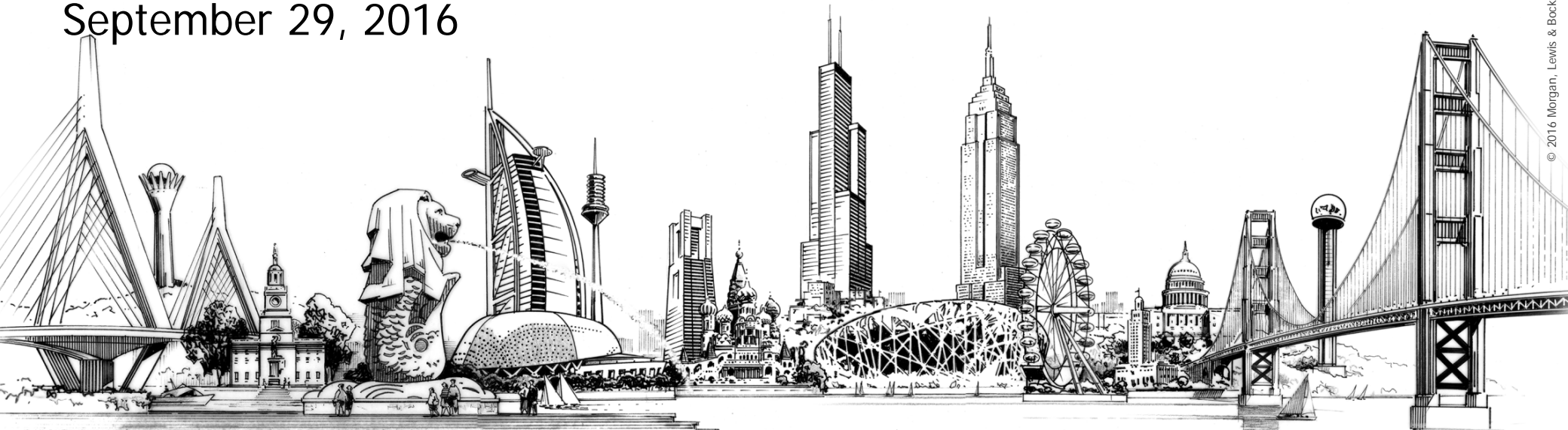


Morgan Lewis

WHAT TECHNOLOGY COMPANIES NEED TO KNOW ABOUT US EXPORT CONTROLS

Margaret M. Gatti and Andrew J. Gray IV
September 29, 2016



Agenda – Outline of Discussion

- **New Developments**
- **Export Defined**
- **Focus on Technology Exports**
- **Export Procedures**
- **Sanctioned Countries and Sanctioned Parties**
- **A Few Words About Encryption and Recent Changes**

US Export Controls

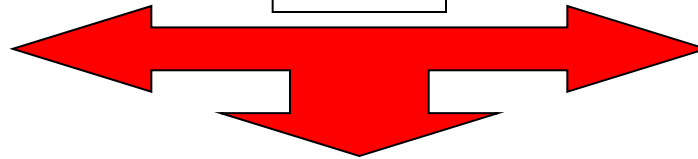
Many new developments over the last several years.

- **Export Reform Initiative**
- **Sanction Relaxation for some countries**
- **Sanction Expansion for other countries**
- **Revision to Regulatory Definition of “Export”**
- **Clarification of “Cloud” Transactions**
- **Modification of Encryption Regulations**

Export Definition

- Goods
- Services
- Software
- Technology

To



US Person in
Foreign
Country

Foreign Person
in Foreign
Country

Foreign Person
in United States

Who qualifies as a foreign person?

- ✓ Non-U.S. Citizen
- ✓ Non-U.S. Green Card Holder
- ✓ Recipient of Worker Visa (H1B, *etc.*)

Export to Foreign Person =

Export to Foreign Person's:

- Country of Residence
- Country of Nationality / Citizenship
- (Country of Birth)

What is an “Export”

Exports occur whenever:

- Goods, software or technology are shipped, transmitted, released or transferred (“exported”) outside the United States or to Foreign Persons within the US (deemed export);
- Goods, software or technology that was shipped, transmitted, released or transferred from the US is re-shipped, re-transmitted, re-released or re-transferred (“re-exported”) outside the US to a third country or a third country national
- Services are provided outside the US or within the US to a Foreign Person

Focus on Technology Exports

Technology is information which is necessary for the "development", "production", or "use" of a product

The export of technology occurs by means of:

- **Visual or other inspection by a Foreign Person of items that reveal “technology” to a Foreign Person;**

This requires an actual release of technology as opposed to mere “theoretical access” or “potential access” which prior to September 1, 2016 was deemed sufficient to trigger an export.

