-color: #d9d9d9;"><b>ITAR/Sanctions</b></td> <td> <ul style="list-style-type: none"> <li>• ITAR (generally no <i>de minimis</i>)</li> <li>• Remember sanctions restrictions</li> </ul> </td> </tr> </table>	<b>Specific ECCNs</b>	<ul style="list-style-type: none"> <li>• Certain high-performance computers and semiconductors</li> <li>• Certain non-U.S. encryption incorporating U.S.-controlled encryption</li> <li>• Certain aircraft components, propulsion systems, thermal and other imaging cameras</li> </ul>	<b>600 Series and 9x515</b>	Special rules apply to these former ITAR items, particularly with respect to sanctioned or destinations or countries subject to arms embargoes.	<b>ITAR/Sanctions</b>	<ul style="list-style-type: none"> <li>• ITAR (generally no <i>de minimis</i>)</li> <li>• Remember sanctions restrictions</li> </ul>
<b>Specific ECCNs</b>	<ul style="list-style-type: none"> <li>• Certain high-performance computers and semiconductors</li> <li>• Certain non-U.S. encryption incorporating U.S.-controlled encryption</li> <li>• Certain aircraft components, propulsion systems, thermal and other imaging cameras</li> </ul>						
<b>600 Series and 9x515</b>	Special rules apply to these former ITAR items, particularly with respect to sanctioned or destinations or countries subject to arms embargoes.						
<b>ITAR/Sanctions</b>	<ul style="list-style-type: none"> <li>• ITAR (generally no <i>de minimis</i>)</li> <li>• Remember sanctions restrictions</li> </ul>						

## The Unwritten Rule of "Second Incorporation"

Possibly exempt from EAR

- BIS policy establishes this "rule"; it is not in the EAR.
- First product must be a "**discrete product**."
- Not for U.S.-origin items for which there is no *de minimis*.

Reexport Subject to the EAR

Export Subject to the EAR

German-made Computer

French-made, COTS Motherboard

U.S. Microchip

*"The purpose of the second incorporation principle is to minimize the burden on foreign parties who purchase foreign-made products and typically have little or no means to determine how much, if any, U.S.-origin content those foreign-made products contain."* (BIS Advisory Opinion, Sept. 2009)

## Step I - Direct Product Rule

- Found in the EAR's "General Prohibitions" (EAR Part 736, General Prohibition Three).
- General Rule: A foreign-made item will be subject to the EAR if it is the direct product of sensitive U.S. technology and is destined to a sensitive destination (countries in Country Groups D:1 (national security controls), E:1 (terrorist-supporting), and E:2 (unilateral embargo)), even if it contains no U.S.-origin content.
  - Applies to foreign-made items that are controlled for national security purposes,
  - If the item is the product of technology/software, or a plant/major component of a plan, that required written assurances as a condition of export (e.g., for national-security reasons).
- Special conditions apply to items that are produced from "600 series" or 9x515 items, and to items classified under ECCN 0A919 (foreign military commodities with certain U.S. content or that are direct products of U.S. technology/software).



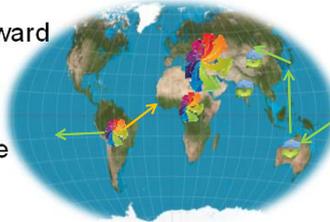
## Step II – Is there a Reexport Subject to the EAR?

### Basic Reexports

- For U.S.-origin products – fairly straightforward

### Other Forms of Reexport (More Complex)

- U.S.-content and *de minimis* calculations
- Direct products of U.S. technology/software
- Deemed reexports
- In-country transfers



### Challenges

- Impact of ECR on jurisdiction/classification of items
- Divergence between U.S. and international lists
- Working with suppliers

