

Export of Commercial or Dual-Use items - EAR

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The Department of Commerce Bureau of Industry and Security (“BIS”) regulates the export of commercial products and technology under the Export Administration Regulations, 15 C.F.R. §§ 730-774 (“EAR”).¹ While there are some parallels to the ITAR, there are also some major differences in how the regulations and the relevant agencies function.

They are similar in that both agencies focus on “technology transfer” and have been increasingly focused on enforcement. They differ in that the EAR covers a wider range of products and technology, the product classification process is highly technical, and most importantly, the need for a license depends not only on the type of product but also on the people involved and the destinations of the export.

A. ITEMS CONTROLLED UNDER THE EAR

Generally, all items of U.S origin or physically located in the United States, are subject to classification under the EAR. Foreign manufactured goods are exempt from the EAR re-export requirements if they contain less than a *de minimis* level of U.S. content by value. Such *de minimis* levels are set in the regulations relative to the ultimate destination of the export or re-export. Fortunately, most items classified under the EAR do not require a license for export or reexport.

The EAR requires a license for the exportation of a wide range of items with potential “dual” commercial and military use, or otherwise of strategic value to the United States (but not made to military specifications). However, only items listed on the *Commerce Control List* (“CCL”) require a license prior to exportation. Items not listed on the CCL are designated as EAR99 items and generally can be exported without a license, unless the export is to an embargoed country, restricted party, or for a restricted end-use.

B. THE COMMERCE CONTROL LIST

In classifying an item under the export control regulations, it is important to first **determine which U.S. government control list applies**. The U.S. Munitions List (USML) and the Nuclear Equipment and Materials List (NEML) both take precedent over the Commerce Control list. For example, if an item appears on both the USML and the CCL, the USML would

¹ The EAR are promulgated under the Export Administration Act of 1979, as amended (50 U.S.C. app. §§ 2401-2420). From August 21, 1994, through November 12, 2000, the Act was in lapse. During that period, the President, through Executive Order 12924, which had been extended by successive Presidential Notices, continued the EAR in effect under the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-1706 (IEEPA)). On November 13, 2000, the Act was reauthorized by Pub. L. No. 106-508 (114 Stat. 2360 (2000)) and it remained in effect through August 20, 2001. Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001, which has been extended by successive Presidential Notices, has continued the EAR in effect under IEEPA.

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govern the item. When searching for the correct classification of an item, it is important to consider all export regulations and understand the order of precedence among them.

The Directorate of Defense Trade Controls (DDTC) has jurisdiction to decide whether an item is ITAR or EAR controlled. DDTC encourages exporters to self-classify the product. If doubt exists, an exporter may submit a Commodity Jurisdiction request to DDTC to determine whether an item is ITAR or EAR controlled.

The CCL provides a list of very specific items that are controlled. The CCL is similar to the "dual-use" list adopted by other countries under the Wassenaar Arrangement, although the CCL has additional items. The CCL is divided into ten broad categories and is available online on the BIS website².

C. ECCN CLASSIFICATION

Once it is established that an item is EAR controlled, the **second step** for the exporter is to determine the Export Control Classification Number ("ECCN") for the item. BIS encourage self-classification of products and technologies. However, when the ECCN classification or licensing requirements are uncertain, BIS has two assistance procedures.³ To determine EAR's applicability and the appropriate ECCN for a particular item, a party can submit a "Classification Request" to BIS. To determine whether a license is required or would be granted for a particular transaction, a party can request that BIS provide a non-binding "advisory opinion." While BIS provides assistance with determining the specific ECCN of a dual-use item listed on the CCL, if doubt exists as to whether an item is ITAR- or EAR-controlled, BIS will stay its classification proceeding and forward the issue to DDTC for jurisdiction determination.

The ECCN is a 5 character alpha numeric code. The first character is a number that describes the category of the item. The second character is a letter which indicates the sub-category. The last 3 numerical digits are used for numerical ordering of the item.

² <http://www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear>

³ See 15 C.F.R. § 748.3.

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Ten CCL Categories:

0. Nuclear related items & miscellaneous items
1. Chemical compounds, microorganism and toxins
2. Materials processing
3. Electronics
4. Computers
5. Pt-1 Telecommunications
Pt2 – Information security (encryption)
6. Sensors and lasers
7. Navigation and avionics
8. Marine (vessels, propulsion, and equipment)
9. Propulsion systems, space vehicles (includes aircraft & aircraft engines)

Five Sub-categories:

- A. Specific systems, equipment, and components
- B. Test, inspection and production equipment
- C. Materials
- D. Software
- E. Technology

For example, most civil computers would be classified under ECCN 4A994. The "4" refers to Category 4, *Computers*, and the "A" refers to the sub-category *Equipment*. Generally, if the last three digits begin with a 'zero' or 'one' (e.g., 4A001), the product is subject to stringent controls, whereas if the last three digits are a "9nn" (e.g., 4A994), then generally there are fewer restrictions on export.