Focus on Technology Exports

The export of technology also occurs by means of:

- **Oral or written exchanges regarding “technology” with a Foreign Person without any consideration of:**
 - **Where or how such exchanges occur; or**
 - **The status of the Foreign Person as an Officer or Director of the Company, an Employee, a Customer, a Distributor, etc**

Focus on Technology Exports

The export of technology also occurs by means of:

- **Providing access to technology through whatever means to:**
 - **Foreign subsidiaries**
 - **Foreign service providers**
 - **Foreign outsourcers**

Focus on Technology Exports

The export of technology also occurs by means of:

- **Technology downloaded via FTP by:**
 - Foreign Persons in the US
 - Foreign Persons outside the US
 - US Persons outside the US (see next slide)
- **E-mails in which technology is included as an attachment and that are sent or forwarded to:**
 - Foreign Persons in the US
 - Foreign Persons outside the US
 - US Persons outside the US (see next slide)

Focus on Technology Exports

Effective September 1, 2016, however, limited changes were made to the definition of “export” to eliminate export status and / or to provide an export exemption:

- **for technology transfers between or among US Persons who are in the same foreign country,**
- **provided that such transfer or transmission does not result in a release of technology to a Foreign Person or to a person prohibited from receiving US technology.**

Focus on Technology Exports

The export of technology also occurs by means of:

- **Authorizing or providing access to Foreign Persons to conduct VPN downloads of technology, either in the US or outside the US;**

N.B.: Accessing software or technology via VPN with no download capability is not an “export”

Focus on Technology Exports

The export of technology also occurs by means of:

- **Uploading technology data to a Cloud Provider whose server is located outside the US;**
- **Storing technology with a Cloud Provider who has a back-up, off-peak hour or recovery server that is located outside the US;**

Focus on Technology Exports

Effective September 1, 2016, however, limited changes were made to eliminate export status for transfers of certain (but not all) technology through the Cloud, provided that the following conditions were met:

- The technology transferred must not qualify as “classified” technology or as technology controlled by the Department of State as Munitions technology;**

Focus on Technology Exports

September 1, 2016 changes for Cloud Users (cont'd)

- The technology transferred must be secured using “end-to-end” encryption, i.e. be encrypted before crossing the national boundary of the originator and remain encrypted until after crossing the national boundary of the recipient;

Focus on Technology Exports

September 1, 2016 changes for Cloud Users (cont'd)

- The encryption used for the transfer must be at least as effective as that which is compliant with the Federal Information Processing Standards Publications (FIPS 140-2); and
- The encrypted technology must not be stored in an arms embargo country or in Russia

Focus on Technology Exports

Before September 1, 2016, only cloud service providers had been provided any direction by means of the two Advisory Opinions that were issued by the Commerce Department on the following dates:

- **January 2009**
- **January 2011**

These BIS Advisory Opinions were binding only with respect to BIS and no other export agency.

Focus on Technology Exports

If you have an export of technology, what do you need to do?

- **Determine if the technology is:**
 - **Classified technology subject to special controls under the National Industry Security Operating Manual (NISPOM)**
 - **Technology that is on the US Munitions List and subject to the jurisdiction of the State Department as technology controlled under the International Traffic in Arms Regulations (ITAR)**

Focus on Technology Exports

If you have an export of technology, what do you need to do? (cont'd)

- **Determine if the technology is:**
 - **Technology that is on the US Commerce Control List (CCL) and subject to the jurisdiction of the Commerce Department as technology controlled under the Export Administration Regulations (EAR)**
 - 500 or 600 series (moved from ITAR)**
 - Encryption Technology**
 - Other EAR technology**

U.S. Munitions List and Commerce Control (Dual Use) List

US Munitions List

- Contains 21 categories of equipment, software, technical data, and defense services (e.g., artillery, ammunition, launch vehicles, military electronics, aircraft, spacecraft, military training equipment, gas turbine engines)
- Controls apply to all countries
- Format in Roman Numerals with subcategories, eg., VIII(h)

Commerce Control List

- Contains ten categories of commercial equipment, software, technical data and technical assistance
- New 500 and 600 series (transfer of items from USML to CCL)
- Controls apply to selected countries
- Format 5 characters, eg., 2E350, where E = technology

Order of Review (ITAR Versus EAR)



- **Review the USML**
 - **Specifically enumerated items**
- **If not on the USML, review the CCL**
 - **Review applicable 600 and / or 500 series ECCNs**
 - **Review Category 5, Part 2 for Encryption Technology**
 - **Review other ECCNs on the CCL**
 - **Last resort = EAR99 (Default ECCN -- no license required BUT only for product-specific reasons)**

Order of Review - ITAR

- When classifying any item, you must always first start with ITAR – not EAR
- USML Order of Review as per ITAR § 121.1(b)(1).
- The USML Order of Review provides guidance for how to classify articles in light of the addition of the revised USML Categories being implemented as part of Export Control Reform, as well as USML Categories that have not yet been revised, and provides guidance on the new definition of "specially designed."
- DDTC has an "Order of Review Decision Tree" on its web site that is a good tool to assist you.
- If item not included on USML, consult CCL