## Step III – EAR Authorizations

- License exceptions include:
  - Temporary Imports, Exports, Reexports and Transfers (In-Country) (TMP)
    - Allows >15 forms of export/reexport activity
  - Additional Permissive Reexports (APR)
    - Allows reexports of most CCL items from Wassenaar-participating countries and Hong Kong, subject to local licensing schemes, to certain Country Group B countries
  - Servicing and Replacement Parts and Equipment (RPL)
    - Exports and reexports of one-for-one replacement parts, components, accessories, and attachments for previously exported equipment or other end items
  - Strategic Trade Authorization (STA)
    - Important and relatively new license exception that permits exports and reexports to certain U.S. allies, even of sensitive EAR-controlled items, subject to numerous conditions
- Reexport licensing also available from BIS; use of SNAP-R application form

## Part II

### Reexport Controls under the ITAR

### Step I - What is Subject to the ITAR?

**Defense  
Articles**

**Defense  
Services**

**Brokering**

**Technical  
Data and  
Software**

Information required for the: *“design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.”*

## Step I - See-Through Rule



### Rule – No *de minimis* concept in the ITAR, so any USML content triggers ITAR

- Any ITAR content incorporated into a commercial item triggers ITAR control over the item.
- Rare exception – “see-through carve-out” notes override the see-through rule such that the designated components are not subject to ITAR, but, instead:

***“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.”***

## Step II – Is There a Reexport Subject to the ITAR?

### ITAR-Controlled Exports

- Actual export (physical or electronic)
- Deemed export
- Defense services



### ITAR-Controlled Reexports/Retransfers

- Actual reexport (physical or electronic)/ reexport
- Retransfer
  - Change in end use or end user, or a temporary transfer to a third party, of a defense article within the same foreign country
  - Release of technical data to a foreign person who is a citizen or permanent resident of the country where the release or transfer takes place.



## Step III - Authorization

---

- Reexport/retransfer licensing available by “general correspondence” (GC) request to State Department’s Directorate of Defense Trade Controls (“DDTC”).
  - Applicant must submit:
    - Details of initial ITAR-authorized export from the U.S.;
    - Quantity, value, and description; and
    - Details of the new end-user, end-use, and/or destination.
- License exemptions may apply, but generally are more limited and narrower than under EAR.
  - ITAR § 123.9(e): Reexports/retransfers of U.S.-origin components incorporated into a foreign defense article to NATO + 5 (Australia, Israel, Japan, New Zealand, Rep. of Korea) authorized without license, but requires written notice to DDTC within 30 days of reexport.

## ECR, Reexport Challenges

---

**Reexport/retransfer of items originally exported as USML-controlled, but have since transitioned to the CCL?**



**From DDTC FAQ**

DDTC may approve the re-export, retransfer, other disposition, or change in end-use, end-user, or destination of an item subject to the EAR provided the following conditions are all met:

1. The item was initially exported or transferred pursuant to a Department of State license or other written approval, or an exemption under the ITAR;
2. The item is for end-use in or with the defense article(s) proposed for re-export, retransfer, other disposition, or change in end-use, end-user, or destination; and
3. All the requirements of § 123.9(c) are satisfied for the item subject to the EAR as well as for the associated defense article.

## ECR, Reexport Challenges



**Q: A foreign company is in receipt of a previously exported article (via DSP-5) that has since transitioned to the EAR. The foreign company now wishes to retransfer the item to an entity not included on the license. Must the company seek a General Correspondence?**

**A:** Because the only item proposed for transfer is now controlled under the EAR (i.e., no longer under the jurisdiction of the Department of State), the company must conduct the retransfer in accordance with Department of Commerce regulations. Note, those items not yet shipped remain subject to the terms and conditions of the USML license until received by the end-user or the license expires or is returned.

COVINGTON

21

Peter Lichtenbaum

Covington & Burling LLP

[plichtenbaum@cov.com](mailto:plichtenbaum@cov.com)

COVINGTON

BEIJING BRUSSELS LONDON LOS ANGELES NEW YORK SAN FRANCISCO  
SEOUL SHANGHAI SILICON VALLEY WASHINGTON

[www.cov.com](http://www.cov.com)

22