Note: 600 series ECCN (nX6nn)

The "600 series" includes military items that were transferred from the ITAR to the EAR. Items included in a "600 series" ECCN supersede other ECCNs on the CCL. **Thus, the first step in conducting a classification analysis of an item "subject to the EAR" is to determine if it is captured in a "600 series" ECCN paragraph.**

Unlike the ITAR, for classification purposes BIS generally looks at the classification of the complete product being exported rather than at the classification of each subcomponent of the item (*i.e.*, "black box" treatment). BIS does an "Overall approach" to the item as opposed to the "See Through" treatment under the ITAR.

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D. DEFINITION OF EXPORT AND RE-EXPORT UNDER THE EAR

1. Export. Export is defined as the actual shipment or transmission of items subject to the EAR out of the United States. The EAR is similar to the ITAR in that it covers intangible exports of “technology,” including source code, as well as physical exports of items.

2. Deemed Export. Under the EAR the release of technology to a foreign national in the United States is "deemed" to be an export, even though the release took place within the United States. Deemed exports may occur through such means as a demonstration, trade show, conference, oral briefing, or plant visit, as well as the electronic transmission of non-public data.

3. Re-export. Similar to the ITAR, the EAR attempts to impose restrictions on the re-export of U.S. goods, *i.e.*, the shipment or transfer to a third country of goods or technology originally exported from the United States.

4. Deemed Re-export. Finally, the EAR defines "deemed" re-exports as the release of software and technologies to “third country nationals” outside the United States. For example, ECCN 5E001 technology may be exported to a university in Ireland under the license exception for technology and software, but might require a deemed re-export license authorization before being released to a Russian foreign national student or employee of that university in Ireland.

E. AUTHORIZATION TO EXPORT

Once an item has been classified under a particular ECCN, **the third step is to determine if a license is required for export to a particular country or if the export is NLR⁴ eligible.** Unlike the ITAR, there is no requirement for formal registration prior to applying for export authorization.

1. Determine Reason for Controls. The "License Requirements" section provides notations as to the reasons for control. These reasons include:

AT	Anti-Terrorism	CB	Chemical & Biological Weapons
CC	Crime Control	CW	Chemical Weapons Convention
EI	Encryption Items	FC	Firearms Convention
MT	Missile Technology	NS	National Security

⁴ NLR ; No License Required.

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NP	Nuclear Nonproliferation	RS	Regional Security
SS	Short Supply	XP	Computers
SI	Significant Items		

The most commonly used controls are Anti-Terrorism and National Security, while other controls only apply to limited types of articles. For example, ECCN 4A994 lists “the following:

<u>Control(s)</u>	Country Chart
AT applies to entire entry	AT Column 1

2. Apply Country Chart. Once an item is identified as meeting the criteria for a particular ECCN, the user can refer to the chart found at 15 C.F.R. § 738, Supp. 1.

The Commerce Country Chart includes the countries having no controls. Items may be sent to these countries as NLR due to the absence of controls.

If a particular control applies to a country that will receive an export, a license will be required. For example, Syria has an “X” under AT Column 1; therefore a license would be required for the export of items classified under the ECCN 4A994, unless an exception applied.

It is important to note that the ECCN and Country Chart only indicates if an item is eligible for NLR to a specific country, but it does not indicate whether an export is eligible for NLR.

To determine if an export is eligible for NLR, the transaction should be reviewed for:

- Prohibited parties
- Nuclear, missile, chemical/biological weapons activities
- Embargoed Countries
- Red Flags⁵

3. Exceptions. The EAR contains a number of exceptions. Therefore, if the item is not eligible for NLR, **before applying for a license, the fourth step is to check for any license exceptions that may apply.** Determining whether a particular exception applies requires review of the specific application as detailed in 15 C.F.R. § 740, as well as review of the notes on applicable license exceptions following the ECCN entry.

There are 2 types of license exceptions:

ECCN-based license exceptions:

LVS	Items of limited value (value is set under each ECCN)
GBS	Items controlled for national security reasons to Group B countries

⁵ See Catch all Controls: Restricted parties and embargoes countries

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- CIV** Items controlled for national security reasons to particular countries where end-user is civilian.
- TSR** Certain technology and software to certain countries
- APP** Computer exports to certain countries (based on Adjusted Peak Performance)
- KMI** Encryption exemption for key management
- STA** Strategic Trade Authorization
- AVS** Aircraft, vessels and spacecraft
- ENC** Certain encryption devices and software – This is a hybrid ECCN-based and situation-based license exception.
- CCD** Consumer Communications Devices – *limited to specific commodities to Cuba or Sudan*
- SCP** Support for the Cuban People – *limited to specific commodities to Cuba*

Key-situation based license exceptions:

- TMP** Certain temporary export, re-exports, or imports, including items moving through the US in transit

This category is very broad. It includes, for instance: TMP tools of trade and TMP Kits of replacement which allow exporter or employees to take some items with them under certain conditions (e.g. those items are returned in the US at the end of the operation); TMP exhibition and demonstration (the exporter must maintain “ownership” and “effective control” while the items are abroad)...

- RPL** Certain repair and replacement parts for items already exported
- GFT** Certain gifts and humanitarian donations
- GOV** Exports to certain government entities.
- TSU** Certain mass-market technology and software
- BAG** Baggage exception
- APR** Allows re-export from certain countries
- AGR** Agricultural Commodities – *agricultural commodities to Cuba*

DOCUMENT HISTORY AND VERSION CONTROLS		
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