Order of Review - EAR

- The U.S. Department of Commerce offers a tool to help identify the steps to follow when reviewing the Commerce Control List [CCL, EAR Part 774].
- This decision tool is based on the new CCL Order of Review in Supplement No. 4 to part 774 of the EAR. The CCL Order of Review provides guidance for how to classify items in light of the addition of the 9x500 and 600 series Export Control Classification Numbers (ECCNs) to the CCL and the new definition of specially designed.
- This decision tool will ask you a series of questions that will help you determine the classification of items that are subject to the EAR.
- **N.B. Not all Encryption Technology can be self-classified and must instead be classified by the Commerce Department.**

Order of Review – ITAR versus EAR

- EAR govern only items “subject to the EAR,” e.g., items not subject to the exclusive jurisdiction of another agency, i.e. ITAR items.
- If an item is described in the USML, ITAR, including one of its catch-all paragraphs, then the item is a “defense article” subject to the ITAR and there is no need to review the CCL with respect to whether it describes the item.

Order of Review – ITAR versus EAR (cont'd)

- If an item is not described on the USML and is otherwise “subject to the EAR,” then work through the CCL to determine where the item is specifically covered by the CCL.
- If it is not specifically covered by the CCL, it is therefore designated as EAR99.
- If you cannot determine whether or not the item is listed in the USML or the CCL, you should consider seeking assistance from the Legal Department, or file a CJ with DDTC or a CCATS with BIS.

Commodity Jurisdiction (CJ) Request

- ✓ **Assign State Department Control**
- ✓ **Remove State Department control**
 - **High level of scrutiny**
 - **High burden of proof**
 - **N.B. Once CJ Request submitted, ITAR jurisdiction presumed**
- ✓ **Binding & Authoritative**

Classification Request

- ✓ **After CJ Request rules ‘Not ITAR’**
- ✓ **Determines proper ECCN or CCL Classification**

Export Procedures after Determining Jurisdiction and Classification

Regulatory Regimes

DDTC & ITAR
Defense Items

OFAC & OFACR

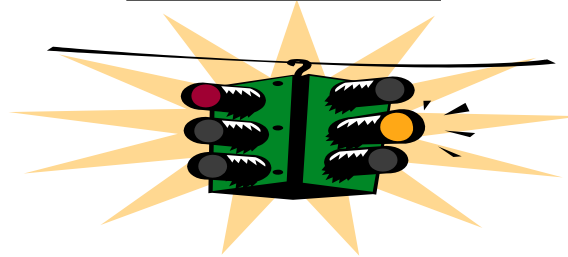
BIS & EAR
Dual Use Items

Prohibitions

Country?
End User?

Restrictions

License Required



Prohibitions

Country?
End User?

Restrictions

Product?
End User?
End Use?
Red Flag?
License Required?

**AFTER DETERMINING
EXPORT JURISDICTION AND
EXPORT CLASSIFICATION,
SCREEN FOR PROHIBITED
COUNTRIES**

Prohibited Country Sanctions for OFAC, DDTC and BIS

Country	OFAC	DDTC	BIS
Afghanistan	No	Yes	No
Balkans	Yes (List-Based)	No	No
Belarus	Yes (List-Based)	Yes	No
Burma	Yes (Selective)	Yes	No
Burundi	Yes (List-Based)	No	No
Central African Republic	Yes (List-Based)	Yes	No
China (PRC)	No	Yes	No

Prohibited Country Sanctions for OFAC, DDTC and BIS

Country	OFAC	DDTC	BIS
Côte d'Ivoire	Yes (List-Based)	License Required case by case basis	No
Crimea Region of Ukraine	Yes (Comprehensive)	Yes	Yes
Cuba	Yes (Comprehensive)	Yes	Yes
Cyprus	No	Yes	No
Democratic Republic Congo	Yes (List-Based)	Yes	No
Eritrea	No	Yes	No
Haiti	No	Yes	No

Prohibited Country Sanctions for OFAC, DDTC and BIS

Country	OFAC	DDTC	BIS
Iran	Yes (Comprehensive)	Yes	Yes
Iraq	Yes (List-Based)	Yes	No
Kyrgyzstan	No	Yes	No
Lebanon	Yes (Selective)	Yes	No
Liberia	No	Yes	No
Libya	Yes (List-Based)	Yes	No
North Korea	Yes (Comprehensive)	Yes	Yes

Prohibited Country Sanctions for OFAC, DDTC and BIS

Country	OFAC	DDTC	BIS
Russia	Yes (Selective)	Yes	No
Somalia	Yes (List-Based)	Yes	No
Sri Lanka	No	License Required/case by case basis	No
Sudan	Yes (Comprehensive)	Yes	Yes
South Sudan	Yes (List-Based)	No	No
Syria	Yes (Comprehensive)	Yes	Yes

Prohibited Country Sanctions for OFAC, DDTC and BIS

Country	OFAC	DDTC	BIS
Ukraine	Yes (Selective)	No	No
Venezuela	Yes (List-Based)	Yes	No
Vietnam	No	License Required/case by case basis	No
Yemen	Yes (List-Based)	No	No
Zimbabwe	Yes (List-Based)	Yes	No

Reality Check on Cuba

- The changes that have been implemented to date are very modest in scope, because long-standing statutory provisions restrict the extent to which the President can act on his own with respect to Cuba.
- Changes to date do not:
 - Lift the general embargo against trade with Cuba.
- Significant limitations on dealing with Cuba continue to apply. (well beyond exports!)

Current U.S. Sanctions that Continue to Apply to Cuba

- **OFAC Regulations prohibit any person subject to U.S. jurisdiction from dealing in any property in which Cuba or a Cuban national has, or has had, any interest**
- **The term person subject to the jurisdiction of the United States includes:**
 - a) Any individual, wherever located, who is a citizen or resident of the United States;**
 - b) Any person within the United States;**
 - c) Any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, territory, possession, or district of the United States;**

Current U.S. Sanctions that Continue to Apply to Cuba

- The term person subject to the jurisdiction of the United States includes: (*cont'd*)
 - d) Any corporation, partnership, association, or other organization that is owned or controlled by persons specified in (a) or (c) (= **foreign subsidiaries**)
- “Dealing” and “Property” are very broadly defined and include such things as contracts and services
 - For example, persons subject to U.S. jurisdiction may not purchase Cuban cigars in ANY third country

Current U.S. Sanctions that Continue to Apply to Cuba

- **Unless directly related to an activity or transaction authorized by earlier provisions or as explained in the new OFAC regulations issued 16 January 2015, persons subject to U.S. jurisdiction are not generally authorized to provide any:**
 - accounting, consulting, transportation, legal, marketing, sales, or insurance services to a Cuban company or to a foreign company with respect to the foreign company's Cuba-related business**

Current U.S. Sanctions that Continue to Apply to Cuba

- **Unless directly related to an activity or transaction authorized by earlier provisions or as explained in the new OFAC regulations issued 16 January 2015, with certain exceptions,**
 - no products, technology, or services may be exported by a person subject to U.S. jurisdiction, wherever located, or, from the United States, to Cuba or a Cuban national, either directly or through third countries, such as Canada or Mexico, without first obtaining a license from OFAC**

Current U.S. Sanctions that Continue to Apply to Cuba

- **The prohibition includes dealing in or assisting with the sale of goods, services, or commodities to Cuba, even if done entirely offshore**
- **Such brokering is considered to be “dealing in property” in which Cuba or a Cuban national has an interest and is prohibited**

Iran

- On July 14, 2015 the United States, European Union, United Kingdom, France, China, Russia, Germany and Iran reached a Joint Comprehensive Plan of Action (JCPOA) deal regarding Iran's nuclear program.
- Implementation Day under the JCPOA occurred on January 16, 2016.
- The relaxation of Iran sanctions that the U.S. implemented on Implementation Day results in:
 - **US Persons:** Very few changes for U.S. individuals and U.S. companies
 - **Foreign Subsidiaries of US Persons:** Somewhat greater changes for foreign companies that are owned or controlled by U.S. Persons
 - **Foreign Persons with no US Nexus:** Rather significant changes for foreign companies that have no U.S. Person ownership ("Foreign Persons") and that are involved in Iranian transactions with no U.S. nexus.

OFAC Iran Sanctions

- For US Persons, very few changes were made to the status quo. The sanction changes implemented on January 16 as applicable to US Persons constitute relatively minor modifications to the USG's primary Iran sanctions.
- However, in accordance with the terms of the JCPOA, the United States committed to license three additional categories of activities that would otherwise be prohibited under the USG's primary Iran sanctions.
 - **A Statement of Licensing Policy**—Issued and effective on Implementation Day. This Licensing Policy Statement provides for a favorable case-by-case review of specific license applications submitted to OFAC by individuals and entities who request OFAC authorization to export, re-export, sell, lease, or transfer commercial passenger aircraft (as well as related parts and services) to Iran.
 - **New general license** that authorizes US Persons to import Iranian-origin carpets and foodstuffs (including pistachios and caviar) into the United States.
 - **New General License H**

OFAC Iran Sanctions

General License H authorizes:

- Foreign subsidiaries of US companies to sell foreign-made products to Iran; and
- US Persons to engage, to the extent necessary, in the following activities in connection with transactions involving Iran that US-owned or controlled Foreign Entities are otherwise authorized to conduct pursuant to General License H:
 1. activities related to the establishment or alteration of operating policies and procedures of a US entity or a US-owned or controlled Foreign Entity so that the US-owned or controlled Foreign Entity can engage in activities newly authorized by General License H; and
 2. activities to make available to US-owned or controlled Foreign Entities automated and globally integrated computer, accounting and other back office activities

Iran Sanctions

Foreign Subsidiaries' Exports to Iran

General License H is very specific as to the type of products that foreign subsidiaries are authorized to export to Iran and as to conditions under which such exports can be made:

- 1. Type of products authorized for export to Iran:**
 - a) Exports of foreign-made products that contain no U.S. content; and**
 - b) Exports of foreign-made products that contain less than de minimis (<10%) U.S.-origin dual use content.**

Iran Sanctions

Foreign Subsidiaries' Exports to Iran

General License H (cont'd):

2. Conditions under which exports of authorized products can be made:

- a) Exports may not be approved or facilitated by AMETEK US or any U.S. Persons.

Export decision must be made exclusively by foreign subsidiary and by foreign individuals with no US Person sign-off or other involvement.

N.B., a U.S. citizen working abroad = U.S. Person.

Iran Sanctions

Foreign Subsidiaries' Exports to Iran

General License H conditions (cont'd):

- b) Exports must be invoiced and paid for in a currency other than US\$

US banks remain prohibited under the Iran sanctions from clearing US\$ payments through the US banking system.

Specify in a contractual provision or as a term of sale which currency (other than US\$) applies to the export.

Keep in mind that many non-US banks are still afraid to deal with Iran (even in non-US\$) due to heavy fines by USG in recent years!

Iran Sanctions

Foreign Subsidiaries' Exports to Iran

General License H conditions (cont'd):

- c) Exports may not be made to or otherwise involve an Iranian party that is a Specially Designated National (SDN) or a party that is 50% or more owned by an SDN.

SDN list is a list of prohibited parties as designated by the Office of Foreign Assets Control (OFAC)

Can use the OFAC screening tool to screen for SDNs but keep in mind that this screening tool screens only for SDNs – not Deemed SDNs.

<https://sanctionssearch.ofac.treas.gov/>

Iran Sanctions

General License H is very specific as to what transactions qualify.

- If the terms of General License H are not observed, foreign subsidiaries of AMETEK will not be authorized to engage in transactions with Iran without a specific license authorization from OFAC. (which OFAC will likely NOT grant!)
- If the foreign subsidiaries proceed without specific OFAC license authorization, they will be in violation of OFAC sanctions and this violation will accrue to AMETEK Inc, as the US Parent Company, under Section 215 of the US Iran Sanction Regulations.

Iran Sanctions

General License H was issued by the US as part US' relaxation of its Iran sanctions that the US agreed to enact under the Joint Comprehensive Plan of Action (JCPOA) deal regarding Iran's nuclear program that the United States, European Union, United Kingdom, France, China, Russia, Germany and Iran reached in July 2015.

BUT, the US has the right to cancel or "snap back" the sanctions relief granted to Iran if Iran does not live up to its obligations under the JCPOA. US has no "grandfather provision on the snap back of General License H but likely will allow for a limited "wind-down" period.

As a result, foreign subsidiaries' contracts with Iran should provide for regulatory performance prohibitions as a *Force Majeure* event.

**SCREEN FOR
PROHIBITED
BUYERS,
RECIPIENTS AND
END USERS**

OFAC, DDTC and BIS Individual /Entity Sanction Lists

Lists to Screen	OFAC	DDTC	BIS
Prohibited Party List	Specially Designated Nationals (SDNs)	Debarred Parties	Denied Parties
	Deemed SDNs		
Prohibited Party List	Foreign Sanctions Evaders (FSEs)	Non-Proliferation Sanctions List	
Restricted Party List	Special Sectoral List (SSI)		Entity List
	Deemed SSIs		
Restricted Party List			Unverified End Users

OFAC, DDTC and BIS Individual /Entity Sanction Lists

Lists to Screen	OFAC (All Exports)	DDTC (Defense Exports)	BIS (Dual Use Exports)
Prohibited Party List	Specially Designated Nationals (SDNs)	Debarred Parties	Denied Parties
Prohibited Party List	Foreign Sanctions Evaders (FSEs)	Non-Proliferation Sanctions List	
Restricted Party List	Special Sectoral List (SSI)		Entity List
Restricted Party List			Unverified End Users
Screening Tool	https://sanctionssearch.ofac.treas.gov/	http://apps.export.gov/csl-search	http://apps.export.gov/csl-search

Buyer and End User Screening

- **Prohibited Party screenings: STOP!**

- SDNs

- (Deemed SDNs)

- FSEs

- Debarred Parties

- Non-proliferation Sanctions List

- Denied Parties

Abort transaction.

Licenses will not be granted to deal with a prohibited party!

Export Procedures after Determining Jurisdiction and Classification

Regulatory Regimes

DDTC & ITAR
Defense Items



OFAC & OFACR



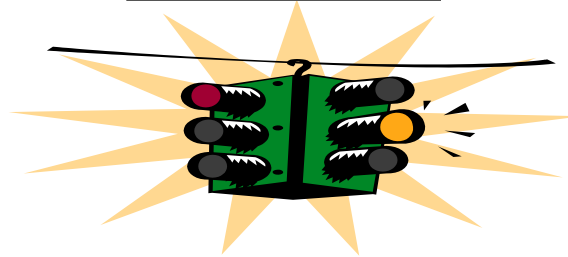
BIS & EAR
Dual Use Items

Prohibitions

Country?
End User?

Restrictions

License Required



Prohibitions

Country?
End User?

Restrictions

Product?
End User?
End Use?
Red Flag?
License Required?

Export License Required?

Based on Export Jurisdiction, Analyze Export for Product-Specific Restrictions / License Requirements

- ITAR products almost always require export licenses – limited exemptions available
- EAR products may require export licenses
 - ECCN on Commerce Control List
 - Commerce Country Chart
 - Greater number of license exceptions exist

A FEW COMMENTS ON ENCRYPTION

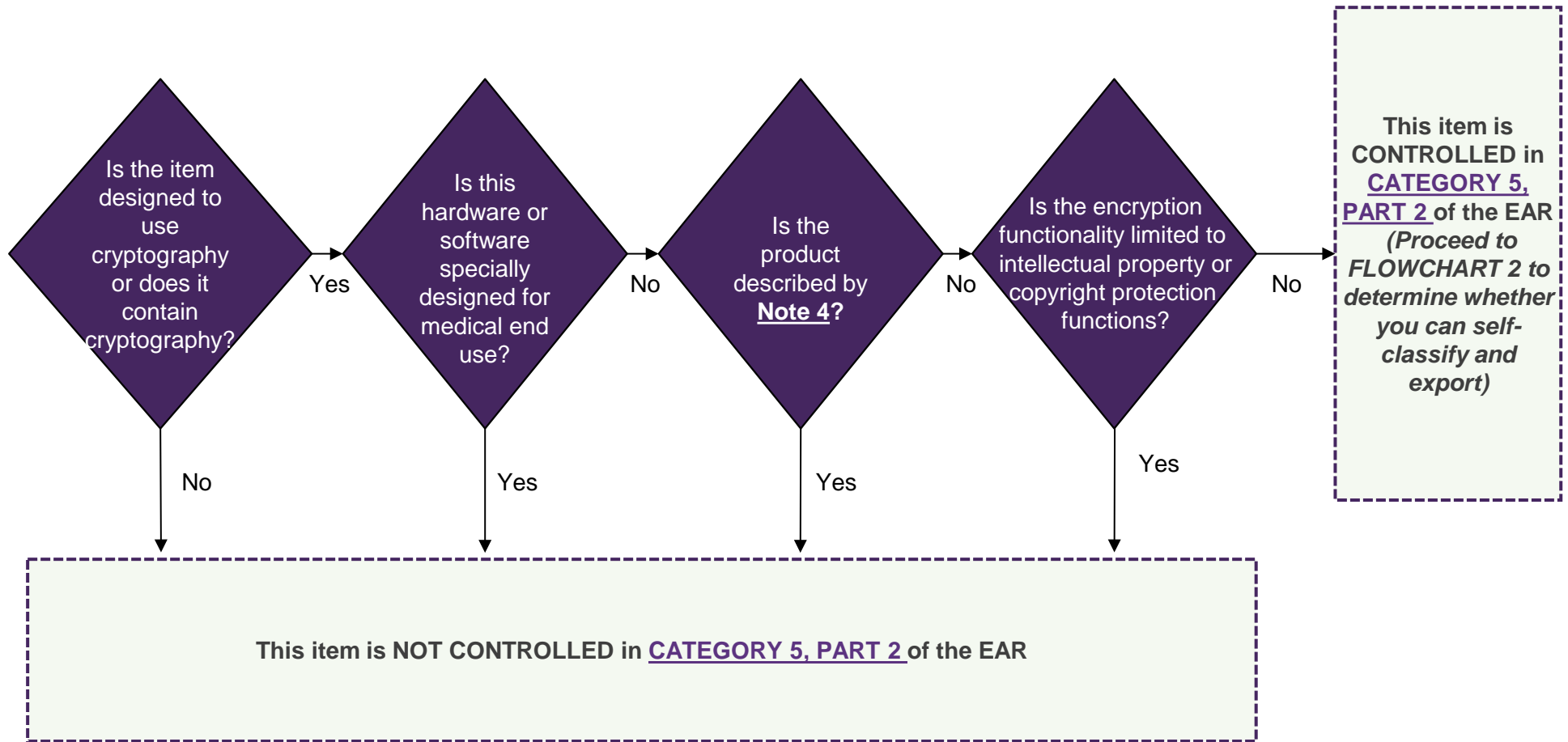
ENCRYPTION

On September 20, 2016, the EAR Encryption Regulations were amended. These amendments resulted from:

- **Ongoing Export Control Reform**
- **Changes to CCL Category 5, Part 2 arising from Wassenaar 2015 Dual Use List Review.**

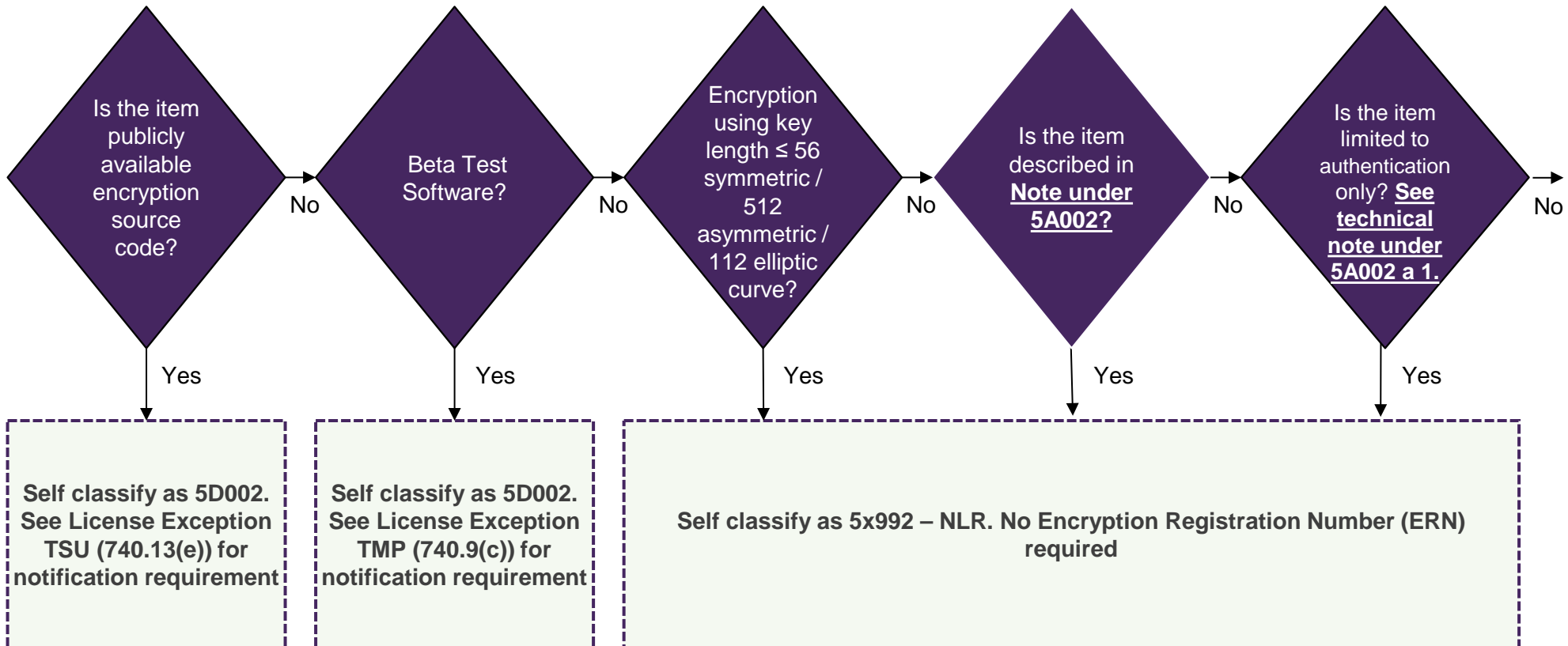
The amendments involve a reorganization of ECCN 5A002 and the addition of two new ECCN 5A00X sub-classifications. Existing flow charts follow.

BIS Flow Chart 1: Items Designed to Use Encryption NOT Controlled Under CATEGORY 5, PART 2 of the EAR

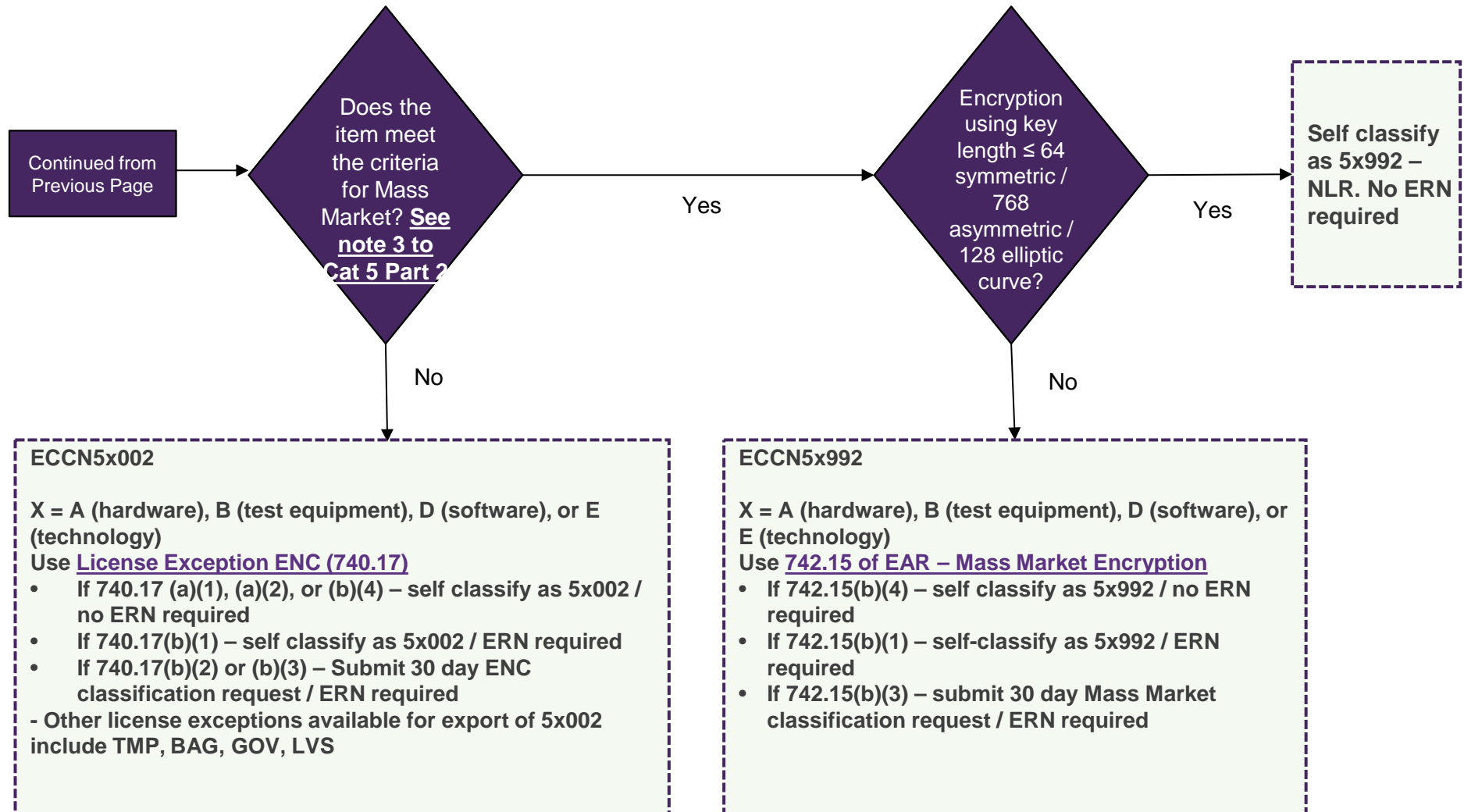


BIS Flow Chart 2: Classifying under an ECCN in Category 5, Part 2

The item is controlled under [CATEGORY 5, PART 2](#) of the EAR, Continued from [FLOWCHART 1](#)



BIS Flow Chart 2 (continued)



Questions?



Biography



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Margaret Gatti represents US and non-US companies, universities, and financial institutions in matters involving economic sanctions, export controls under the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR), customs and import regulations, free trade agreements, antiboycott regulations (EAR and IRS), anticorruption laws (FCPA and UKBA), anti-money laundering legislation, international commercial sales terms (INCOTERMS), international e-commerce, and Bureau of Economic Analysis (BEA) reporting, as well as national security issues.

Biography



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Andrew J. Gray IV concentrates his practice on intellectual property (IP) litigation and prosecution and on strategic IP counseling. Andrew advises both established companies and start-ups on computer and Internet law issues, financing and transactional matters that involve technology firms, and the sale and licensing of technology. He represents clients in patent, trademark, copyright, and trade secret cases before state and federal trial and appellate courts throughout the United States, and before the US International Trade Commission.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Almaty	Dubai	Moscow	San Francisco	Wilmington
Astana	Frankfurt	New York	Santa Monica	
Beijing	Hartford	Orange County	Shanghai	
Boston	Houston	Paris	Silicon Valley	
Brussels	London	Philadelphia	Singapore	
Chicago	Los Angeles	Pittsburgh	Tokyo	
Dallas	Miami	Princeton	Washington, DC	



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